ANALYSIS

LABOUR AND SOCIAL JUSTICE

SHADOW REPORT ON THE REGULATION OF COLLECTIVE AGREEMENTS IN HUNGARY

PROPOSALS FOR THE HUNGARIAN ACTION PLAN UNDER EU DIRECTIVE 2022/2041

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In the Shadow Report on the Hungarian regulation of collective bargaining, labour law researchers make proposals for an action plan to increase collective bargaining coverage (Directive (EU) 2022/2041).

In Hungary, the number of collective agreements has been steadily decreasing, and today only about 18% of employees are covered by collective agreements, which exist only at workplace level and only the half of them covers wages.

Our proposals cover: the right to collective bargaining in the private and public sectors, social dialogue at sectoral and national level, trade union rights and strikes.

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LABOUR AND SOCIAL JUSTICE

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EXECUTIVE SUMMARY

THE AIM OF THE REPORT

Directive 2022/2041 is about ensuring adequate minimum wages in the European Union. The Directive sheds light to the following context: "(25) Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages." In other words, there is a clear link between the minimum wage, the level of average wages and collective bargaining coverage.

In Hungary, collective bargaining coverage is only 18%, which is a long way from 80%. The Directive requires such Member States to "draw up an action plan to promote collective bargaining with a view to gradually increasing the coverage rate of collective bargaining".[1] The aim of drawing up an action plan is to achieve higher wage levels for as many employees as possible through higher collective bargaining coverage, so that fewer employees are affected by in-work poverty.

It is our conviction that collective bargaining is a useful source of labour market regulation, which increases general welfare and strengthens democracy. Our report aims to contribute to a comprehensive review of Hungarian collective labour law. In the first part of the study, we present the number of collective agreements and trends based on available data. On the basis of this analysis, we make specific proposals to remove obstacles, arguing that a reform of this nature can be effective with the social partners' agreement.

This study does not cover all the factors that determine collective bargaining coverage, so we will only deal in a limited way with the historical and social processes that have led to the current situation. Our analysis focuses primarily on the legal aspects, i.e. on the solutions to be applied by labour law that could lead to increased coverage. The issues examined are: the capacity to conclude collective agreements; sectoral collective agreements; trade union rights; and the right to strike.

THE CURRENT SITUATION

Unfortunately, we do not know the exact level of collective bargaining coverage. Based on the available statistics, we can only estimate that the coverage rate is around 18%. This gives rise to two tasks. The first is that effective measures would be needed to approach 80%. The second, which is also required by the Directive, is to monitor the impact of these measures, i.e. to set up a registration system from which data on collective agreements can be retrieved up to date.

For this reason, we recommend that the Hungarian Central Statistical Office (KSH) should make available annually comparable, detailed data on the number and content of collective agreements. Furthermore, based on data from the KSH and the National Administrative Register, an annual government report should be prepared on data on collective agreements, current problems and trends, and governmental and legislative tasks related to them.

RIGHT TO COLLECTIVE BARGAINING

The Labour Code (LC) contains rigid rules on the right to conclude collective agreements, which in practice hinder the conclusion of collective agreements. Accordingly, only a trade union with a 10% density can conclude collective agreements. There is no other way to conclude a collective agreement.

The 10% rule precludes smaller employers from collective bargaining. Moreover, the 10% density requirement seems increasingly high in the context of the current 7%, with declining union density. Since collective agreements are valid for everyone at the employer, it is important that the union is sufficiently representative. Where there is no representative union, a collective agreement could be concluded on the basis of an employees' vote.

Currently, representative trade unions can conclude collective agreements together, i.e. there is a coalition obligation. This rule has not really worked well in practice. The requirement of a forced agreement is an obstacle to cooperation between unions, which could even undermine col-

1 Directive 2022/2041 Article 4 (2)

lectivebargaining. It would therefore be necessary to regulate the "order of strength" between unions on the basis of the number of members. There is also the question of how to calculate the 10% union density. To determine this, a credible membership register would be needed and the number of members of all trade unions operating at the employer should be added together.

Besides that the regulation does not take into account that the membership of a trade union can change dynamically. If a union reaches 10% density, it should have full rights to become a party to the contract. If, on the other hand, the union loses its representativity, its rights to collective bargaining should also cease.

An old question is what creates the interest on the employer's side to conclude a collective agreement. Under the current Labour Code, it is difficult to speak of such an interest, since there are many issues the employer can settle without a collective agreement, moreover, within fairly broad limits. Furthermore, the fact that the LC makes extensive use of the principle that the statutory rule can be derogated in collective agreements to the detriment of employees, erodes the regulatory and employee-protective power of collective agreements. To remedy this, the exclusive scope of the collective agreement should be extended at the expense of unilateral employer regulation and the employment contract, while also considering the question of what can be regulated at the workplace and what can only be regulated in a collective agreement at a higher level.

In this context, we also propose the abolition of the normative works agreement, which in practice is not a substitute for collective agreements and raises a number of problems.

COLLECTIVE AGREEMENTS AT SECTORAL LEVEL AND SOCIAL DIALOGUE AT NATIONAL LEVEL

It is also a long-standing problem that social dialogue at sectoral level has not developed, and the Sectoral Dialogue Committees (ÁPB) have not played their role (although 17 are operational). The consequence is that there are hardly any sectoral collective agreements and their regulatory role is negligible.

Act 74 of 2009 regulating the ÁPBs provides for complicated procedures for the social partners, and they are not in line with the LC. The solution to this problem should therefore start with a comprehensive overhaul of the legislation.

The regulatory reform should focus on making employers' representatives more interested in concluding sectoral collective agreements. The way to do this is to allow as many essential issues as possible to be regulated exclusively by sectoral collective agreements This could include, for example, a working time banking exceeding one year, the yearly maximum of extraordinary working time, the level of severance pay and proportionate disciplinary sanctions.

At the same time, it would be worth abolishing the guaranteed minimum wage, determining today the wages of 730,000 workers. It could be replaced by sectoral wage agreements and sectoral minimum wage agreements. Its precondition would be a review of the extension rules of collective agreements, which are essentially not applied today. Given that the employers' side is also poorly organised, the chambers of commerce could be given the right to conclude collective agreements at sectoral level.

TRADE UNION RIGHTS

The quality of trade union rights affects the bargaining power of trade unions. Typically, the LC has limited or eliminated the rights of trade unions at workplace level. Nevertheless, it cannot be said that the rights that remain are invariably 'fine', they can be exercised in accordance with their function and trade unions do exercise them.

Most trade union rights should be neutral with regard to legal status and sector. The current extreme differences (public/private) are difficult to justify, and some arrangements in the public service represent a breach of international labour law.

There are some rights that have been transferred to the works council by the LC, the justification for which is questionable, as the works council often cannot exercise them.

Employers should be obliged to provide trade unions with adequate information to enable them to participate effectively in decisions.

The labour law protection of trade union officials has been limited by the current Labour Code and its extent depends on the number of employees in the site which is considered as autonomous. However, the amount of the tasks due to representation and the need for labour law protection depend more on the number of members of the union than on the number of employees. At the same time, determinig the number of members requires a change in the way in which membership is certified.

Rethinking of the working time allowance, and thus of the status of 'full-time' officials, is also inevitable. The wage costs of union-employed officials and experts could be financed by a public fund, with contributions from employers, employees and additional public contributions. A system of a capitation-type support for trade unions should also be developed. Just as the political parties receive subsidies from the central budget, so trade unions could justify a capitation on similar principles.

With regard to the right of trade unions to representation, we propose to regulate the enforcement of claims of public interest. The trade union could bring a public

interest (class) action or administrative procedure against the employer for the breach of certain rules. At the same time, the scope of labour inspections should be extended to include the rights of interest representation.

RIGHT TO STRIKE

The strike regulation should not be an obstacle to collective agreements, but a facilitator.

The legislation is vague in its definitions, so basic concepts such as strike, collective dispute or agreement should be fixed. Such clarification is needed primarily to prevent unlawful strikes.

We also propose to grant the right to strike to those groups of employees to whom the right to collective bargaining should be extended, such as civilian employees of the armed forces and law enforcement agencies and health care workers. Effective dispute settlement procedures should be introduced in areas where there is no right to strike.

The judicial determination of the minimum (essential) service level raises a number of questions. Arbitration using the final offer method could solve the problem, in addition to the statutory determination of essential services in some sectors and the agreement of the parties on minimum level of services. On the one hand, arbitration would prevent the professional/technological obstacles of defining the minimum service level or setting an excessive level. On the other hand, it could also be avoided that the legal difficulties prevent the strike.

Finally, the legal status of the strike agreement, for which there are currently no rules, needs to be settled. This agreement could be a declaration on the same footing as the collective agreement, which could be enforced in court and is subject to the peace obligation (prohibition of strikes).

PART I

COLLECTIVE BARGAINING COVERAGE: CURRENT SITUATION, TRENDS AND POTENTIAL INSTRUMENTS OF LABOUR LAW

Erzsébet Berki – Tamás Gyulavári – Gábor Kártyás

In Part I, we look at the current number of collective agreements, their evolution in the light of available data, and make suggestions for improving data collection. We then describe the rationale and areas for reforming labour law rules on collective agreements.

1. THE PROBLEM OF AVAILABLE DATA

Two sources of data are available for the analysis of collective agreements. The first is the labour force survey of the Hungarian Central Statistical Office (KSH), which periodically measures the union density and the coverage of collective agreements on a representative sample. The Industrial Relations Information System (hereinafter referred to as the MKIR) is the other source of data, which records collective agreements in a public database.[2] In the following, we first analyse the specificities and shortcomings of these data collections.

1.1. The data of the KSH

To evaluate the data of the labour force survey, it is important to know that the KSH collects data on a representative sample of employees, which is then extrapolated to the whole national economy. As the employees are interviewed, the result is not the number of collective agreements, but the number and proportion of employees who say that they have (do not have or do not know whether they have) a collective agreement at their workplace. This indicator is more in line with the coverage indicator, which can be obtained by dividing the number of employees covered by a collective agreement by the total number of employees (in the case of a narrowed coverage indicator, the denominator includes only the number of employees who have the right to conclude a collective agreement). The comparability of the KSH data over a sufficiently long time span is limited, as the questions and the level of aggregation of the reported data also differ between surveys.

The KSH survey tells us little about what collective agreements are about. But the question was usually asked whether collective agreements affect wages.

1.2. The Industrial Relations Information System (MKIR): problems with the register

A part of the Industrial Relations Information System (MKIR) is the Register of Collective Agreements, which contains and processes the data submitted pursuant to Decree 2/2004 (I. 15.) of the Minister for Employment Policy and Labour on the detailed rules for the notification and registration of collective agreements. Accordingly, the contracting parties are obliged to notify the conclusion, amendment, termination and expiry of a collective agreement.

Since its creation, the MKIR registry has had some problems that are certainly not impossible to solve, but there never seems to have been a serious intention to create a system that does not reproduce these problems.[3] The main problems are:

- The Decree also requires notification of contract amendments and terminations, but this is often not done. Thus, there are collective agreements in the system which are not in force but which appear to be in force. If the collective agreement is terminated because the employer has ceased to exist, the person obliged to notify also 'disappears'.
- The headcount data (number of employees covered by scope of the collective agreement) provided at the time of notification are not or very rarely updated, so the resulting coverage data can only be considered approximate.

2 See e. g. Decree No. 2/2004 (I. 15.) of the Minister of Labour and Social Affairs (FMM) on the detailed rules for the notification and registration of collective agreements.

3 Erzsébet Berki– László Neumann: *A Munkaügyi Kapcsolatok Információs Rendszer szakmai követelményrendszere.* Manuscript. 2014. 72.

– Coverage tables are presented in a sectoral breakdown and cannot be used to produce higher level aggregated data. As a consequence, in some cases, the tables available on request do not have a line for 'total'.
– There is no consistency between the data in the coverage tables and the number of collective agreements that can be listed – and therefore the number of employees covered by the scope of collective agreements – and the discrepancies cannot be explained by visible factors.

The data controller also perceived these problems, data cleaning is therefore ongoing.[4] The cleaning process takes longer because the data holders are the parties to the collective agreement, i.e. the administrator does not have the right to simply pull out of the list of collective agreements that are known from other sources to no longer be in force.

As a consequence, the following data should be treated with the tolerance that they are the data of the collective agreements in the register, which do not coincide with reality due to the above.[5]

In light of the above, we recommend that the government remedy the above shortcomings of the MKIR database and create and maintain a reliable, up-to-date record of collective agreements, which could form the basis of a detailed, accurate statistical database. Furthermore, we recommend that KSH make available annually comparable, detailed data on the number and content of collective agreements. Based on KSH and MKIR data, we recommend that an annual government report be prepared on collective agreement data, current problems and trends, and related governmental and legislative tasks.

2. COLLECTIVE BARGAINING COVERAGE IN THE PRIVATE SECTOR: CURRENT SITUATION AND TRENDS

Collective bargaining coverage shows a slight decrease on average across OECD countries in Europe, but with significant differences. The data place Hungary in a group of countries where collective bargaining coverage is less significant. A group of countries like ours also tend to have less developed economies, most of them former socialist countries *(Table 1)*.

In Hungary, according to KSH, one in four workers said they were covered by a collective agreement in 2004, but in 2009 and 2015 only one in five said they were. It is striking to note the contradictory impact of the entry into force of the Labour Code between the last two dates on collective agreements: in some sectors, the proportion of employees who answered yes has fallen significantly, despite the fact that the transitional law accompanying its introduction left the old collective agreements essentially untouched. In other sectors, however, the proportion of those who said yes increased significantly, particularly in the information, communication and financial activities sectors. These are, however, sectors with smaller workforce, and in the more populous sectors such as industry, education and health care, we see a slight decrease *(Table 2)*.

The overall rate of 20.6% can be considered low, with employers and trade unions making little use of the opportunities for collective bargaining provided by the Labour Code. By 2020, the proportion of respondents who answered yes had fallen further. However, for that year, the KSH only provided a breakdown by sector. This shows that the rapid decline in agriculture is unchanged, industry is only slightly down, while the services sector remains slightly above average *(Table 3)*.

According to the MKIR, the number of single-employer collective agreements fluctuates around 1,000. As can be seen, after a few years after the introduction of the Labour Code, the number increased by about fifty, and after 2019 we see a downward trend again. We see a similar trend in the number of employees covered by collective agreements, except for 2022, which is 43 thousand higher than in 2019, with a total of 440 thousand. This suggests both a shift towards larger firms having collective bargaining and a significant proportion of unions missing out the opporunity of collective bargaining, with a coverage of 440,000 compared to an estimated 300,000 union members, a rather low proportion *(Table 4)*.

The number of multi-employer collective agreements in the private sector in 2022 is 64, covering a total of 3 589 employers and 190.3 thousand employees *(Table 5)*.

The stock of multi-employer collective agreements (which may be multi-employer agreements and agreements concluded by employer representatives) appears surprisingly stable over the decade, but we see a significant decline in 2022. This is also partly the result of data cleaning, and partly possibly due to the disappearance of the union that concluded the collective agreement or the collective agreement was cancelled. Of these, the biggest loss is the private security sector collective agreement, which could somehow settle the labour-related anomalies in the sector.

4 The data reported here were downloaded in October 2022.

5 The statistical block of the Labour Market Mirror regularly used the register of collective agreements, which was provided by the operator of the MKIR after a special data cleaning. These data are available until 2019. Since it is not possible to search the database for a year, only for the current date, we use these data until 2019, the data for November 1. 2022 were retrieved directly from the database. See: https://kti.krtk.hu/wp-content/uploads/2022/01/mt_2020_hun_303-388.pdf and http://mkir.gov.hu/#1 2022 data retrieved directly from the database. See e. g. https://kti.krtk.hu/wp-content/uploads/2022/01/mt_2020_hun_303-388.pdf and http://mkir.gov.hu/#

Table 1
Estimated collective bargaining coverage in European OECD countries (narrowed coverage indicator)

Country/Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Austria	98.0	98.0	98.0	98.0	98.0	98.0	98.0	98.0	98.0	98.0
Belgium	96.0	96.0	96.0	96.0	96.0	96.0	96.0	96.0	96.0	96.0
Czech Republic	36.0	36.9	36.7	36.4	34.3	34.2	32.9	33.6	34.2	34.7
Denmark	..	83.0	83.7	..	..	83.1	..	..	82.0	..
Estonia	15.7	..	..	..	14.1	..	..	..	6.1	..
Finland	..	..	..	..	91.9	..	..	88.8	..	..
France	98.0	..	..	98.0	..	98.0	..	..	98.0	..
Germany	59.8	58.9	58.3	57.6	57.8	56.8	56.0	55.0	54.0	..
Greece	100.0	100.0	51.5	37.3	29.2	21.3	14.3	14.2	..	..
Hungary	27.3	26.4	26.9	25.5	25.4	28.3	28.1	23.3	21.1	21.8
Italy	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Lithuania	10.9	10.4	9.6	9.0	8.7	8.5	8.3	8.3	7.6	7.9
Latvia	32.9	..	..	..	32.4	..	..	..	27.1	..
Luxembourg	58.4	..	..	..	56.8	..	..	..	56.9	..
The Netherlands	90.6	87.2	85.1	85.7	85.9	79.4	79.3	77.1	76.7	75.6
Norway	..	..	71.0	73.0	72.0	..	70.0	69.0	..	..
Poland	18.6	18.1	17.7	..	..	17.3	..	..	..	13.4
Portugal	77.8	78.1	75.5	76.5	74.0	73.7	74.1	73.1	73.6	..
Slovakia	..	35.0	..	..	..	24.4	..	..	..	..
Slovenia	70.0	..	..	65.4	69.2	67.5	70.9	78.6	..	..
Spain	79.4	79.8	80.1	84.6	83.4	79.6	80.8	78.9	80.1	..
Sweden	88.7	88.3	88.8	88.4	88.6	88.7	88.6	87.7	88.0	..
Switzerland	..	..	44.8	..	44.6	..	45.1	..	45.0	..
UK	30.9	31.2	29.3	29.5	27.5	27.9	26.3	26.0	26.0	26.9
OECD total	34.8	34.6	33.5	33.4	33.1	32.7	32.4	32.2	32.1	32.1

Source: OECD Stat, https://stats.oecd.org/Index.aspx?DataSetCode=CBC (downloaded: August 31. 2023)

Table 2
Percentage of employees who think that their workplace has a valid collective agreement (2004-2015, %)

	Economic sector	2004	2009	2015
A	Agriculture, forestry, fishery	12.3	8.6	4.8
B	Mining, quarrying	40.4	27.3	29.6
C	Processing industry	23.7	20.7	20.2
D	Electricity, gas, steam, air conditioning	47.2	49.8	45.0
E	Water supply; wastewater collection, treatment, waste management, decontamination	36.8	33.4	27.7
F	Construction	6.1	4.8	6.0
G	Trade, motor vehicle repair	9.2	6.5	9.1
H	Transport, warehousing	46.9	42.7	36.7
I	Accommodation services, catering	8.4	4.6	4.8
J	Information, communication	25.0	10.3	16.9
K	Financial, insurance activities	24.3	16.4	20.5
L	Real estate transactions	12.4	9.4	11.0
M	Professional, scientific, technical activities	13.9	8.5	10.3
N	Administrative and service support activities	16.4	8.6	11.8
O	Public administration, defence; compulsory social security	32.7	30.0	26.9
P	Education	43.5	38.4	38.9
Q	Human health, social care	39.8	35.1	33.5
R	Arts, entertainment, leisure	19.9	20.3	21.5
S	Other services	18.6	5.8	7.8
	Total	**25.2**	**20.6**	**20.6**

Source: KSH

Table 3
Percentage of employees who think their workplace has a valid collective agreement in 2020 (%)

Economic sector	2020
Agriculture	3.3
Industry	19.6
Services	18.8
Total	**18.5**

Source: KSH

Table 4
Stock of single-employer collective agreements in the private sector

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2022
Number of agreements	966	959	942	951	951	950	994	995	999	1011	989
Affected staff, persons	448 138	448 980	442 723	448 087	443 543	458 668	463 823	386 947	388 996	397 650	440 914

Table 5
Stock of multi-employer collective agreements in the private sector

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2022
Number of agreements	82	81	81	83	83	83	84	84	83	84	64 (3589)
Staff affected, persons	221 627	202 005	204 585	173 614	219 050	299 487	313 044	266 212	230 938	229 477	190 342

3. COLLECTIVE BARGAINING COVERAGE IN THE PUBLIC SECTOR: CURRENT SITUATION AND TRENDS

Legislative changes since 2010 have abolished collective agreements in some cases, such as the abolition of collective agreements in the home affairs sector, when the law enforcement employment relationship was created, the defence employment relationship in the national defence sector and the health service employment relationship in the health sector. As a result, the right to conclude collective agreements has been abolished in the law enforcement and defence sectors, as well as in the public administration and health care sectors, where trade unions and employers had previously been able to bargain collectively. Collective agreements have also ceased to exist where large groups of employees have been forced to change their status – mostly those who have been transferred from the civil service employee status to the employment relationship (under the Labour Code) and can conclude new collective agreements in their new status (e.g. vocational training, public collection sector).[6] Under these circumstances, the decline in unionisation and collective bargaining would have occurred even if all other factors had remained unchanged *(Table 6)*.

In the public sector, the actual collective bargaining processes do not seem to have been tracked by the registers. From 2014 to 2015, the phasing out of collective bargaining in public education presumably took place, but there is no reason to believe that the number of collective agreements almost doubled from 2019 to 2022. In the two tables below, we have collected data to the generally known changes *(Table 7)*.

Instead of the 861 collective agreements mentioned above, there are 20 collective agreements concluded by the educational districts in public education. The number of employees cannot be derived from the database, and we do not know how many new collective agreements have been concluded in vocational training and higher education 'outsourced' to the scope of the Labour Code, or how many were/are in church and foundation institutions.

It is also doubtful to what extent the creation of educational districts respectively the redistribution of the employer's status after the dissolution of the KLIK (Klebelsberg State School Administration Center) can be considered as a basis for single-employer collective agreements.

6 For a summary of the narrowing of the scope of the Law on the status of civil service employees (Kjt.) see István Horváth–Gábor Kártyás: Látlelet: Az egészségügyi szolgálati jogviszonyról és a szabályozás kérdőjeleiről. *Munkajog,* 2021/1. 1–3.

Table 6
Stock of collective agreements covering one institution in the public sector

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2022
Number of agreements	1751	1744	1735	1736	1734	798	800	804	819	820	1563
Staff affected, persons	224 651	222 136	261 401	260 388	259 797	301 430	312 055	270 583	167 583	193 695	239 558

Table 7
The data of MKIR in the field of education (2022)

TEÁOR	Sector	Collective agreements, number of agreements	Number of persons concerned
8520	Primary education	557	33 825
8531	General secondary education	111	850
8532	Vocational secundary education	165	14 966
8542	Tertiary education	15	27 893
8559	N.e.c. other forms of education	4	201
8560	Activities complementing education	9	518
	Education total	**861**	**78 253**

Table 8
MKIR data for sectors where collective agreements will no longer be possible in 2022 (2022)

TEÁOR	Sector	Collective agreement, number of agreements	Staff affected
8610	In-patient care	74	61 785
8621	General out-patient care	2	76
8622	Specialist out-patient care	10	1 641
8690	Other human health services	5	10 393
8422	Defence	24	2 709
8424	Public safety, public order	20	10 840
8425	Fire protection	1	228
	Total	**136**	**87 672**

Table 9
Multi-institutional collective agreements in the public sector

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2022
Number of agreements	1	1	0	0	0	0	0	0	1	1	1 (3)
Staff affected, persons	..	320	0	0	0	0	0	0	55 979	56 612	n.a.

In addition, in a number of sectors, the legal status laws have abolished collective agreements that are still in the register. Their details are shown in the table below. The 136 collective agreements and the corresponding number of employees can be deducted in their entirety from the corresponding data. After deducting 977 (861-20+136) collective agreements, 486 collective agreements remain. If only the number of contracts in the health sector is deducted from the 2019 data, 684 collective agreements remain. The actual number of agreements could be somewhere between these two figures, assuming that new collective agreements have been concluded since 2019 *(Table 8 and 9)*.

4. THE JUSTIFICATION FOR THE LABOUR LAW REFORM

The central question of the 2012 labour law reform and the adoption of the 2012 Labour Code[7] as its result was how to increase the number of collective agreements and thus the coverage of collective agreements in the Hungarian labour market. There is a consensus among Hungarian labour lawyers that the regulation of the world of labour by collective agreements is desirable in Hungary, as

7 The reform was achieved with the creation of the Labour Code.

Table 10
Collective labour law instruments in practice based on data from the KSH

Question, year		Yes	No	Don't know
Is there a trade union at your workplace?	2015	25.1	62.4	12.5
	2020	23.6	65.5	10.9
Are you a trade union member?	2015	9.0	88.8	2.1
	2020	7.4	90.0	2.7
Is there a works council at your workplace?	2015	17.9	63.5	18.5
	2020	16.4	64.9	18.6
Does your workplace have a collective agreement?	2015	20.6	57.3	22.1
	2020	18.5	57.8	23.8

it is internationally, as it has many advantages. However, the scarce data available to us show that after the 2012 reform, presumably at least partly as a result of the reform, the coverage of collective agreements and the number of employees covered by them has (further) decreased. The 2015 and 2020 Labour Force Surveys of the KSH[8] also show a clear general devaluation and continued erosion of collective labour law institutions *(Table 10)*.

For these reasons, we consider it essential to examine in detail which old and new labour law rules contribute to the weak or declining collective bargaining coverage and, most importantly, what changes are needed to reverse this trend. Of course, we are aware that the number of collective agreements is not only determined by labour law rules, but also by a number of non-legal factors which have a major influence on it (density, knowledge, financial resources, organisational structure, economic, political and policy climate of the parties etc.). However, in this shadow report we focus exclusively on labour law instruments, ignoring for the moment all non-legal instruments and aspects.

Our aim is therefore not just to identify problems and criticise the current regulation, but also to identify potential breakthrough points. Our study has a particular purpose and meaning given the transposition of the Minimum Wage Directive, which obliges all Member States with less than 80% coverage, including Hungary, to draw up an action plan to promote collective bargaining.[9] Our suggestions could usefully contribute to the discussion and elaboration of such an action plan.

In the following sections, the factors affecting the decline in collective bargaining coverage, such as the rules on collective bargaining capacity, specific problems of sectoral collective agreements, trade union rights and the right to strike, are discussed in detail.

PROPOSALS IN THIS CHAPTER IN BRIEF

In this chapter we made the following suggestions with regard to statistics on collective agreements:

- The government should remedy the shortcomings of the MKIR database and maintain a reliable and up-to-date register of collective agreements, which could form the basis of a detailed and accurate statistical database.
- The KSH should annually provide comparable, detailed data on the number and content of collective agreements.
- An annual government report on data on collective agreements, current problems and trends, and related governmental and legislative tasks, based on data from the KSH and MKIR should be prepared.

8 2015: https://www.ksh.hu/stadat_evkozi_9_1?lang=hu; 2020: https://www.ksh.hu/stadat_evkozi_9_18?lang=hu.

9 Directive 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union Article 4 (2). Member States must transpose the Directive by 15 November 2024.

PART II

THE RIGHT OF COLLECTIVE BARGAINING

TAMÁS GYULAVÁRI – GÁBOR KÁRTYÁS

In this section we look at the rules of the law on collective bargaining and how they could be improved. First, the representativity rule is examined, followed by the normative works agreement, the coalition obligation, the subsequently acquired representativity, and finally the regulatory role of the collective agreement.

1. COMPLIANCE WITH THE 10% REPRESENTATIVITY RULE

A trade union does not have the right to conclude a collective agreement. In view of the regulatory role of collective agreements, i.e. the effect they have in shaping the content of the individual employment relationship, only a trade union which has sufficient authority from the employees to be covered by the agreement is entitled to conclude the collective agreement. The legal regulation of representativity is a very sensitive issue, since the quality of the parties to the agreement also determines the quality of the collective agreement.[10] The right of a trade union to conclude a collective agreement on behalf of a small group of employees, which in turn would apply to employees who are not organised or who are members of another union, should be avoided.[11] On the other hand, with the requirement set too high, the majority of workplaces/employees may miss out on collective bargaining in the absence of a representative union capable of negotiating a collective agreement.

The 1992 Labour Code (in force up to 2012) linked the right to collective bargaining to the number of votes obtained in the works council elections, providing for the following – relatively complex – system. A trade union could conclude a collective agreement if its candidates obtained more than half of the votes cast in the works council elections. In the case of several unions the limit had to be met jointly. If the unions failed to agree on a collective agreement, the (representative) unions which obtained at least 10% of the votes could conclude the agreement, provided that the candidates of these unions obtained more than half of the votes in total. In this case, the support of non-representative unions was no longer necessary for an agreement. Finally, if the representative unions did not agree to support the agreement, the union with more than 65% of the votes could conclude the collective agreement on its own.[12] Here, it should be noted that the Labour Code does not currently use the term representativity, but in this study we refer to the criterion used as a condition for the right to collective bargaining and use the term as such.

The staged system in place before 2012 sought to break the deadlock caused by the presence of several unions.[13] This method, however, only partly reflected union support, and led to unions running their own leaders in works council elections in order to optimise the vote, creating a kind of personal union between two representative bodies with different functions. A further problem was that it made it impossible to conclude collective agreements with employers – mainly in small and medium-sized enterprises – where no works council elections had been held.[14]

The 2012 reform brought a fundamental change in the representativity criterion for trade unions, which now requires at least 10% membership of the workforce of the employer concerned.[15] The problem is, however, that national figures show that total trade union membership is below 10% of the workforce and is steadily and sharply declining. In the 2020 survey of the KSH cited in the introduction, only 7.4% of employees said they were members of a trade union, a significant drop even compared to the 2015 figure (9.0%).

10 Kovács 2011, 80.

11 György Nádas: A kollektív szerződések jogdogmatikai kérdéseinek vizsgálata. In: István Horváth (szerk.): *Tisztelgés. Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára,* ELTE Eötvös, Budapest, 2015, 325.

12 Article 33 (2)-(5) of the 1992 LC.

13 György Kiss: Munkajog a közjog és a magánjog határán – egy új munkajogi politika kialakításának szükségessége. *Jogtudományi Közlöny,* 2008/2, 79–80.

14 Kovács 2011, 82.

15 The average statistical number of employees for the six months preceding the conclusion of the contract shall be taken as the basis. Article 276 (2) and (6) of the LC

This of course represents the average, total membership, which in itself does not reflect an organisation concentrated in certain types of workplaces. But the same survey also shows that it is already impossible to reach a collective agreement in around two-thirds of workplaces where there is no union at all. So if membership continues to fall, the number of representative workplace unions will automatically fall, and with them, of course, the number of collective agreements. If the current rule remains, then collective bargaining coverage could decline steadily and automatically, roughly in proportion with the membership. This process will be reinforced by the specificity of the system, that collective agreements in Hungary today basically exist only at the workplace level.

One obvious solution is of course to lower the 10% threshold. However, given the decline in trade union membership, this would be a downward spiral if the criterion were to be lowered and lowered, with the result that it would slowly lose its original function: to guarantee representativity. This would therefore not solve the problem, but only postpone it, and would cast doubt on the legitimacy of the trade unions that conclude the agreement, and is therefore not recommended. In addition, lowering the threshold (for example to 5 or even 3%) would presumably not lead to more collective agreements because of the other limiting factors.

It is a long-standing thesis in labour law that countries with workplace-level collective agreements have very low coverage, as it is roughly proportional to membership (e.g. USA, Canada, Japan).[16] A good counter-example is France, where there is 98% collective bargaining coverage with only 8% union members, but this high rate is due to the extension of the scope of collective agreements.[17] A sectoral collective agreement can therefore ensure high collective bargaining coverage even with low union membership, if the legal conditions are favourable. The key to this secret could therefore be the conclusion of sectoral collective agreements and/or extension of collective agreements to a sector, as this would lead to significantly greater coverage. One obvious solution is to revive sectoral dialogue (see the section on the chances of this). The structural reason for the low coverage is the monopoly of dialogue at workplace level.

In parallel with encouraging sectoral dialogue, another possible solution is to provide evidence of representativity in other ways besides the number of members. This solution can be implemented in parallel with the promotion of sectoral dialogue. A collective agreement could be negotiated and signed by both the non-representative union and the elected representatives of the employees, irrespective of whether the union is representative according to the 10% rule. Thus, if there is no representative union, the agreement could be ratified by the employees through a vote. If a sufficient proportion of employees approve the negotiated collective agreement, neither the principle of representativity nor the right to collective bargaining is violated by a disproportionate (too strict) requirement. In addition, the non-representative union could also participate in collective bargaining with the representative union.

This solution (employee vote) would not be alien to Hungarian labour law, since it has a precedent in positive law, although we cannot speak of a serious established practice. The 1992 Labour Code also stipulated that if the candidates of the trade union(s) did not obtain more than half of the votes in the works council election, negotiations for the conclusion of a collective agreement could be conducted, but the approval of the employees was required for the conclusion of the collective agreement. The employees had to vote on this. The vote was valid if more than half of the employees entitled to elect a works council took part in it.[18]

However, the disadvantage of this solution is that the requirement of majority support from non-organised workers cannot provide the same guarantee as if the agreement required the consent of a sufficiently representative trade union with its own legal personality. In the absence of trade union mediation, it is much less likely that the bargaining power difference between employers and employees will be levelled out. It is also questionable how popular such a solution would be with employees.

Nonetheless, a solution based on employee empowerment could work alongside and complement sectoral dialogue. If the above (old-new) concept were to gain support, the essential details could be agreed on with the social partners, in particular participation and voting percentages required for the ballot. Of course, we are aware that this can only work if employers are also interested in collective bargaining, so we will address this issue in more detail below.

In a solution based on an employee's ballot, negotiations could therefore be conducted by the non-representative union and/or the employees' representatives. Employees would vote on the negotiated collective agreement, and the collective agreement thus concluded would be subject to the general labour law rules. The key issue is the required level of participation and voting. If these are too high, this could hinder such initiatives and the success of the whole alternative contractual solution. Since 10% organisation is the representativity alternative, the participation rate could be set lower than before (e.g. around 25%). For voting, we consider majority approval (requiring 50%+1 vote) to be appropriate.

16 Collective Bargaining: Levels and Coverage. https://www.oecd.org/els/emp/2409993.pdf, 168.

17 https://www.worker-participation.eu/National-Industrial-Relations/Countries/France

18 Article 33 (6) of the 1992 LC.

A return to the result of the works council elections could also be considered. However, statistics show that in 2020 at workplaces there were fewer works councils (16.4%) than trade unions (23.4%).[19] The old rule could therefore lead to an even worse coverage. On this basis, we propose to regulate the institution of employee voting with the voting rules outlined above. We do not think that this would have an immediate tangible impact on coverage, but it could strengthen the culture of collective participation and bargaining and create an alternative pathway in workplaces without representative unions.

It could also be argued that the scope of the collective agreement should be limited to trade union members, as opposed to the rule followed since 1992. This solution would obviously encourage employees to join trade unions, but it would immediately and appreciably reduce collective bargaining coverage. In this respect, European labour law is divided, since in some countries collective agreements have, and in other countries they do not have an erga omnes effect. Against this background, we do not recommend this change, as it would only worsen the situation by drastically reducing the number of employees covered by collective agreements.

2. NORMATIVE WORKS AGREEMENT: NECESSARY OR UNNECESSARY EVIL?

By reviving the legal institution of the normative works agreement[20] it was obviously the intention of the legislator to allow employers without a representative trade union to conclude collective agreements at workplace level.[21] This was to favour collective agreements and dialogue at workplace level over the already dormant bargaining at sectoral level. At the same time, this solution does not fit dogmatically into the Hungarian system in terms of the sources of labour law and collective labour law. Thus, in particular, the members of the works council that concluded it do not enjoy protection, have not been given regulatory powers by the electorate, cannot strike and cannot regulate wages in this agreement.[22] The latter solution has its origins in German labour law, but there the works agreement complements collective agreements (mostly) at sectoral level, and hence the exclusion of wage regulation (with exceptions).[23] However, the Hungarian system is completely different, so in the absence of a sectoral level, the exclusion of wages from the scope of the legislation is completely meaningless and renders normative works agreements meaningless.

We do not even know how many such normative works agreements have been concluded since 2012 and with what content. In order to assess the issue more accurately, it would be essential to measure and research them on an ongoing basis using public statistics (KSH). The experience of practitioners is that only few such agreements exist (if any).[24]

There are two possible solutions to tackle this legal situation. One is to modify the rules and the legal environment of the works agreement to address these problems. Some of the problems can be addressed by amendments, such as granting protection to the members of the works council (others than the chairman) and allowing the regulation of wages. However, granting the right to strike and regulatory empowerment would create structural, dogmatic confusion. Furthermore, it is not desirable to encourage works agreements at workplace level at the expense of sectoral collective agreements. We therefore agree with some of the regulatory objectives (except for strengthening the workplace level), but do not consider the chosen solution to be appropriate.

The other solution is to repeal the legal instrument of the normative works agreement. Since the promotion of dialogue at sectoral level and the extension of collective bargaining capacity proposed above are better suited to fulfil the original role of the normative works agreement, we do not consider that this legal instrument is necessary. Its function can be fulfilled in other ways without the negative effects of this solution. On the basis of all these considerations, we propose to delete the provisions of the normative works agreement from the Labour Code. As practical experience shows, the eliminaion of this legal instrument would not cause any deficit.

The works agreement would then only have a regulatory role in the relationship between the signatory parties. In this respect, however, we consider it aproppriate to maintain the flexibility that the works agreement, like the collective agreement, can derogate from most of the provisions of the Labour Code on works councils.[25]

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19 *Labour Force Survey Q1 2020 additional intake.* https://www.ksh.hu/stadat_evkozi_9_1?lang=hu

20 This solution existed for a short time in the 1992 LC, as Article 31, amended in 1999 and in force until 2002, also recognised the so-called normative scope of the collective agreement, but the provisions of the collective agreement had to be applied accordingly. For a critique see e. g. György Kiss: *Munkajog.* Osiris, Budapest, 2015, 387–388.

21 Article 268 LC.

22 For a summary of the dogmatic problems of normative works agreements, see: Gábor Kártyás: Kollektív szerződés. In: Tamás Gyulavári (ed.): *Munkajog.* ELTE Eötvös Kiadó, Budapest, 2019, 462–463.; Imre Szilárd Szabó: A kollektív szerződések szerepe a megújult munkajogi szabályozásban. *Magyar Munkajog E-folyóirat,* hllj.hu, 2015/1., 38–39.

23 Weiss, Manfred. 2019. "The Sources of German Labour Law". In: *The Sources of Labour Law,* edited by Gyulavári, Tamás and Menegatti, Emanuele, 229-244. The Hague: Kluwer Law International, pp. 240-242.

24 Imre Sz. Szabó 2022. *A szakszervezetek jogállása a magyar munkajogban.* Budapest: Novissima, 225.

25 Article 267 (5) LC.

3. COALITION OBLIGATION AND NEWLY ACQUIRED REPRESENTATIVITY: DEADLOCKS ON THE EMPLOYEES' SIDE

3.1. Lifting the coalition obligation

If more than one representative trade union is entitled to conclude the agreement, a collective agreement may be concluded if they all agree.[26] This can lead to a stalemate where a union with 80% density cannot reach an agreement with the employer if another union with 10% of the membership disagrees with the proposed text, even on a single point. This rule (coalition obligation) is a disproportionate and unnecessary restriction on the right to collective bargaining. This affects a decreasing number of workplaces with significant but fragmented union membership.

However, it is a waste of resources, in our view, to focus the collective bargaining process on the compromise between the employees and not with the employer, even if there is a large difference in support between them. It would therefore be appropriate to return to the solution of the 1992 LC. Thus, in principle, representative trade unions are entitled to conclude an agreement jointly, but, in the absence of an agreement, unions under a certain proportion of membership may be excluded from the agreement. The exact proportions should be determined in consultation with the social partners. However, setting the proportion too high would make it impossible to apply the new solution.

3.2. Rules on the capacity of trade union federations to conclude collective agreements

Our proposal is that the total number of the members in an employment relationship with the employer, who are members of organisations of a trade union functioning as a federation at the eemployer should be the reference for determining the right to conclude a collective agreement.[27] According to the rules in force of the LC, a trade union federation is only entitled to conclude a collective agreement at the level of the work organisation if at least one of its member organisations represented at the employer has a membership of at least ten per cent of the number of employees covered by the collective agreement and its member organisations have authorised it to do so.[28]

Thus, a federation is only entitled to conclude a collective agreement if at least one of its member organisations reaches the 'ten per cent' threshold. Even if the trade union federation is sufficiently 'representative' overall (in some cases well above the required 10 per cent), it does not have the necessary substantive accessories/prerequisite for concluding a collective agreement, because of a labour law rule that 'restricts' it. In practice, this problem usually arises with the transformation of companies (e.g. mergers, fusions under the Civil Code), with transformations in the public service sector providing a striking example.

Our specific proposal in relation to Article 276 (3) of the Labour Code: "(3) A trade union federation is entitled to conclude a collective agreement if at least one of its member organisations represented at the employer meets the condition provided for in paragraph (2) and is authorised to do so by its member organisations, or if the number of members of its member organisations represented at the employer who are employed by the employer reaches fifteen per cent of the number of employees and is authorised to do so by its member organisations."

3.3. The problem of ex-post representativity

Even more serious distortions than coalition obligation can be caused by the problem of ex-post representativity between the right to collective bargaining and the real support for trade unions. Even under the 1992 Labour Code, the doctrine was established in judicial practice that only the parties that had concluded the collective agreement could amend it.[29] This legal maxim is explicitly included in the present LC, giving only the right of consultation in negotiations on the amendment of the collective agreement to the trade union that reaches the 10% limit after the agreement is concluded.[30]

This provision does not take into account that the support for a union can change significantly over time. For example, a trade union with 20% membership at the time of the conclusion of the contract may be entitled to modify its collective agreement even if its membership has fallen significantly in the meantime and is barely above the minimum 10%. Vice versa, even if a trade union has a membership of over 60% at the employer, if it was not a party to the collective agreement in force at the time, it cannot amend or terminate it. And its legal possibilities and instruments are further complicated by the fact that a union which has subsequently gained support cannot use the legal means of industrial action, since it is illegal under the law on strikes to strike in order to change the agreement in a collective agreement during the period of validity of the collective agreement.[31]

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26 Article 276 (4) LC.

27 The provisions of Act V of 2013 on the Civil Code (Ptk.) applicable to associations.

28 Article 276 (3) LC.

29 EBH 2002.684.; BH 2003.128.

30 Article 276 (8) LC.

31 Article 3 (1)(d) of Act VII of 1989 on Strikes (hereinafter referred to as the Sztrájktv.); Szabó 2015, 33; Imre Szilárd Szabó: Még elégséges szolgáltatás a gyakorlatban – az elmúlt 13 év "legnagyobb" személyszállítási sztrájkjának tanulságai. *Munkajog,* 2023/2. 65–70..

The contradictions in the legislation are further compounded by what we believe to be erroneous judicial practice. In one case, the Curia (Supreme Court) ruled that the Labour Code contains a provision exclusively with regard to the conclusion of collective agreements that makes the right to sign a collective agreement conditional on the 10% threshold. It does not mean, however, that a party entitled to conclude a collective agreement can be excluded from amending it. In other words, according to the interpretation of the Curia, a trade union which concludes a collective agreement is entitled to amend or terminate the agreement, irrespective of the number of members, as long as it is in force.[32] Several studies have already shown how relative it is to solve this case on the basis of the civil law doctrine on contracts, but at the same time how unmanageable situations this interpretation creates.[33]

The basis of the problem can be found in the dual nature of the collective agreement, in that a collective agreement that substantially shapes the individual employment relationship of employees cannot be considered a private contract, since it has a quasi-legal source role.[34] In our view, collective bargaining capacity is in fact a regulatory capacity, and it is therefore a mistake to apply to it the doctrine of modification and termination of (private law) contracts. Instead, we propose that if a trade union meets the conditions for its eligibility to conclude a collective agreement after the conclusion of the collective agreement, it should be considered a party to the collective agreement as soon as it has demonstrated to the other parties that it has met the conditions. It is then entitled to amend or terminate it on the same terms as the other signatory unions. This rule would not in itself lead to more collective agreements, but it is necessary for a meaningful collective bargaining based on real union support.

The latest development in this regard is the ruling of the Constitutional Court from September 2023[35] which annulled the rule in question on the grounds that it constituted an unreasonable distinction between representative trade unions with the capacity to bargain collectively.[36] Following the annulment, Article 276 (8) of the Labour Code on the Labour Code remains in force with the following wording: "A trade union (trade union federation) which, after the conclusion of a collective agreement, meets the condition set out in paragraph (2) shall be entitled to initiate the amendment of the collective agreement and to participate in the negotiations on the amendment."

Although the ruling of the Constitutional Court partially addressed the issue, two problems remained. On the one hand, judicial practice can still be criticised on the grounds that it does not interpret representativity in a dynamic way. On the contrary, we propose that if a trade union loses its representativity, it should not be entitled to modify or terminate the collective agreement in force. On the other hand, it is clear from the ruling of the Constitutional Court that it is unconstitutional to differentiate between representative trade unions in the field of collective bargaining, regardless of when they acquired representativity (before or after the conclusion of the collective agreement in force). However, Article 276 (8) of the Labour Code still stipulates that a trade union which has become representative after the conclusion of a collective agreement may only amend the collective agreement in force, but the right to terminate it is not guaranteed in the text of the provision. In our view, the principle of legal certainty requires that this should also be laid down in specific legal terms.

4. A POSSIBLE SOLUTION: THE COMPULSORY COLLECTIVE AGREEMENT?

Of the respondents to our online questionnaire in 2023, eight expressed the view that collective agreements should be made compulsory. Some of them refined this by saying that the agreement should be compulsory only above a certain number of employees or only at the initiative of the union for negotiations. Others would make the collective agreement compulsory in a positive direction, i.e. for certain public tenders and subsidies, a collective agreement in force at the employer would be a condition. However, one respondent was explicitly against making it compulsory, suggesting that this would only increase the opposition to collective bargaining and trade unions, and that the content of 'must-have' contracts would certainly be poor. While such a solution would undoubtedly lead to a rapid and spectacular improvement in coverage, we believe that this would be a mistake. The essence of the legal institution of the collective agreement is the voluntary nature of the collective bargaining. This would be severely undermined if the parties were brought to the negotiating table not by a willingness to agree, but by a legal obligation to do so. Obviously, different agreements would be reached if one party (or both parties) were to face legal sanctions in the event of a failure to negotiate.

In addition, we believe that any form of binding (even indirect) obligation would not solve the fundamental structural problem of the lack of a negotiating partner for collective bargaining in many cases. On the trade union side, this is evident in the case of small and medium-sized

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32 EBH 2018.M.6.

33 Áron Péter Balogh: A kollektív szerződés módosítása szerződéskötési képesség hiányában. *Munkajog,* 2019/1.; Endre Nemeskéri-Kutlán: "Örökös tagság?", avagy a kollektív szerződés kötésére vonatkozó szakszervezeti jogosultság anomáliáinak feloldhatósága a jogalkotás által. In: *Ünnepli tanulmányok Lőrincz György 70. születésnapja tiszteletére.* HVG-ORAC, Budapest, 2019.

34 See in detail: Hágelmayer Istvánné: *A kollektív szerződések alapkérdései.* Akadémiai Kiadó, Budapest, 1979, 325., 329.; újabban: Puskás Ágnes: A kollektív szerződés jogi természetéről. *Pro Futuro,* 2019/2., 74–81.

35 Decision of the Consitutional Court No. 22/2023, available at: https://alkotmanybirosag.hu/ugyadatlap/?id=A812F30729E506BBC125899E005BB031

36 György Kiss: A kollektív szerződés magánjogi természetének megítéléséről. *Közjogi Szemle,* 2023/4: 85-92.

enterprises, but it is also a matter of concern for employers at sectoral level. The independence of the parties, which is a prerequisite for a meaningful collective bargaining process, would be seriously compromised if the employer's side were interested in encouraging employees to form a union and/or to achieve the membership required to obtain the right to bargain. Therefore as a summary, we do not support compulsory collective bargaining solutions.

5. THE REGULATORY ROLE OF COLLECTIVE AGREEMENTS: REDESIGN

According to the general rule in force since 2012, the collective agreement may derogate from Parts II and III of the LC[37] to the advantage or even disadvantage of the employee. In this way, the Labour Code has created an extremely broad framework for collective autonomy and the parties' freedom of collective bargaining, which has never been applied in Hungarian labour law before.[38] It should be noted that this differs in principle from the solution followed in continental jurisdictions and in the world in general, which allows the collective agreement to derogate from the law only for the benefit (in favour) of the employee (in melius derigation). There are undoubtedly exceptions to this main rule in an increasing number of European legal systems, particularly in the area of working time. However, no EU Member State has a general free derogation similar to the Hungarian LC.[39]

Although the aim of this innovation was to increase employer interest and thus the number of collective agreements, the statistics show that this attempt has failed. The downward trend in the number of collective agreements is obviously not due to this solution, but it does not seem to have been successful in creating interest either. We believe that the employer interest for collective bargaining has not been created because the low legal minimums, the increasing number of unilateral regulatory options, and the possibilities for derogation in employment contracts provide sufficient flexibility for employers. In comparison, employers no longer seem to be interested in further derogations in collective agreements. Free derogation creates a real interest on the employer's side if it is worthwhile for the employer to give employees extra benefits and rights (especially higher wages and salary elements) beyond the LC for derogating from certain statutory rules, i.e. for derogating to the disadvantage of employees.

At the same time, a fundamental feature of the LC is that it gives the employer the right to unilateral discretion on regulation of a number of issues that are crucial in this respect. For example, an employer may apply a working time banking of up to six months in special working arrangements;[40] may, for unforeseeable reasons, modify the already notified working time schedule up to 96 hours in advance;[41] allocate a daily rest period of less than 11 hours in special working arrangements;[42] may decide to provide for consecutive rest days in the case of an uneven work schedule, or not to allocate a rest day after six working days in special working arrangements;[43] may impose 250 hours of exceptional working time per year, which may be increased to 400 hours by an individual agreement with the employee.[44] If the employee causes damage through slight negligence, the employer can claim up to three times the minimum wage, even with a payment notice; and in the absence of a collective agreement, disciplinary liability can be regulated by an individual agreement.[45] These options were linked to the provision of the collective agreement in the 1992 LC.

Realistically, it is worth starting from the assumption that the legislator will not break the free derogation system regarding collective agreements referred to above. However, there is a leeway as to which issue who is entitled to regulate:

- unilaterally the employer,
- the agreement of the parties,
- the lower (typically workplace level) collective agreement, or
- the higher (possibly sectoral level) collective agreement.

Our proposal essentially concerns regulatory powers and aims to significantly shift them in favour of collective agreements. This would in fact mean a reform that would increase the role of the various collective agreements (workplace and sectoral) in regulating the employment relationship, in particular at the expense of the unilateral provision (company statute, by-law) by the employer and, to a much lesser extent, to the detriment of the agreement (employment contract) concluded by the parties. This would reduce the growing imbalances compared to previous legislation between individual and collective labour law actors (employers and employees) in terms of rights and obligations arising from the employment relationship, which is caused by the LC. A reorganisation of regulatory powers would improve the rights and labour law status of employees without any substantial rewriting of the legal rules.

37 Article 277 (2) LC.

38 Gyula Berke: *A kollektív szerződés a magyar munkajogban.* Utilitates Bt., Pécs, 2014, 148.

39 Tamás Gyulavári,– Emanuele Menegatti: Introduction: Recent Trends in the Hierarchy of Labour Law Sources In: Gyulavári, Tamás – Menegatti, Emanuele (eds.): The Sources of Labour Law. Kluwer Law International, The Hague, 2020.

40 Article 94 (2) LC.

41 Article 97. (5) LC.

42 Article 104 (2) LC.

43 Article 105–106 LC.

44 Article 109 LC.

45 Article 179 (3), 285 (2), 56 LC.

We, therefore, assume that the LC currently gives the employer very broad autonomous powers of instruction in a number of fundamental, economically sensitive matters, especially in the organisation of working time. In our view, the statutory minimum also favours the employer on most issues, especially compared to the previous legislation. It is no coincidence that Hungarian labour law is considered 'flexible' by international standards, which means that it provides less protection for workers than many other European labour laws.[46] The 2012 reform – in contrast to the two previous reforms, the 1992 LC and the 2002 legal harmonisation amendment package – represented a step backwards in terms of employees' rights, as the legislation has become noticeably more 'flexible'. However, the level of flexibility is difficult to measure, especially in international comparison, and many have legitimate reservations about this type of measurement, which only takes into account certain factors, a selected set of rules.[47]

We see that there is an interest on the employees' side in collective bargaining, even if primarily organised at the workplace level, as trade unions have a fundamental interest in being a partner in wage increases or the legitimacy effects of improvements in working conditions in general. Thus, reducing the level of legal guarantees for employees or employees' representatives' rights would not lead to more collective agreements. Employee representatives are interested in collective bargaining, but they cannot force employers to conclude collective agreements. The weaker trade union and employees' rights are, the less capable trade unions are of effective interest representation. With this we would like to refute the possible argument that collective agreements are not concluded because trade union and employees' rights are still too generous and therefore the employees' side is not interested in collective bargaining.

Employers' interest in collective bargaining could be created if they could only be eligible for valuable derogations from statutory standards by concluding a collective agreement. This could include the linking of many working time and other rules to collective agreements, such as:

- the imposition of a working time banking longer than two (or four, depending on the policy decision) months;
- the communication or modification of working time schedules within less than one week from the start of working time;
- consecutive weekly rest days, for example, for a period exceeding two weeks (the number of weeks is a decision depending on legal policy and social dialogue);
- application of a daily rest period of less than 11 hours;
- exclusive increase of the maximum annual extraordinary working time;
- granting part of the paid leave after the end of the reference year;
- the sharing the cost of the prerequisites for performing work between employer and employee.

Today, the regulation of the above-mentioned matters fall largely within the unilateral jurisdiction of the employer and to a lesser extent can be freely regulated in the employment contract (even to the detriment of the employee). If there is a consensus on the principle of reorganisation of regulatory authorisations, it would be worthwhile to review the Labour Code with a view to identifying which additional rules should be made subject to a collective bargaining mandate. The more statutory provisions that require collective bargaining, the more employers will be interested in concluding such agreements. A good example is the imposition of a working time banking of more than two months, which would explicitly increase employers' willingness and interest in concluding collective agreements. So the point is not to have total freedom of derogation, but to treat genuinely important regulatory subjects as exclusive collective bargaining subjects.

Another important conceptual issue in this respect is which issues are reserved at what level of collective bargaining (especially at the workplace or sectoral level) in the LC. If we really want to create a sectoral level, it is worth allowing as many essential issues as possible to be regulated exclusively by a sectoral collective agreement, or to allow only derogations from the law in favour of the employee at a lower level from the higher level collective agreement. In this context, the amendment of the current text should generally prohibit derogations to the detriment of the employee (in peius derogation) in the lower level collective agreement from the higher level collective agreement.[48]

We are also aware that for smaller employers (small and medium-sized enterprises), concluding a collective agreement would be a serious problem, often an insurmountable obstacle. For this reason, a distinction could be made between employers on the basis of the number of employees. This problem could, in principle, be solved by exempting smaller employers (e.g. those with less than 50 employees) from the rules requiring a collective agreement for the relevant provisions. This would mean that only employers with more than 50 employees could be primarily affected by the reorganisation of the regulatory powers of the law described above.

Against this solution, however, a legitimate argument can be made that, if the right to collective bargaining is opened up, this relaxation is not justified on the basis of the number of employees. The above exemption would

46 Donna E. Wood: Building Flexibility and Accountability into Local Employment Services: Country Report for Canada. *OECD Local Economic and Employment Development (LEED) Working Papers,* 2010/17, OECD Publishing, Paris, 9.

47 Campos Nauro: Goulash Reforms: *Tracking thirty years of labour law changes in Hungary.* https://blogs.lse.ac.uk/businessreview/2019/11/11/goulash-reforms-tracking-thirty-years-of-labour-law-changes-in-hungary/

48 Article 277 (4) LC.

effectively eliminate collective agreements below a certain number of employees, even though the employees' community could vote for a collective agreement if it wished to do so. In light of the above, we do not consider it an effective solution to exempt smaller employers from the collective bargaining rules under the standards described above.

PROPOSALS IN THIS CHAPTER IN BRIEF

In the chapter we made the following proposals with regard to collective bargaining:

- It should be possible to conclude a collective agreement on the basis of the employees' vote.
- The legal institution of the normative works agreement should be abolished.
- As a general rule, representative trade unions should be entitled to conclude an agreement jointly, but, in the absence of an agreement, unions below a certain proportion of membership may be excluded from the agreement.
- The total number of the members of the unions at the employer should be the reference when determining entitlement to collective bargaining.
- If a trade union loses its representativity, it should not be entitled to amend or terminate the collective agreement in force.
- It should be stated in the LC that a trade union which becomes representative after the conclusion of a collective agreement may terminate the collective agreement.
- The decentralisation rule should be abolished, which allows the lower level collective agreement to derogate from the higher level agreement to the detriment of employees, if the higher level agreement specifically allows such an in peius derogation.
- The exclusive regulatory topics of the collective agreement should be extended to the detriment of unilateral employer regulation and the employment contract, to the benefit of both workplace and sectoral collective agreements.

PART III

COLLECTIVE AGREEMENTS AT SECTORAL LEVEL AND THE NATIONAL SOCIAL DIALOGUE

IMRE SZILÁRD SZABÓ[49]

In this section, I review the rules of collective agreements at sectoral level and (in particular) the macro-level reconciliation of interests related to the lowest wages, and the possibilities for their development. First, I will examine the specificities of the domestic collective bargaining system, followed by the possibilities of ‚break-out points', possible directions for expanding the range of subjects, and finally the mechanisms for setting the appropriate minimum wage.

1. SPECIFICITIES OF THE HUNGARIAN COLLECTIVE BARGAINING SYSTEM

The political changes in Hungary (too) resulted in an almost total change of the trade union structure, as the 'old-style' trade union movement did not meet the requirements of the new social and political (and later economic) circumstances. It can also be clearly demonstrated, however, that the old structure (with its organisational, cultural and often human conditions) has been preserved to a large extent, so that labour legislation alone has been unable to ‚liberate' the actors from the employer (‚company') level for almost three decades,[50] if this was the real purpose of the last thirty years of legislation at all.

To 'break out' from the company level, it would be essential to link certain possibilities for derogation from the law to a collective agreement at a higher level (e.g. sectoral, branch, subsector). However, it cannot be ignored when discussing this issue that the ‚challenges' for trade unions have historically been determined by the structure of the trade union movement, which is essentially organised at company level (see in particular the legal instrument of working time allowance),[51] the highly decentralised nature of collective bargaining, where it is inevitable that the vast majority of trade union revenues (typically made up of membership fees)[52] are also realised at company level (very exceptionally at sectoral or sub-sectoral level).

Another particular feature of post-socialist countries is the fact that the legal (statutory) regulation of trade unions is highly demonstrative in the legal policy perception of trade unions, their actual political power and influence. From this point of view, the fact that the specific labour law regulation of trade unions included in Act I of 2012 on the Labour Code (hereinafter: the LC) follows that of the works councils is a ‚message' in itself. The general regulation of the legal status of trade unions in the field of labour law has not changed substantially with the entry into force of the 2012 LC (although the trade union's powers have indeed been formally reduced);[53] one of the most important novae created is that from the trade union side, the issue of organisation has become more important, which has become a condition for the conclusion of a collective agreement (collective bargaining capacity). By contrast, in the various areas of national and sectoral reconciliation of interests, this aspect (generally the measurement of support by any means) has become increasingly imperceptible.[54]

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50 Se: Attila Kun: Hungary: Collective Bargaining in Labour Law Regimes. In: Liukkunen Ulla (szerk.): Collective Bargaining in Labour Law Regimes, Cham: Springer-Verlag, pp 333-356 Paper Chapter 12. (2019) (Ius Comparatum – Global Studies in Comparative Law 2214-6881 2214-689X ; 32)

51 See in detail in Part V of the "Shadow Report" prepared with the support of the Budapest Büro of the Friedrich Ebert Stiftung, in cooperation with the Department of Labour Law of the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University (Imre Szilárd Szabó – Zoltán Petrovics: Szakszervezeti jogok).

52 Hungarian Central Statistical Office, 9.1.1.12. Number and revenue of non-profit organisations by operational characteristics by type of organisation: https://www.ksh.hu/stadat_files/gsz/hu/gsz0014.html (downloaded: May 06 2024)

53 See in particular: objections, abolition of the right of control, reduced labour law protection, reduction of working time benefits, highly restrictive confidentiality rules.

54 Imre Szilárd Szabó: A szakszervezetek jogállása a magyar munkajogban. Novissima Kiadó, 2022. 161. o.

The fact that socialist collective agreements typically neglected wage issues (wage scales),[55] and wages were set centrally by the state, had long influenced the wage-setting mechanisms in post-socialist countries. While these countries had a long and burdensome history of centralised, administrative wage setting and control in the socialist era, current domestic collective bargaining practices reflect the opposite extreme:

– we typically have a decentralised (i.e. local, employer-level), unbalanced wage-setting structure and collective bargaining practices;
– unlike in most Western European EU countries, where sectoral collective agreements are at the heart of the so-called wage-scale systems.[56]

It also follows from the above that one of the most important issues of the harmonisation of the minimum wage directive[57] (should be) the reform of the system of medium-level (sectoral) collective agreements, as this is the most missing link in Hungarian industrial relations today.

2. SECTORAL COLLECTIVE AGREEMENTS

2.1. Criticism of the current legislation

The main statutory forums for sectoral social dialogue in Hungary are the Sectoral Dialogue Committees (ÁPB). The aim of their work is to 'establish' the mid-level (sectoral) collective agreements on a bipartite basis.[58] The Government is not directly involved in this dialogue, but supports these committees on the basis of the Budget Act.[59] One of their main missions when they were set up was to promote collective bargaining at sectoral level, but they have not achieved this objective, as no new sectoral collective agreement has been concluded since the creation of the ÁPBs in the mid-2000s, apart from the only sectoral collective agreement in the private security sector,[60] and in many sectors of the national economiy such a forum has not been established and/or is not operational. However, in the sectoral dialogue committee, those entitled to do so may conclude a collective agreement or other agreement under the ÁPB Act,[61] and can ask the Minister responsible for Social Dialogue to extend collective agreements to the sector.[62] Currently, according to data of the Ministry of National Economy, there are 17 ÁPBs registered (see Annex 1 of the study for details).

In the ÁPB, all stakeholders for interest reconciliation belonging to different sides of the ÁPB are entitled to conclude a collective agreement as a whole, failing this, the following cascade rules apply:[63]

– all interest representation stakeholders of the side with decision-making powers together; if this is not possible
– the whole of the representative stakeholders of the side, if this is not possible either,
– on each side, the representative sectoral interest reconciliation stakeholders which together account for two thirds of the total number of representative interest representation groups on the side.

In addition to detailed legislation, however, it can be seen that the lack of sectoral social dialogue in general, the low number of sectoral collective agreements and the limited number of employees covered by them remain the main

55 Istvánné Hágelmayer: A kollektív szerződés alapkérdései. Akadémiai Kiadó, Budapest, 1979.

56 See e. g. Torsten Müller – Stefan Clauwaert – Isabelle Schömann – Kurt Vandaele: More Of The Same: Wages And Collective Bargaining Still Under Pressure. In: Benchmarking working Europe 2015. ETUI. p. 48.

57 Directive 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union

58 Pursuant to the Act on the ÁPB (Article 5-9), the participation in the sectoral social dialogue is open to the employee representation (sectoral trade union) which
1. has a statutory representative body or official with at least ten employers in the sector concerned and the number of its members employed by these employers reaches one per cent of the number of employees in the sector, or
2. has with at least three employers a representative body or official in accordance with the statutes of the representative body, and the number of members of the representative body is at least 10% of the number of employees in the sector, or
3. has a body in the operating establishments of employers which is entitled to representation under its statutes or has an official, the reduced number of votes obtained by its candidates in the last works council elections within the preceding five years reaches five per cent of the number of employees in the sector at the time of the submission of the application to the Sectoral Participation Committee.

On the employer's side, the conditions are met by the employer's representative body
1. whose members, classified in the sector according to their main activity, employ at least five per cent of the employees in the sector, or
2. whose member organisations include at least forty employers classified in the sector according to their main activity.

59 In February 2001, the National Labour Council decided to launch a PHARE programme for the development of sectoral social dialogue entitled "Strengthening autonomous social dialogue", with the direct aim of setting up ÁPBs. It was also within the framework of this programme that the information system with an integrated master database, which had hitherto been a gap in the field of industrial relations, was established. Direct consultations between employers' organisations and trade unions at sectoral level had been scarcely present in the Hungarian social dialogue prior to the project.

60 Erzsébet Berki: Kollektív szerződések Magyarországon (2012-2023). In.: Tamás Gyulavári– Gábor Kártyás: A kollektív szerződéses lefedettség csökkenése Magyarországon (2012-2023). 14. o. Beáta Nacsa: Az Ágazati Párbeszéd Bizottságok működésének jogi – munkajogi elemzése. A középszintű érdekegyeztetés változásai Magyarországon a PHARE projekttől napjainkig, illetve az Ágazati Párbeszéd Bizottságok kapcsolatai a makroszintű érdekegyeztetés intézményeivel c. kutatás zárótanulmánya. Civil Európa Egyesület, 2010, 36. o.

61 Article 14 Act on ÁPBs.

62 Article 17 Act on ÁPBs.

63 Article 14-15 Act on ÁPBs.

shortcomings of social dialogue in Hungary.[64] The basic reason for this is that, modelled on the EU sectoral social dialogue structure, the ÁPBs were created virtually 'top-down', without any real antecedents, will/demand (and determination). However, there was a serious reason for setting up the ÁPBs in this way: it enabled the parties to engage meaningfully in EU sectoral social dialogue.[65]

After almost twenty years, it may have been necessary to identify and promote a few models (e.g. electricity industry) where there was a real demand from employers and trade unions, and then to replicate the system and the legal framework in other sectors.

Overall, today the system is over-complicated both in terms of regulation and the procedures behind it, and in many cases even the correct sectoral classification of employers is a problem,[66] but the verification of data (e.g. density) is not solved under the current rules, as it is mainly left to self-declaration, so that the Sectoral Participation Committee has no possibility to carry out substantive checks.[67] It would be more appropriate for the legislator to define the relevant sectors of the national economy quasi 'top-down' (even using the TEÁOR'08[68] classification used by the Central Statistical Office),[69] and only in these could an ÁPB operate; narrowing the scope for a sub-sectoral, class-sectoral system.

2.2. The regulating role of the sectoral collective agreement

Interest-based solutions could mean, first and foremost, a review of the hierarchy of sources and regulatory scope of labour law regulation. If we really want to create a sectoral level, it would be worthwhile to allow as many essential issues as possible to be regulated exclusively by sectoral collective agreements, or to allow only derogations from the law in favour of the employee in lower-level collective agreements[70]. This could include – as a first step – the possibility of 'extreme derogations from labour law', such as a working time frame of more than one year, or the imposition of extraordinary working hours exceeding 300 hours per year instead of a voluntary overtime agreement,[71] but also the scope of the provisions regulating the level of severance pay and the determination of sanctions commensurate with the severity of the adverse legal consequences. Such a change would certainly not in itself lead to more sectoral collective agreements, but at least it would reflect the interests of employers in this context.

2.3. Should the guaranteed minimum wage be enshrined in law?

Without real motivation, sectoral interest reconciliation remains a theoretical issue. In addition to the possibilities for derogations from labour law in relation to collective agreements, the central regulation of the lowest wages is a striking feature. The political (theoretical) reality of this is underlined by the agreement signed on 20 November 2023 by the members of the Standing Consultative Forum of the Private Sector and the Government (excluding the Hungarian Trade Union Confederation)[72] on the increase of the minimum wage and the guaranteed minimum wage, as well as on the recommendation for wage increases. Clause 4 of this agreement states that the Parties are committed to promoting collective bargaining and thereby substantially increasing collective bargaining coverage. To this end, it is considered necessary to amend the rules on the extension of sectoral collective agreements accordingly, which could form the basis for a future professional wage scale system in Hungary.[73]

A *guaranteed minimum wage* above the minimum wage is linked to a job related to secondary education, vocational training. The qualifications required for the job are

64 Apart from the electricity industry, only the catering industry has a sectoral collective agreement, but with very little real normative content. The electricity industry, on the other hand, is a genuinely vital model, with sectoral collective agreements regularly amended by the parties. See in detail: https://www.vd.hu/villamosenergia-ipari-agazati-kollektiv-szerzodesek_29939 (downloaded: April 4. 2024). Previously, the Construction Industry Collective Agreement was terminated on the employer side and then on the employee side, which led to its extension being withdrawn in 2023. (Hivatalos Értesítő 2023. 56.). The collective agreement for the bakery sector was terminated by the signatory parties and its extension was withdrawn in 2013.

65 Imre Szilárd Szabó: Az európai szociális párbeszéd hatása a magyarországi szakszervezetek működésére és az ágazati szociális párbeszédre. In: Péter Miskolczi Bodnár (ed.): Az Európai Unióhoz történő csatlakozásunkat követő hazai és európai jogfejlődés, Wolters Kluwer (2020). pp. 401-412.

66 On the basis of information from interest representatives in the manufacturing sector or in transport (e.g. rail transport).

67 Article 21 Act on ÁPBs.

68 https://www.ksh.hu/teaor_menu (downloaded May 2 2024)

69 Tamás Gyulavári and Gábor Kártyás refer to this in Part II of their "Shadow Report" (The right to collective bargaining): https://jak.ppke.hu/storage/tinymce/uploads/2--resz-Kollektiv-szerz--deskotesi-jog.docx?u=1c3k6w

70 Tamás Gyulavári and Gábor Kártyás refer to this in Part II of their "Shadow Report" (The right to collective bargaining) https://jak.ppke.hu/storage/tinymce/uploads/2--resz-Kollektiv-szerz--deskotesi-jog.docx?u=1c3k6w

71 Tamás Gyulavári – Gábor Kártyás: A kollektív szerződéses lefedettség növelésének potenciális munkajogi eszközei. In: Gyulavári Tamás – Kártyás Gábor – Berki Erzsébet: A kollektív szerződéses lefedettség csökkenése Magyarországon (2012-2023), Friedrich Ebert Stiftung, 2023. 34. o.

72 The specific proposals of the Hungarian Trade Union Confederation (MASZSZ) include (in addition to raising trade union rights to a level similar to the previous Labour Code, guaranteeing the right to strike and ensuring the right to collective bargaining for public sector workers) that, in order to make the employers party interested in sectoral agreements, they
– should have an advantage in public procurement;
– have an advantage in EU and other tenders;
– benefit from tax incentives and the government should only enter into strategic agreements with companies that agree to join the sectoral agreements
The other two trade union confederations (LIGA, Workers' Councils) also regularly formulate similar agendas and demands, but they have kept them separate from the 2023 negotiations.

73 https://munkastanacsok.hu/alairtak-a-minimalber-es-a-garantalt-berminimum-emeleserol-valamint-a-bernovekedesi-ajanlasrol-szolo-megallapodast/ (downloaded: April 15 2024)

laid down by law or, failing that, by collective agreement or, failing that, by the employer. The professional qualifications required to perform the activity must be specified by the sectoral Minister in a separate law. If the qualifications required to perform the job are not prescribed by law, the employer decides alone which qualifications, vocational training are required to fill the job. It is also worth noting that after almost 20 years, this legislation still raises a number of technical legal issues (in particular as regards what is considered to be secondary education and vocational training), which is not the most favourable solution in terms of legal certainty due to divergent interpretations of the law. The rules relating to the guaranteed minimum wage not only concern labour law, but are also important in the field of tax law, for example by laying down the rules for flat-rate taxation.[74]

According to the State Secretary for Employment Policy[75] the minimum wage affects around 230,000 people in the private and public sectors, and the guaranteed minimum wage affects around 730,000 people, i.e. the wage of almost 1 million people. The share of minimum wage earners is also significant in sectors that are either not low-paid or are strategic sectors prioritised by the government (rubber industry, mechanical engineering, vehicle manufacturing). However, retail and catering now employ a much smaller share of minimum wage workers, and employment at the guaranteed minimum wage has become the norm in these sectors.

In Hungary, there are roughly 4.4 million employees and 3.7 million in employment, according to the KSH.[76] One can ask the simple question, does this represent a healthy wage structure when such a wide range of people are directly affected by the lowest wages? Is it not rather the result of the trends that have been particularly pronounced in recent years, whereby the basic wages of huge masses of employees are ‚squeezed' to the guaranteed minimum wage, and a not insignificant proportion of employers 'explore' by how much the government regulation governing the minimum wage and the guaranteed minimum wage changes in terms uf sums, rather than considering the realities of the market in each sector. Economic research also points out, when looking at the impact of the lowest wages, that the regional data (Visegrád 4) show a very different picture than in Hungary. While in Hungary the development of the minimum wage had a significant and substantial impact on the development of the average wage, the analysis in the other countries of the region could not show a clear relationship. The reason for the difference is to a large extent due to the guaranteed minimum wage.[77]

Our proposal is to abolish the legal institution of the guaranteed minimum wage, because in addition to the statutory minimum wage, in many EU Member States there are also various sector-specific minimum wages based on collective agreements between trade unions and employers' associations, which would be a model for domestic legislation. The minimum wages set out in collective agreements may, under certain conditions, be extended by the state, i.e. they may become a binding norm by administrative act and thus apply to all employees in the industry concerned, regardless of whether their employer is covered by a collective agreement. Such a model would, in our view, both create a clearer ‚competitive market' and benefit employees, especially in today's labour market with severe labour shortages.

The overall aim of the proposal (in addition to the one set out in chapter 4 of this paper) is thus to reach a substantive agreement between the actors in sectoral industrial relations (trade unions and employers) on the guaranteed (professional) minimum wage applicable in the sector, which could be extended by the state to the sector as a whole. However, it is also important to note that in the public sector (the pay scales of public service employees, civil servants are particularly affected in this context), the ‚phasing out' of the guaranteed minimum wage would create specific problems (for example, it would have a negative impact on the social sector wage system), which would need to be addressed by separate legislation, avoiding a possible loss of earnings for the people concerned. A solution to this could be to set a specific proportion of the minimum wage (e.g. a multiplier of 1.3) for those items where the wage system is based on the guaranteed minimum wage.

3. DETERMINING THE ‚APPROPRIATE' MINIMUM WAGE

Article 5 of the 'Minimum Wage Directive' lays down serious obligations in relation to the procedure for setting the appropriate minimum wages laid down in the legisla-

74 See the assessment of contribution and social contribution tax for persons in self-employment as main professional activity on a flat-rate basis. Pursuant to Article 4, subsection 14.2 of Act CXXII of 2019 on persons entitled to social security benefits and on the coverage of these benefits, for the purposes of the provisions on the payment of contributions by insured self-employed persons and partnerships, the monthly amount of the guaranteed minimum wage applicable to full-time work on the first day of the month in question, if the main activity of the self-employed person or partnership requires at least secondary education or secondary vocational training.
The monthly amount of the guaranteed minimum wage valid for full-time work pursuant to Article 34 (11) of Act LII of 2018 on Social Contribution Tax, if the main activity of the self-employed person or the main activity of the partnership requires at least secondary education or secondary vocational qualification, or, failing this, the monthly amount of the statutory minimum wage valid on the first day of the month in question.

75 https://www.portfolio.hu/gazdasag/20221216/minimalber-2023-ban-megerkeztek-a-legfontosabb-tablazatok-585652 (downloaded: February 01 2024)

76 https://www.ksh.hu/stadat_files/mun/hu/mun0181.html (downloaded: April 02 2024)

77 According to calculations by Dániel Molnár and Gábor Regős, a 1 percentage point increase in the minimum wage raises the average wage growth rate in the private sector by 0.3 percentage points. See: Molnár-Regős: A minimálbér-emelés, mint gazdaságpolitikai eszköz. Polgári Szemle, 19. évf. 1–3. szám, 2023., 27. o.

tion. In this context, the legislator should stipulate[78] that a set of information (including data from the previous year) should be made available to the negotiators (and independent expert rapporteurs) 20 working days before the start of minimum wage negotiations.

This set of data would be supplemented by the economic forecasts for the coming year (such as inflation, including changes in food, fuel and energy prices, average wage growth, data for the national economy, including the private and public sectors, economic growth (GDP), employment and unemployment rates and nominal unit labour costs in the private sector).[79] The starting point of the minimum wage increase negotiation is the discussion of the report prepared by the experts and the presentation of a proposal for a minimum wage increase by the negotiating parties (separately by the trade unions and separately by the employers), which would not be unknown in European practice.[80]

In our view, the current constitutional law would not allow for a legal solution in 2024 that would give the social partners a 'veto right' to set the minimum wage.[81] This would require an amendment to the Constitution – which would provide the basis for this – which would certainly not lead to a more pronounced increase in minimum wages.[82]

4. REVIEW OF THE EXTENSION RULES

The rules on the extension of sectoral collective agreements should be amended in order to establish a sectoral minimum wage system. This should include simplifying the conditions for extension for employers' representatives, as it is currently impossible to conclude agreements that meet the criteria laid down by the legislation.[83] Currently, the condition for the extension is that the employers who are members of the employers' representative organisations that sign collective agreements must together employ a majority of the employees in the sector, which is not currently met by employers' self-organisations operating under the coalition regulation. Thus, in our view, the current 50% rate should be fixed at a maximum of 20-25%, which would be in line with the current level of employer representation (organisation). In sectors where no such agreement is reached, the Standing Consultative Forum of the Private Sector and the Government (VKF) could make a proposal to the Government, which could set sectoral guaranteed minimum wages. This is still possible under the Labour Code, in addition to the possibility of taking into account the specificities of the labour market in certain geographical areas,[84] which could also be a regulatory guideline for collective agreements (possibility of county/regional collective agreements).

In my view, the involvement of the Hungarian Chamber of Commerce and Industry in this process has become inevitable (given the mandatory membership of companies), as the coverage, resources and experience of the public economic body have become unquestionable, in contrast to the often 'insular' presence of employers' interest representations. The chamber should therefore be given the right to conclude collective agreements, with the parties' obligation to negotiate being laid down. In this context, I take the Austrian legislation as a model, where the relevant actors (subjects) are public bodies (Wirtschaftskammer Österreich) in industrial relations and collective agreements,[85] but Slovenia is also a vital example.[86]

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78 This could be done by government decree following the technical amendment of the Labour Code (Bill T/7953).

79 These aspects also form the basis of the VKF (Standing Consultation Forum of the Government and the Private Economy) workers' proposal.

80 In Germany, the national minimum wage was introduced in 2015. It is set by an independent Minimum Wage Commission (Mindestlohnkommission), composed of social partners and academics, which makes a recommendation to the government every two years on the rate of minimum wage increases, based on the rate of wage increases set in collective wage agreements, as required by the Minimum Wage Act. The Commission's recommendation addresses the level of the minimum wage that guarantees an adequate living standard for employees, does not jeopardise the international competitiveness of the German economy and does not entail employment risks (e.g. increased unemployment). https://www.mindestlohn-kommission.de/EN/Home/home_node.html (downloaded: May 06 2024)

81 Decision No 124/2008 (X. 14.) of the Constitutional Court (AB) found, inter alia, that Bill T/1306 on the National Interest Reconciliation Council (hereinafter: the OÉT tv.) was unconstitutional. The Constitutional Court – following a motion of the President of the Republic – examined first of all whether the OÉT and trade unions can be constitutionally granted the right to consent in the drafting of legislation.

82 The 'biggest' minimum wage increases have taken place when there was no right of agreement either in law (2002-2008) or in principle (2008-2010). The first Orbán government abolished the Interest Reconciliation Council in 1999, replacing it with a National Labour Council, with the intention of consulting only on labour issues. Looking at the positions of the employers' organisations, we believe that with the right of veto, neither the minimum wage increase of 2001 (from 25,500 HUF to 40,000 HUF) nor the increase of 2002 (to 50,000 HUF) would have taken place, but the same is true for the period following the change of government in 2010; let us consider the increase of 2017 (when the minimum wage jumped by 15% and the guaranteed minimum wage by 25% in one year) or the 20% increase of 2022.

83 Pursuant to Article 17 (2) of the ÁPBtv: *"The condition for the extension is that the employers who are members of the employers' representative bodies signing the collective agreement must together employ the majority of the employees in the sector, and that the trade unions concluding the extension must include at least one representative body which is considered representative in accordance with Article 12 (2) a). These provisions shall also apply if the collective agreement to be extended was not concluded in an ÁPB."*

84 Article 153 (3) LC.

85 Bundesministerium: https://www.bmaw.gv.at/Themen/Arbeitsrecht/Entlohnung-und-Entgelt/Kollektivvertraege.html (downloaded: May 01 2024)

86 Stanojević, Miroslav und Andreja Poje (2019): Chapter 26 – Slovenia: organised decentralisation in the private sector and centralisation in the public sector. In: Müller, Torsten, Kurt Vandaele und Jeremy Waddington (Hg.): Collective bargaining in Europe: towards an endgame. Volume III. Brüssel: ETUI, 545-562.

Closely linked to this issue is the question of democratic legitimacy from the part of the trade unions at national (macro) level,[87] for which the most favourable solution could be a kind of 'social election', which could be modelled on the previous regulation on the election of self-government of the social security.[88] This is also a demand that has been expressed from time to time by some in the trade union movement. Most recently (in 2011), two confederations (the Liga Szakszervezetek 'Democratic League of Independent Trade Unions' and the Munkástanácsok Országos Szövetsége 'National Confederation of Workers' Councils') proposed national trade union elections.[89]

PROPOSALS IN THIS CHAPTER IN BRIEF

In this chapter we made the following proposals:

- Providing interest-based labour law solutions for the dissemination of sectoral collective agreements. Setting out more areas where only the sectoral agreement can derogate from the law.
- ‚Restructuring' the system of ÁPBs and giving public economic bodies the right to conclude collective agreements.
- ‚Re-regulating' the legal instrument of ‚extension' by reducing the criteria for voluntary employers' organisations.
- Restructuring the legal instrument of the guaranteed minimum wage in labour law, while creating the possibility of a sectoral professional wage bargaining system.
- Examining the possibility of ‚social elections' in the field of the reconciliation of interests at national-level (as one of the tools of participation opportunity for the trade unions) ensuring democratic legitimacy.
- Developing the necessary economic background and data providing a methodology for setting an appropriate minimum wage.

87 On legitimacy issues, see: Tamás Prugberger: Az országos, az ágazati, valamint a területi érdekegyeztetésről de lege lata és de lega ferenda. Miskolci Jogi Szemle, 2010/2. sz. pp. 5-11.

88 https://static.valasztas.hu/nep97/jo/vf/vf020000.htm (downloaded: April 28 2024)

89 https://www.liganet.hu/6445-a-liga-elnoksegenek-2011-evi-beszamoloja.html (downloaded : April 02 2024)

PART IV

TRADE UNION RIGHTS

IMRE SZILÁRD SZABÓ[90] – ZOLTÁN PETROVICS[91]

1. INTRODUCTION

In comparison to the previous legislative framework, the LC has introduced several changes to the rights of trade unions at workplace level. The quality of the regulation of trade union rights and the scope of individual rights is of particular significance, as it can directly influence the bargaining position and bargaining power of trade unions.

The LC has resulted in the restriction or abolition of the following (former) trade union rights:[92]

- "The general obligation of state bodies, local authorities and employers to cooperate with trade unions, under which they were obliged to respond to trade union comments and proposals within 30 days, with detailed reasons, has been abolished.[93]
- In contrast to the previous rule, the labour law protection afforded to trade union officials is now limited both in terms of the number of persons concerned, the duration of the protection and the scope of the employer's measures.[94]
- Working time allowance is reduced.[95]
- Any working time allowance that is not utilised by the trade union will be forfeited, as it cannot be redeemed,[96] in contrast to the previous rule.[97]
- The legal institution of the trade union objection has been abolished.[98]
- In the written information to be given at the beginning of the employment relationship, the employer does not have to provide information about the name of the trade union withn the workplace.[99]
- The possibility for trade unions to seek redress through administrative procedures in the event of a breach of trade union rights has been abolished. Thus, before 2012, labour inspections also covered the protection of trade union officials, the working time allowance and the observance of the rules on trade union objections.[100]
- Also until 2012, the 'disorder of industrial relations', and thus the exclusion of the employer from public subsidies was implied in cases of the violation of the rules governing the organisation of the trade union, the implementation of the measure subject to a trade union objection or the application of judicial or administrative sanctions for failure to respect the labour law protection to which the trade union official was entitled.[101]
- Until April 15 2012, any breach of the requirement of good industrial relations was also deemed a misdemeanour, subject to a fine of up to 100,000 HUF.[102,103]

The changes to the provision governing collective labour law in the LC have been met with strong criticism from all

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92 See further Imre Szilárd Szabó: A kollektív szerződések szerepe a megújult munkajogi szabályozásban. Magyar Munkajog E-folyóirat, hllj.hu, 2015/1.

93 Article 21 (1) of the1992 LC.

94 Article 25 (1) of the 1992 LC, Article 273 of the 1992 LC. For a comparison of regulatory change, see: Gábor Kártyás: A szakszervezeti tisztségviselők munkajogi védelme és legújabb fejleményei. In: Zoltán Bankó – Gyula Berke – Erika Tálné Molnár (szerk.): Quid Juris? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára. Budapest, Pécs, PTE ÁJK, Curia, Munkaügyi Bírák Országos Egyesülete, 2018, 202–205.

95 Article 25 (2) of the 1992 LC, Article 274 (2) of the LC.

96 Aticle 274 (4) of the LC.

97 Article 25 (5) of the 1992 LC.

98 Article 23 of the 1992 LC.

99 Article 76 (7) h) of the 1992 LC, Article 46 LC.

100 Act LXXV of 1996 on Labour Inspection (Met.), Article 3 (1) (m-n).

101 Article15 (5) (b) of Act XXXIII of 1992 on Public Finances.

102 Article 95 of Government Decree 218/1999 (XII. 28.) on certain offences.

103 Tamás Gyulavári– Gábor Kártyás: A kollektív szerződéses lefedettség csökkenése Magyarországon (2012-2023). Friedrich-Ebert-Stiftung Budapesti Irodája, Budapest, 2023. szeptember https://library.fes.de/pdf-files/bueros/budapest/20640.pdf (May 9 2024) 31.

trade union confederations.[104] The primary concerns raised by trade unions pertain to the withdrawal[105] and curtailment of their former rights,[106] and ultimately marginalising their role.[107] It is important to note at the outset that the various aspects of trade union rights are closely interlinked (overlapping), so that the exercise of some rights has an impact on the practical implementation of others.

The current legislation in the field of collective labour law is characterised by a number of 'inconsistencies', which give rise to potential sources of legal disputes and conflicts of interest between the various subjects of collective labour law, such as: procedures for the verification of the number of trade union members; the inconsistency of the situation of a trade union which has the capacity to conclude a collective agreement in addition to the one in force; the loss of the capacity to conclude a collective agreement; the determination, calculation, justification and application problems of working time allowances; or the 'limits' created by the different labour law rules on public property.

The use of the terminology concerning trade unions in the LC is isolated in several parts ('official', 'higher trade union body'), its content in labour law is uncertain and unresolved, and at the same time it carries a different interpretation with regard to civil law. A comprehensive review of these issuesis even now possible and justified, not least to improve the coherence of the jurisprudence on this topic.

The specific rights enshrined in the LC provide an adequate legal basis for the operation of trade unions, and the reason for the overall 'crisis' of interest representation is not primarily to be found in labour legislation.[108] Furthermore, it is important to underline that, in our view, most of the specific trade union rights should be granted on a legal status- and sector-neutral basis in the public and private sectors, while differentiating the possibilities of collective bargaining. In our view, the current extreme differences (public sector – private sector) are difficult to justify, and in the case of the civil service, certain elements of the current legislation are also explicitly contrary to international labour law.

In our view, it would be inappropriate to restore the regulation of trade union rights as it was before, especially in view of the fact that it is closely linked to other areas of collective labour law (such as collective bargaining or the provisions governing the reconciliation of interests).

2. TRADE UNION VERSUS WORKS COUNCIL

The role of trade unions at workplace level seems to have been reduced by the transfer of certain rights to works councils. This is not a novel issue, as the 1992 LC had already divided the powers of representation of interests between the two institutions. The trade unions have been interested in being able to influence the functioning of the works council in some way and in having their officials be members of the works council.

According to the 1992 LC, the trade union was entitled to monitor the observance of the rules on working conditions, and in this context it could request information from the body responsible for the implementation of the rules on the employment relationship.[109] The LC in force includes among the tasks of the works council the monitoring of the observance of the rules governing the employment relationship.[110] In addition to the fact that the right of control was reduced to monitoring, the works council, which in principle implemented 'participation', was not granted any further specific rights in this area.

The employer must initiate negotiations with the works council in the event of a collective redundancy or a change of employer.[111] Notably, trade unions are not mentioned in this context in the LC, even if the employer does not have

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104 Examples of resolutions adopted by trade union confederations in the private sector in recent years:
The LIGA Trade Unions' position is: *"In the field of collective rights, the change is the systematic removal of guarantees for the enforcement of rights."* Excerpt from the trade union foreword to the study. In: Erzsébet Dabis – Gábor Feleky – János Lőrinczi – Balázs Rossu – Krisztina Ruzs Molnár: Elemző tanulmány – az új Munka Törvénykönyvének hatásvizsgálata. (Független Szakszervezetek Demokratikus Ligája, TÁMOP-2.5.3.C-13/1-2013-0001). 2015. 3.
See in detail: Az új Mt. története (2011): http://www.liganet.hu/page/88/art/6296/akt/0/html/az-uj-mt-tortenete.html (downloaded: December 26 2019).
The opinion of the National Federation of Workers' Councils on the draft Labour Code (2011): *"it substantially limits the rights of trade unions in the workplace"*. http://www.vpdsz.hu/2011pdffajl/pdf_08/Mt_MOSZ_velemeny_110804.pdf (Downloaded: December 26 2019)
As the Hungarian Trade Union Confederation (2018) puts it in its so-called "white paper": *"the trend emerging from the regulation is clear: the aim is to weaken the role of trade unions, thus limiting the protection of employees' interests to the minimum level required by international standards, and in some cases even below this level.…"* https://www.pvdsz.hu/uploads/Feher_konyv.pdf (downloaded: December 26 2019)

105 See the abolition of the so-called trade union 'right of objection', on which trade unions have indicated that its abolition should be accompanied by a provision at least in the judicial procedure to suspend the implementation of the employer's decision on the basis of a reasoned request by the trade union.

106 For example, reducing the amount of working time allowance, ending the employer's statutory redemption of 'stuck hours', limiting the number of protected officials, etc..

107 According to some trade unions, the very fact that the legislation on trade unions was placed at the end of the LC, following the works council legislation on employee participation, was itself symbolic.

108 More details on this: Imre Szilárd Szabó: A szakszervezet jogállása a magyar munkajogban (2022), Novissima.

109 Article 22 (3) 1992 LC.

110 Article 262 (1) LC.

111 In the event of a transfer of undertaking (in today's terminology in Hungarian law, a change in the employer), the legal predecessor (transferor) and successor employer (transferee) was obliged to inform the trade union represented at the employer, or in the absence of a trade union, the works council, or in the absence of a works council, the committee formed by representatives of non-organised employees [Article 85/B (1) of the 1992 LC]. If the employer planned to implement collective redundancies, in the absence of a works council, he/she was obliged to consult the trade unions represented at the employer and the committee of workers' representatives [94/B (1) of the 1992 LC].

a works council.[112] In such cases, it should be specified that in the absence of a works council, the employer is obliged to negotiate with the trade union at the employer.

The works council's extensive rights of opinion and consultation often extend to issues that could in principle be the subject of collective bargaining, creating a 'mix' of representative and participatory rights. For example, the works council's right to express an opinion on work schedule, the principles governing pay, work-life-balance, some elements of which could even be included in the collective agreement.[113] As a real alternative to collective bargaining, a normative works agreement between the employer and the works council – with the exception of issues relating to remuneration for work – creates the possibility in principle for the works council, which is typically without tools (e.g. obliged to act impartially in strikes) [114], to carry out functions belonging to the trade union, thus weakening the position of the trade unions. In light of the aforementioned considerations, it would be necessary to separate the functions of the two institutions, to eliminate the 'competition'[115] and to 'profile' the powers that can be linked to them. In this context, we refer first and foremost to the possibility of concluding a works agreement with normative effect, which, in line with the recommendations set forthin Part II, should in our view be removed from the LC.

3. LABOUR LAW PROTECTION OF TRADE UNION OFFICIALS

So-called labour law protection has been significantly reduced in the LC in force, both in terms of the number of protected trade union officials and the scope and duration of protection. Previously, there was no limit on the number of trade union officials protected, but in the current LC the number of protected persons depends on the number of employees at the establishment considered as autonomous.[116]

In our view, the current system needs to be corrected because it was based on the premise that the previous rules allowed for too broad a scope of protection. Some trade union officials who are engaged in substantive representational activities and who are therefore effectively protected remain largely unprotected under the provisions of the LC.[117] Since the amount of tasks related to interest representation and therefore the need for labour law protection depends more on the number of union members than on the number of employees, it would be reasonable to base the protection on a new basis depending on the number of union members.[118] In our view, it is justified that all trade unions at an employer, regardless of the number of members, should have a protected trade union official. Furthermore, the number of protected trade union officials could be adapted to the number of trade union members, even if a certain number of trade union members (e.g. 50-100) would be covered by the protection of labour law by an additional trade union official. However, to determine the number of members, it would be necessary to introduce a new mechanism for verifying the number of members, as explained in subchapter 5.

4. THE TRADE UNION'S RIGHT OF REPRESENTATION

Under the LC in force, trade unions have the right to represent employees before the employer or its representative organisation in relation to their financial, social, living and working conditions. Furthermore, the trade union is entitled to represent its members, by proxy, before courts, public authorities and other bodies for the purpose of defending their economic and social interests.[119]

With regard to the right of trade unions to representation, we propose the regulation of the enforcement of claims in the public interest. We consider it appropriate to allow trade unions to bring public interest actions or administrative (employment monitoring) proceedings against employers in the event of a breach of certain provisions of the employment relationship rules or where there is an imminent threat of such a breach, provided that a large group of employees is affected, but the exact group of employees concerned cannot be determined.

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112 Article 72 (1), 265 (2) LC.

113 Article 264 (2), j), k) and n).

114 Article 266 LC.

115 Imre Szilárd Szabó: A szakszervezetek jogállása a magyar jogban. Doktori (PhD) értekezés. Pécsi Tudományegyetem Állam- és Jogtudományi Kar. Budapest-Pécs, 2022. 160–161.

116 The trade union is entitled under Article 236 (2) of the Labour Code to designate, if the average statistical number of employees on the first day of the calendar year, calculated for the preceding calendar year, does not exceed a) five hundred, one person, b) more than 500 but not more than 1 000, two persons, c) more than 1 000 but not more than 2 000, three persons, d) more than 2 000 but not more than 4 000, four persons, e) more than 4 000, five persons. In addition to the official so designated, one official designated by the statutory supreme body of the trade union represented at the employer shall be protected [Article 273 (3) to (4) of the LC].

117 Imre Szilárd Szabó: A szakszervezetek jogállása a magyar jogban. Doktori (PhD) értekezés. Pécsi Tudományegyetem Állam- és Jogtudományi Kar. Budapest-Pécs, 2022. 145.

118 Gábor Kártyás: A szakszervezeti tisztségviselők munkajogi védelme és legújabb fejleményei. In: Bankó Zoltán – Berke Gyula – Tálné Molnár Erika (szerk.): Quid Juris? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára. Pécs–Budapest, Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Curia, Munkaügyi Bírák Országos Egyesülete, 2018, 207.

119 Article 272 (6)-(7) of the LC. These provisions are essentially not different from those of the 1992 Labour Code, which gave trade unions the right to inform employees of their rights and obligations concerning their material, social and cultural rights and their living and working conditions, and to represent their members vis-à-vis the employer and before public bodies in matters concerning industrial relations and the employment relationship. The trade union was also entitled, on the basis of a power of attorney, to represent its members before the courts, other authorities and other bodies in matters concerning their living and working conditions [Article 19 (2)–(3) of the 1992 LC].

Possible examples include breaches of the rules on working hours, daily or weekly rest periods, the granting of leave, the rules governing the processing of employees' personal data, the amount of pay, the payment of certain wage supplements or the protection of wages. The enforcement of public interest is not an alien concept within the field of labour law. One needs only to recall the relevant provisions of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (Ebktv.) which allows, inter alia, interest representation organisations to bring labour lawsuits.[120]

5. WORKING TIME ALLOWANCE AND SUPPORT FOR TRADE UNIONS

The most sensitive area of current labour law is the regulation of so-called working time allowances, which currently provide the basis for the employment and livelihood of hundreds of trade union officials. As confirmed by a case decision of the Curia[121], the utilisation of working time allowances (in terms of eligibility and extent) is determined by the trade union, given that the officials are entitled to them as 'part' of the trade union.

A significant rethink of the 'support' of trade unions in labour law, particularly in regard to the working time allowance, would be essential. A rethinking of the working time allowance, and thus of the status of so-called ‚full- time' officials, would be inevitable in a reformed system. Such a system could even work by allowing the wage costs of union-employed officials and experts to be financed from a public (employment) ‚fund', which would be provided by the employer, the employees and additional public contributions, with an appropriate methodology. This would entail that the ‚full-time' trade union official could now be employed by the trade union in a way that is legally and dogmatically indisputable, while simultaneously alleviating the membership (which is not in a position to sustainably finance human costs) of a considerable portion of the financial burden.

As a safeguard rule, it could also be stipulated that, in the event of termination of this scheme for any reason (e.g. change of function of the official, such as recall, resignation, expiry of mandate), the employer would be obliged to re-employ and/or reinstate the employee with objective labour law protection for a limited period. We would also consider that this option should be available to unions only after a certain level of density has been reached, which would greatly facilitate the merger of trade unions, based primarily on common sense.

The development of a system of financial support based on objective criteria for trade unions could also be considered. Currently, state support represents a small proportion of the financial resources available to trade unions; amounting to less than 10% of total income.[122] It is our contention that interest representation is not solely a private concern, but also the common interest of society. Just as political parties receive support from the central budget, so trade unions can justify a capitation on similar principles. There is also the idea that, as with NGOs and churches, 1% of the personal income tax could be offered to trade unions, so that taxpayers could have 3 x 1% instead of 2 x 1%.[123]

We believe that the financial support based on objective criteria should primarily be a matter for macro- and mid-level stakeholders in the interest reconciliation, but that the specific proposal for this should be developed by the stakeholders themselves. A methodology (alternative) could be:

1. based on the number of members,
2. reflecting the number of employees covered by a collective agreement concluded by the affiliated unions,
3. or an equal split between the parties.

Nevertheless, this also raises the issue of the development of rules on the verification of trade union membership. To this end, it would be desirable to establish a transparent, up-to-date and publicly accessible register of membership, which would be maintained by the court and would also ensure that the data of the individuals concerned are adequately protected. In the event that data is required for the purpose of determining the level of financial support based on objective criteria or for the exercise of certain trade union rights, anyone with a legitimate interest in knowing the number of members would be entitled to request data from the register, after having verified this, in a way that would not allow identification of any individual.

This would also allow for a new basis for the data reporting requirements necessary for the establishment of the Sectoral Dialogue Committees. Given that, in the context of verifying the number of members of a trade union represented at an employer, the number of employees who are members of the trade union at the employer is of particular importance, but only the employer concerned is able to provide information on the existence of the employment relationship. Consequently, the employer would be obliged to provide the court keeping the register with a list of employees when such a request is made. The court would then issue a certificate confirming the exact number of members for the employer on the basis of a

120 Article 20 Ebktv.

121 BH 2014. 345.

122 In 2022, the total income of trade unions amounted to HUF 15 055.5 million, of which the state subsidy amounted to HUF 1 072.3 million. Source: https://www.ksh.hu/stadat_files/gsz/hu/gsz0014.html (downloaded: May 11 2024)

123 With the amendment of Act CXXVI of 1996.

comparison of the available register of members and the list of employees provided by the employer.

6. ROLE OF THE EMPLOYMENT SUPERVISORY AUTHORITY

We consider relevant the problem that, if the (specific) rights of trade unions under the LC are violated, there is currently no other substantive remedy for the violation of rights than through the courts. In the event of a breach of these rights, the trade union may initiate a labour dispute,[124] but the court can at most only establish the fact of the infringement; the law does not provide for any sanction ('lex imperfecta', i.e. a rule without consequences).

This is a problem that neither the current nor the previous labour inspection legislation[125] addresses in substance, i.e. the authority does not have competence to deal with such cases. Although the text of the previous Act on Labour Supervision (Met.) stated that it was designed to discourage "employment and work non-compliant with the law" and to protect the rights of employees and that of their representative bodies, this was driven by the fact that that the authority still had specific powers in this area in 1996.[126] Thus, the labour inspections covered the employer's obligations in relation to the rules ensuring the organisation of a trade union for the protection of the employees' economic and social interests, the monitoring of the rules on labour law protection and the working time allowance of employees holding elected trade union posts, of members of the works council, public service employees' council and the health and safety representatives, as well as the enforcement of the employer's obligations in relation to the measures challenged by the trade union.[127]

We would therefore consider it appropriate to expand the scope of inspections in a careful and well thought-out way. The appropriate direction could be to revert to the competence of labour (employment supervision) inspections to examine whether certain employee representation rights contained in the LC (which can also be proven by official means) are being properly enforced, and to link the violation to sanctions (classically the imposition of a labour fine). Such cases could be:

- the trade union's right to information, the right of 'propaganda';
- the right to 'use the premises', the right of 'access';
- certain powers to ensure the functioning of the works council,
- infringement of the rights to information and consultation.

PROPOSALS IN THIS CHAPTER IN BRIEF

Our proposals set out above can be summarised as follows:

- There is a justification for a comprehensive review of the terminology used in the LC in relation to trade unions (e.g. 'official', 'higher trade union body').
- There is a need to ensure that trade union powers are status- and sector-neutral, while differentiating between the possibilities for collective bargaining in the public and private sectors.
- The functional separation of works councils and trade unions and the ‚profile-cleaning' of their powers (thus the abolition of the possibility of a normative works agreement could be justified).
- The protection of trade union officials in terms of labour law should be made dependent on the number of trade union members.
- Trade unions should be able to pursue claims in public interest.
- The rules on working time allowances should be reshaped and it should be possible to finance trade union officials and experts from public funds.
- The elaboration of a system of capitation (financial support based on objective criteria) for trade unions based on the number of members would be justified.
- Rules should be drawn up on the regulation of the certification of the members of trade unions, for which purpose we propose that a transparent, up-to-date, publicly authentic register be set up, to be maintained by the courts.
- Labour inspections (employment inspectorates) should again be responsible for checking if employees' rights of representation are being properly enforced, and sanctions (e.g. labour fines) should be imposed in the event of any infringement.

124 Article 285 (1).

125 Met.

126 The legislator abolished this power in 2012.

127 Article 3 (1), h), i), j) of Met.

PART V

THE RIGHT TO STRIKE

ERZSÉBET BERKI

1. TERMINOLOGY

As we have seen in the previous sections, collective bargaining in Hungary is characterised by low frequency, weak regulatory power and the dominance of the employer level. Similar can be said about strikes. Below we present the main problems that arise in relation to the regulation of strikes, which need to be addressed in order to ensure that strike regulation does not hinder collective bargaining but facilitates collective agreements.

In view of the generous treatment of definitions in the legislation, some definitions should be introduced.

In general, collective bargaining is defined as negotiations between the parties entitled to conclude a collective agreement.

According to the ILO's guiding definition[128] collective bargaining takes place between an employer, a group of employers or one or more employers' organisations and one or more workers' organisations for:

a. determining working conditions and terms of employment; and/or

b. regulating the relations between employers and employees; and/or

c. regulating relations between employers or their organisations and one or more workers' organisations.

In Article 5 of the ILO Convention 154 we see the following:

"1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:

(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention…".

In the present case, the concept of collective bargaining is interpreted broadly – in contrast to previous chapters – for several reasons. Thus, we also deal with those negotiations which, in terms of their content, fall within the above definition, but the negotiating parties may be not only employees' and employers' organisations, but also a group of employees on the one hand, and the employer or a public body, including the government, which exercises control over the employer's activities, on the other. However, it is clear that a negotiation between parties that are not entitled to conclude a collective agreement (trade unions and employers or employers' representative bodies) cannot result in a collective agreement. The outcome of such negotiations here is called an agreement. This agreement is not supported or protected by law in any respect, cannot be enforced in court and there is no way of enforcing its implementation – and often no way of monitoring it – by peaceful means.

However, since, in addition to the law, negotiations for such agreements in principle play an important role in regulating working conditions in the public service, and since the centralisation of economic organisations entails the increasingly frequent intervention of the supervising bodies into negotiations on the side of the employers[129],

128 Convention 154 on the promotion of collective bargaining Article 2. https://2010-2014.kormany.hu/download/a/1a/01000/154E.pdf (downloaded March 12 2024)

129 Imre Szilárd Szabó draws attention to this point: Még elégséges szolgáltatás a gyakorlatban – az elmúlt tizenhárom év "legnagyobb" személyszállítási sztrájkjának tanulságai. 2023, Munkajog, 2023/2., 65-70. and Imre Szilárd Szabó: A "bértárgyalások" és a hozzájuk kapcsolódó munkajogi és munkaügyi kapcsolati kihívások a köztulajdonban álló vállalatok által működtetett közszolgáltatások területén. Pro Futuro 2021/2. 148-161.

we also consider negotiations aimed at establishing such agreements to be part of collective bargaining.

Similarly, negotiations in which the interests of the employees are not represented by a trade union (permanent coalition), but by a delegation of employees or a group of employees elected on an ad hoc basis (occasional coalition) are also considered collective bargaining.[130] We must do this all the more so because, according to Act VII of 1989 (hereinafter: Sztv.), the right to strike is vested in all workers, regardless of whether they are trade union members.

This raises the question of the definition of 'workers', which the Constitutional Court did not find objectionable.[131] According to the grounds of the judgement, this term covers all persons working in an employment relationship and the right to strike is available to all such persons. However, as forms of employment become more differentiated, questions are increasingly being raised as to whether this is the case. There has long existed a category of workers who work under a civil law contract, not an employment relationship, which allows them to stop working but without the right to strike and thus without protection, and who are simply considered to be in breach of contract, with all the sanctions entailed.

Since there is no definition of strike in the law, we consider the definition of "organised, temporary, collective industrial action to promote or protect the economic and social interests of workers" to be valid in the present case.[132] One special case is a warning strike, which takes place during the mandatory 7-day negotiating period and lasts no longer than 2 hours. Another special case is the solidarity strike, which is an expression of solidarity with and support for another group of employees and in which the strikers do not formulate their own demands.[133]

Strikes are a tool used in collective (interest) disputes in collective negotiations, which – to put it somewhat succinctly – employees need because the employer (or other opposing party) is in a position of power over them. Unfortunately, labour law does not give us any guidance as to what collective dispute is. The current LC makes reference to the actors, but says nothing about the subject of the dispute.[134] Thus, a collective dispute can be a legal dispute, in which a strike cannot be used, but we only know this from the Sztv. However, collective disputes may also arise in negotiations not with the employer but with any other power which may influence the interests of the 'workers', such as the employer's representative body, the responsible authority or the government, or the employer may not necessarily negotiate with the trade union or the works council, but may also be in dispute with the occasional representatives of the employees.[135]

The three sections of the LC (Articles 291-293) do not contain binding provisions, except for arbitration, so the parties can decide whether or not to apply them to the dispute. In addition, however, collective disputes have very serious consequences, so we should know exactly when we can talk about collective disputes, which is not possible in the absence of a proper definition.

In our view, it would be more appropriate to use the term collective dispute of interest in the law, and with regard to the reference to the content, we can return to the solution used in the 1992 LC: it is a dispute that does not constitute a legal dispute. However, we consider it necessary to include in the definition of the collective interest dispute its open, declared nature: the date of declaration can serve as a starting point for calculating the time limits in the Sztv. or for using any other dispute resolution procedure with partial time limits.

2. STRIKES AND COLLECTIVE AGREEMENTS: PRACTICAL IMPLICATIONS

The law links the institution of the strike and collective bargaining on two points, one of which is the link indicated above, namely that the strike may be used in collective disputes, i.e. not in legal disputes. This connection is expressed in the Sztv. by a prohibition:

"Section 3 (1) Strikes shall be unlawful:...c) against an individual act or omission of an employer, whose amendment can only be a decision which falls within the jurisdiction of a court..."

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130 The problem was raised in the 1990s by Dr. Ferenc Tóth, who also presented and analysed it in his textbooks on labour relations education. See for example: Tóth Ferenc: Munkaügyi kapcsolatok. Zsigmond Király Főiskola 2002. Manuscript. 155.

131 See the resolution 30/2012. (VI. 27.) of the Constitutional Court: http://public.mkab.hu/dev/dontesek.nsf/0/EE89762D28B66C-83C1257ADA00525618?OpenDocument. downloaded on March 12. 2024.

132 For more information see Erzsébet Berki: Sztrájk! Sztrájkok és más direkt akciók Magyarországon a rendszerváltás után. OFA, Budapest, 2000. 31-34.

133 Article 2 (3) and 1 (4) of the Sztv.

134 Article 291 (1) of the LC. The employer and the works council or the trade union may set up a conciliation committee (hereinafter referred to as "the committee") to settle disputes between them. The works agreement or collective agreement may also provide for the establishment of a standing committee.

135 The Supreme Court (Curia) has already ruled in a case that the right to strike cannot be interpreted only in the relationship between employer and employee. "The (economic and social) rights and obligations relating to the employment relationship of employees may be exercised not only by the employer, but also by a person or body outside the employer, whose action in this case constitutes an employer's action." (II. 10.900/2009/3 Mfk.). This, and other decisions, are in line with the view expressed in György Kiss: Labour Law I, 1996, that the existence of an employment relationship between the parties to a dispute is not a precondition for a collective dispute. See pages 422-423.

However, the distinction between a legal dispute and a collective dispute is not always clear, collective disputes often lead to a legal dispute, and sometimes legal disputes are treated as collective disputes, but as this is rarely recognised by the partners, it is not common for them to go to court. The conceptual clarification suggested in the introduction may help to avoid such cases as far as possible.

It is more complicated when the government is involved in the debate. As we saw earlier, the definition of employer includes all stakeholders with power to shape working conditions, including, where appropriate, the government. However, the legal capacity of the government is limited, it appears in collective bargaining explicitely in the role of employer, but the law always treats it as part of the state, as an entity with the function of governance, and therefore it is not liable in court for its actions in its role as employer. In practice, this is achieved by the court's refusal to hear an employment claim in which the government could be the defendant. The question arises as to whether a lawful strike can be held in these cases under the above-mentioned prohibition.

This is connected to another link between collective bargaining and the institution of the strike: also under Article 3, it is unlawful to strike "d) to change an agreement in a collective agreement during the period of validity of the collective agreement.".

This is the so-called peace obligation rule (prohibition to strike), which is based on the simple idea that if a contract has been negotiated by peaceful means, it should also be changed by negotiated means if the parties consider that it is no longer suitable for them. Collective agreements are concluded to ensure that work is carried out peacefully and that actions such as strikes do not cause economic damage to the parties. The only objection to this prohibition is that it should not be in the Act but in collective agreements. However, experience over the last thirty-two years has shown that there have been no practical problems with having this rule in the law.

However, this prohibition does not apply in cases where something is not laid down in a collective agreement but in an agreement. Thus, a lawful strike can be held to change agreements with the government, the supervising body or the municipality, since these are not formal collective agreements. It is clear, however, that the applicability of the strike to both a dispute and a collective interest dispute with the government contradicts the requirement that the court should decide in a legal dispute and that the enforcement of an agreement should be subject to judicial review, and that if it is to be changed, it should be done at the negotiating table.

In order to eliminate the confusion described here, it would be necessary to allow collective bargaining in those sectors where there is currently a so-called interest reconciliation (or not, but in principle it could be possible), which could be concluded by collective agreement. This would obviously increase collective bargaining coverage and remove ambiguities in the application of strikes. This would require employers in community services to be controlled by the state or local government, but not to take away employer functions, and to have employer representative bodies capable of collective bargaining at sectoral level. It is probably not enough to give employers' organisations collective bargaining and contracting rights, but also to give them a strong public incentive and to reverse the concentration of power. If this is not enough, solutions can be found in EU countries that can be adapted, for example by setting up agencies, negotiating centres, etc.[136]

3. PROBLEMS WITH THE CURRENT STRIKE LAW

3.1. Who can and who cannot strike?

3.1.1. LAW ENFORCEMENT AGENCIES AND ARMED BODIES

Striking is a fundamental right that employees have. To this statement, however, experts are quick to add that it is not an unlimited fundamental right.[137] This means two things, on the one hand you can prohibit it, on the other hand you can restrict it.

In Hungary, strikes are prohibited for armed bodies, law enforcement agencies, national security services and tax inspectors at the National Tax and Customs Administration (NAV). With the exception of the NAV, the prohibition applies to everyone in these bodies, regardless of their legal status. The laws governing the status of professional staff repeat these prohibitions, with restrictions on other fundamental rights, but also, in principle, provide compensation in return for the prohibitions. However, they do not recognise the institution of collective disputes, with the consequence that they do not provide for dispute settlement procedures to help the parties reach an agreement, as a substitute for the right to strike. The situation for civilian employees is even worse, as the legislation under which they work does not provide for compensation in exchange for the loss of the right to strike.

The project on the right to strike of the parliamentary Ombudsman for citizens' rights (2008-2010)[138] addressed this issue, and the Ombudsman submitted a petition to

136 See Casale, G.; Tenkorang, J. Public service labour relations: A comparative overview Geneva, International Labour Office, 2008 DIALOGUE Paper No. 17; Danielle Bossaert Michael Kaeding: Social Dialogue in the Public Sectors of the EU Member States: An Analysis of Different Models at the Level of the Central Public Administration Maastricht, November 2009.

137 See Flóra Orosz: A sztrájk mint alapjog, a sztrájkszabályozás jogrendszerben való elhelyezkedése. In Szilágyi, J.E., Hrecska-Kovács, R. (szerk.) A sztrájkjog összehasonlító jogi elemzése egyes európai államokban, 44–73. Budapest: Mádl Ferenc Összehasonlító Jogi Intézet.2021.; Kajtár Edit: Magyar Sztrájkjog a nemzetközi és az európai szabályozás fényében. PhD értekezés, Pécs, 2011.

138 Sztrájkjogi projekt ÁJOB Projektfüzetek 2010/4. OBH Budapest, 130 p.

the Constitutional Court to remedy the legal anomalies identified in the investigation. The Ombudsman did not agree that there was a total ban on strikes for law enforcement officers.[139] In his opinion, according to the Constitution, "professional members of law enforcement bodies must in principle be guaranteed the exercise of the same fundamental constitutional rights as anyone else: in their case, restrictions on specific fundamental rights may be imposed only if, in the context of their duties, the restriction is indispensable for the functioning of the law enforcement body in a democratic society."

The Constitutional Court ruled[140] that a total ban was appropriate and did not take into account the fact, as the Ombudsman had also pointed out, that "transitions and stages can and should be established between a total ban on the right to strike for law enforcement officers and the free exercise of the right to strike." Given that the institutional system known as ‚reconciliation of interests' also operates in this area, so that there may be negotiations on agreements or collective disputes, it would be necessary to introduce compulsory dispute settlement procedures if the ban on strikes is maintained.

3.1.2. AGREEMENT ON THE EXERCISE OF THE RIGHT TO STRIKE BY CIVIL SERVANTS

The document called Agreement on the Exercise of the Right to Strike by Civil Servants[141], which was adopted in 1994 and is based on the sentence of the law that "Article 3 (2)... The right to strike may be exercised in public administration bodies under specific rules laid down in an agreement between the Government and the trade unions concerned...", is a serious restriction of the right to strike.We gave a critique of the content and form of the agreement in our 2007 study on the collective rights of civil servants and their enforcement.[142] The substance of our critical comments is summarised below.[143]

The legal nature of this Agreement, and therefore the applicability of the rights and obligations arising from it, is unknown. The Agreement settles a subject that is normally covered by collective agreements, but only the trade unions are entitled to sign collective agreements. In addition, the Civil Service Act has never provided for collective bargaining for civil servants. If it is a negotiated agreement between the parties, i.e. not a collective agreement, it has no legal binding force and the courts do not have to apply it. If it is a civil law contract, it lacks certain formal requirements, such as the indication of a forum for redress, but it is also a question of whether the government can conclude such a contract. It can also be argued with certainty that the Agreement is not a law.

The personal scope of the agreement is unclear, partly because of the use of the term 'public administration body' and partly because of the different legal relationships in the civil service. The title of the Agreement refers to the exercise of the right to strike by civil servants, which would imply that the Agreement does not apply to, for example, government officials, but the text does include their employer within its own scope. This at least makes the interpretation of the scope of the Agreement uncertain.

According to the Agreement, in the public administration, only the union that has signed the Agreement can call a strike. This imposes a double restriction, on the one hand excluding from the right to strike a group of civil servants as an occasional coalition, and on the other hand excluding those unions that have not signed the Agreement. (This restriction cannot be defended on the basis of Article 31 of the European Social Charter,[144] and civil servants who are not organised or belong to another trade union cannot be excluded from the right to strike by an agreement concluded without them.) Nor is it a solution to leave the possibility of joining the interest representation open, especially since civil servants cannot do so personally.

The condition that more than half of the civil servants must agree to initiate a strike is partly contrary to Article 6 (4) of the Charter[145], and it is also illogical that non-union civil servants (also) decide what the union should do. The provision requiring two-stage consultation before a strike in this context is in principle correct, but the extension of the cooling-off period to 9 days is also a restriction that should be regulated by law.

A solidarity strike can only be initiated in the event of another civil servants' strike, according to the Agreement.

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139 See Sztrájkjogi projekt 75-76.

140 Resolution of the Constitutional Court 30/2012. (VI. 27.), see: http://public.mkab.hu/dev/dontesek.nsf/0/EE89762D28B66C83C1257A-DA00525618?OpenDocument.

141 In addition to the signatories of the agreement, the national associations of local municipalities have also joined.

142 Erzsébet Berki – Gábor Fodor T.– Beáta Nacsa – László Neumann: Kollektív jogok és érvényesülésük közszolgálatban. Összehasonlító elemzés a köztisztviselői, a szolgálati és a hivatásos katonai jogviszonyra vonatkozóan. Zárótanulmány a Nemzeti ILO Tanács részére, http://www.nilo.hu/main.php?folderID=21028&articleID=40545&ctag=articlelist&iid=1

143 The following can be found in my book: Erzsébet Berki: Sztrájk 2.0 A munkaharc eszközeinek alkalmazása Magyarországon. Dura Kiadó, Budapest, 2016. I analyse the issue further in my essay A sentence on strikes. In: Ünnepi tanulmányok Lőrincz György 70. születésnapja tiszteletére. Hvgorac Budapest 2019. 53-65.

144 "Article 31 Restrictions 1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals." Act C of 1999 on proclaiming the European Social Charter, https://net.jogtar.hu/jogszabaly?docid=99900100.tv (downloaded April 10. 2024).

145 "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertakethe right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." Act C of 1999 proclaiming the European Social Charter. https://net.jogtar.hu/jogszabaly?docid=99900100.tv downloaded April 10. 2024.

This fundamentally infringes the right of employees to express their opinion on a strike organised anywhere else and indirectly calls into question the idea of solidarity.

The solution whereby only the signatories to the Agreement, namely the signatory trade unions and the government, can appeal to the courts about the legality of the strike is a violation of the right to legal redress. On the other hand, it contradicts the provision in the Sztv., which broadens the scope of those who can go to court (for example, the government could go to court in the case of a strike in a municipal office). It seems unreasonable that, in the event of legal proceedings, civil servants are required to fulfil their duties until the court has ruled.

These problems were also identified by the Ombudsman for fundamental rights when he appealed to the Constitutional Court, asking for the correction of certain sections of the Sztv., including the annulment of the sentence that leaves the exercise of the right to strike in the public administration to an agreement.[146]

In its Decision 30/2012 (June 27 2012)[147], the Constitutional Court rejected the Ombudsman's motion. Note that the Constitutional Court adopted the decision with a parallel reasoning (joined by three judges) and two dissenting opinions (the first of which was joined by two judges).

Overall, the legal nature of the agreement is no more than the title says, i.e. it is not a law, it is not a collective agreement, it is not a civil contract. It is therefore unfounded to claim that it can create or deprive rights of third parties and the judicial practice of treating the agreement in the same way as legislation is unfounded.[148] In terms of its content, the Agreement imposes a severe and unjustified restriction on the rights of a sufficiently large number of employees to require the deletion of the above-quoted sentence of the law and the termination of the Agreement. There is no doubt that the functioning of the public administration is important for the life of society, if any restriction of the right to strike in this area is necessary, the rules for this can be negotiated by the parties concerned and must be incorporated into the law.

This agreement based 'solution' has also appeared in the health sector, with the creation of the so-called health service relationship. Previously, in the health sector, health workers had the same rights as other ‚workers' to strike, in addition to the obligation to provide a minimum service level. In contrast, according to Article 15 (11) of Act C of 2020 on the Health Service Relationship, "... the right to strike may be exercised in a state-run health service provider under specific rules agreed between the Government and the trade unions concerned." However, no such agreement exists, and the above rule should be deleted from the law before it causes more serious problems.[149]

3.2. The minimum service level[150]

Unlike previous changes of a technical nature, the 2010 amendment to the Sztv. introduced significant changes. With this amendment, the possibility of establishing by law or by the courts of the minimum service level was introduced, and the list of cases of unlawful strikes was changed. According to the amendment (Article 3 (1)), a strike is unlawful even if the provision of a minimum service level is hindered and the duty to cooperate is breached, and even if the content of such minimum service is unknown: there is no law, no agreement and no court decision which would set its level.[151]

According to Article 4(2) of the Sztv., the minimum service level applies to an employer who carries out an activity which substantially affects the public, in particular public transport and telecommunications, and of bodies providing electricity, water, gas and other energy services. In such organisations a strike may be exercised only in such a way as not to prevent the provision of minimum services which are still adequate.

3.2.1. DIFFICULT SITUATION FOR THE COURT AND THE STRIKERS

There is no rule on what activities should be covered by the minimum service level. As a consequence, it is not only for the court to determine whether the service provided is still a minimum service, but also whether it is necessary in a given case. The consequence of this is that the role of the court is shifted from jurisdiction to that of a legislator,

146 On 12 October 2009, the Ombudsman referred the matter to the Constitutional Court in motion AJB-4620/2009, upholding his motion in motion AJB-1874/2012 AB (February 2012). The addition was made at the request of the Constitutional Court, because both the Sztv. and the Constitution have been amended in the meantime (while the Parliamentary Ombudsman for Citizens' Rights has become the Ombudsman for Fundamental Rights) see: http://public.mkab.hu/dev/dontesek.nsf/0/ee89762d28b66c83c1257a-da00525618/$FILE/ATTJKF3X.pdf/2012_355.pdf.

147 The quotes in this chapter are from the Constitutional Court decision. See the resolution: http://public.mkab.hu/dev/dontesek.nsf/0/EE89762D28B66C83C1257ADA00525618?OpenDocument.

148 Consequently, the Constitutional Court has no jurisdiction over the Agreement. I note that there is not and has never been an agreement between the government and the social partners that has been treated by the Court as a binding rule; on the contrary, the difference between an agreement and a contract is precisely that the agreement is not legally protected.

149 See further: Erzsébet Berki: Sztrájkok és beavatkozások. Munkajog 2022. IV. 40-49.

150 See further: Erzsébet Berki: Sztrájk 2.0. quoted work 158-172.

151 Prior to the 2010 amendment of the law, the generally recognised and applied decision on this matter was contained in BH1991. 255, according to which "The legality or illegality of a strike shall be assessed solely on the basis of Article 3 of the Sztv. The mere fact that an employer who carries out an activity which substantially affects the population is prevented from providing a minimum service cannot in itself serve as a basis for finding a strike unlawful."

in violation of the principle of separation of powers, to which the Curia (Supreme Court) has not reacted. [152]

According to the current legal text, there are three ways to determine whether the service can be considered as minimum service. It can be regulated by law (see below), failing which it must be agreed, and if no agreement is reached, it can be determined by the court.

The Opinion 1/2013 (IV. 8.) of the Administrative-Labour Department of the Curia "On certain issues related to the exercise of the right to strike" states: "The law primarily provides for agreement – it follows that the parties cannot treat the reconciliation for this purpose as formal, but act in accordance with the purpose of the law if they reconciliate in a meaningful and serious way with a professionally supported offer." In reality, however, it is in the employer's vital interest to make an offer that cannot be accepted and that would then lead to the matter being brought before the courts and the proceedings preventing a strike indefinitely, i.e. such agreements can only be reached in special circumstances, by way of exception.[153]

The application of the new rules of the 2010 amendment to the Sztv. was assisted by the Curia's decision No. EBH2013. M.10. II. "In the absence of a statutory provision and agreement of the parties, the extent and conditions of the minimum service level may be decided by the court by examining the offers made by the parties and by issuing a decision on the acceptance of the final offer made by one of the parties." On the question of the minimum service, the Curia has thus accepted the established case law[154]: the proceedings must be conducted by a specific type of arbitration, the final offer method, but in compliance with the requirements of the Civil Procedure Code, which can only be applied together with great difficulty. As a consequence, several strike initiatives have failed since 2010.

However, the labour court is obviously not an expert on the technical issues involved in determining what is a minimum service, and therefore cannot be expected to determine the scope and extent of the activities that fall within the scope of such minimum service. It is therefore understandable that the court procedure forces the parties to come up with a ready offer, the court only has to choose between the offer and the counter-offer. This is not so easy either, since a good choice is only possible by understanding the technical issues that the submissions contain.

In the first instance, the court has 5 days to determine the level of the minimum service, which the opposing party is unlikely to accept, and has 15 days to appeal. The time frame for the second instance is also 5 days, 25 days in total, if for procedural reasons the courts do not interrupt their own 5-5 days. In fact, the date of the decision is unpredictable, which makes the requirement that the date of the strike should be fixed before going to court rather bizarre, especially as the court routinely instructs the parties that the application must be definite, which includes the fixing of the date of the strike. However, these deadlines frustrate warning strikes, which are characterised by the fact that they can be held for up to 2 hours during the 7-day negotiations before the strike.

3.2.2. THE QUESTION OF THE EXTENT

The use of the final offer method makes it impossible to make a decision in principle when determining the extent of the minimun service level, as this will be decided by the offer made by one of the parties. Such principles can be established on the basis of the ILO Conventions and the case law of the Social Charter, and are also partly enshrined in the law itself. On this basis, it can be said that a strike must not endanger life, health, physical safety or the environment or hinder the prevention of a natural disaster, must not cause a serious national crisis or be prejudicial to public order or public morals.[155] If these require-

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152 In December 2012, the joint strike committee of the teachers' unions filed a petition with the Budapest Labour Court, stating that "the Petitioner and the Respondent, in the absence of a common position necessary for an agreement, agreed to submit to the court's decision on the following two issues pursuant to Article 4 (3) of the Sztv.: whether Article 4 (2) of the Sztv. applies in the field of public education, i.e. whether the parties are obliged to agree on the provision of minimum services. In the event of an affirmative answer to the above question, each Party shall submit its request as to the manner and extent of the minimum service." This request was rejected by the Budapest Labour Court in its decision No. 45.Mpk.50.113/2012/3, stating, inter alia, in its reasoning that the request was for a general legal position, which the court had no jurisdiction to take. "The court cannot decide whether, and if so, to what extent, it is necessary to provide minimum services in the case of a work stoppage affecting public education until it has been announced by the applicants." In another case, the court ruled that there was minimum service level in the event of a public education strike (Decision 45.Mpk.50.113/2012/3, page 3, 17 December 2012) and that there was not yet sufficient service in creches (Order of the Budapest-Capital Regional Court No 6 Mpf. 690141/2015/2) and in freight transport (Labour Court No 37.Mpk.50.039/2015/5.).

153 The Ombudsman also expressed doubts in this respect in his inquiry report (OBH 5649/2007): "In my view, however, due caution should be exercised in introducing a sanction to this provision which would prohibit employees from going on strike in the absence of agreement between the parties, as in this case it would become in the employer's interest to prevent the parties from reaching an agreement." We know of several cases in which the agreement was reached because the organisers of the strike accepted the employer's offer without objection, since they wanted to hold the strike anyway.

154 On the procedure see: Balázs Asbóth A még elégséges szolgáltatás mértékének meghatározására irányuló nem peres eljárás. Az új bírósági nem peres eljárás bevezetésének indokai és működése a Fővárosi Bíróság gyakorlatában. www. jogiforum.hu. 2011. Downloaded November 16. Mária Kulisity: A sztrájk jogszerűségének megállapításával összefüggő bírósági gyakorlat. Pécsi Munkajogi Közlemények 2009/2..; Viola Ajtay-Horváth: Quo vadis sztrájkjog? Gondolatok a még elégséges szolgáltatásról. ELTE 2012. OTDK dolgozat. Manuscript.

155 These aspects are well weighed in the order of the Budapest-Capital Labour Court 36.Mpk.50.096/2011/7, which ruled on the minimum service level required in rail passenger transport on the initiative of the Train Drivers' Union (June 27 2011), despite the fact that the order was overturned by the court of appeal.

ments are met, the service provided during the strike is a minimum service.

Obviously, no decision in principle was taken even when the legislator laid down the legal rules for the provision of the minimum service. There are currently three such rules in force:

- Act XLI of 2012 on Passenger Transport Services;
- Act CLIX of 2012 on Postal Services; and
- Government Decree No. 36/2022 (II. 11.) on certain emergency regulations, which was transposed by Part 11 of Act V of 2022 on regulatory issues related to the end of an emergency, which defines the minimun service level in public education.

All three pieces of legislation impose an excessive level of service in the event of a strike, regardless of what the strike might otherwise threaten if it goes ahead, thereby significantly reducing its leverage.[156] However, none of the laws regulate the extent of the related activities involved in providing a minimum service. For example, in passenger rail transport, there may be questions about whether passengers who still have minimum service should be sold tickets or whether all cashiers should be allowed to strike. Questions such as these will surely be answered in practice – possibly with the help of the courts, with consequences for those who organise the strike.

3.2.3. WHO CAN NEGOTIATE ON BEHALF OF THE EMPLOYER?

Whatever the level of the minimum service, any failure to meet it will lead to an unlawful strike. However, this can also be the fault of the employer, and the provision of minimum service is a shared responsibility with the strikers. "Sanction, however, is only imposed on the organisers/strikers of the strike. In such cases, the strike organiser has no choice but to pursue his or her case through ordinary legal proceedings, in which the court may find that the employer has failed to comply with the duty of cooperation. However, this does not "rehabilitate" the strike, i.e. it does not make it retroactively legal (which would not be possible either), i.e. the organisers/strikers have to suffer the consequences of the unlawfulness (e.g. the workers are dismissed). If the strike was unlawful through the fault of the employer, it remains unlawful, and in the case of an unlawful strike, the appropriate rules of both labour law and civil liability may apply."[157]

In the context of the nationwide teachers' strikes, the question aroses as to who should/may be negotiated with regarding the minimum service level, whether the responsible body (The Ministry of Human Resources) has the right to conclude an agreement on the minimum service level?[158] In the case of the teachers' strikes, the Ministry, as the government-appointed negotiator, reached an agreement, in each case acting during the negotiations as if it could agree not only on the merits of the demands but also on the minimum service level.

At the time of the 1995 national teachers' strike, this question was raised in principle and the answer was that the government could not agree instead of the employers[159], but that the strikers should agree with the employers, because the strike was at the employer and the employer should provide the minimum services. As a consequence, the government and the teachers' union have issued a joint recommendation on the minimum service level to facilitate local negotiations.

The fact that the court has granted – and presumably will grant in all similar cases – an application naming the government as a respondent is presumably due to the fact that the court is technically unable to deal with a situation involving several (many) employers. If, on the other hand, employers are left out of the procedure, it is questionable what legal relevance the court's decision has for employers who are separate legal entities and who are not even notified of the decision – unless they are notified by the local strike committee. In the meantime, the employer and the strike organisers in principle share the responsibility for providing the minimum service, but the consequences of not providing the minimum service fall exclusively on the strikers.

3.2.4. PROPOSAL TO REGULATE THE MINIMUM SERVICE LEVEL

The above problems with the minimum service were caused by the 2010 amendment to the law, including the involvement of the court and the extension of the cases of unlawfulness. Consequently, if the court is left out of the procedure and the lack of the minimum service does not have the consequence of unlawfulness, i.e. the pre-2010 rules are restored in this respect, these problems will be solved. However, it does not solve the problem, which many have previously complained about, that strikes can make socio-economic life unpredictable and thus cause disproportionate damage.

There are many arguments for regulating the minimum service level, but we should admit, there are complex work processes and technologies that would inevitably lead to

156 Digest of the case law of the European Comitee of Social Rights, Council of Europe, 2008. Article 6. 4. Mária Kulisity: Az ILO állásfoglalásai a sztrájkról. In Háziné Varga Mária (ed.) Érdekképviselet felsőfokon, Raabe Kiadó, Budapest, 2007.. Ajtay-Horváth quoted work.

157 Erzsébet Berki: Sztrájk 2.0. quoted work 167.

158 See Erzsébet Berki: Kérdések a sztrájkról. http://szakszervezetek.hu/dokumentumok/akciok/4156-kerdesek-a-sztrajkrol és http://kiut.eu/cikkek/berki_kerdesek_a_sztrajkrol

159 At the time, the main argument was that the agreement on the minimum service level was a special type of collective agreement and that the government could not conclude a collective agreement or bind employers until it was in the form of a government regulation, but there was no time or, presumably, intention to issue one.

further problems, and possibly very serious damage, if they were to be regulated by law for all workplaces. However, legislation should define the services for which there is a need for the minimum service. Nonetheless, any attempt to rigidly regulate the content of the service cannot be supported, because the level of the minimum service is not constant and depends on place and time. It is no coincidence that, in the present circumstances, the court insists on the fixed nature of the strike, i.e. that its lawfullness is only established when it is known when the strike is planned.

As a consequence, we propose to determine the minimum service (in addition to the agreement) by open arbitration – the final offer method – instead of the judicial route, with the special feature that the procedure can be unilaterally initiated. The possibility of unilateral initiation would, on the one hand, prevent the employer from obstructing the strike by not joining the initiative. On the other hand, it would avoid a compulsory arbitration, which would require a very fine-tuned procedure. Strikers are free to decide whether they prefer to negotiate and reach an agreement, or to go to the arbitrator. This would also solve the problem that a legal warning strike cannot be held at this stage. Once the offer is received, the arbitrator could obtain the counter-offer or use an expert in the field to make a professional assessment of the offers. In our view, 2 x 7 days should be sufficient for the procedure, which should not be subject to appeal.

At the same time, the list of cases of unlawful strikes should be revised. A minimum service which is not given due to the employer's fault cannot be a basis for a strike to be unlawful, but it can be a basis for the employer to be liable to the strikers. The detailed rules will, of course, require considerable professional work, which cannot be done here.

3.3. Sanctions and the disadvantage resulting from a lawful strike

In the event of an unlawful strike, the organisers of the strike or the participants may suffer disadvantages, some of which may be of a labour law nature and others of a civil law nature. There have been several cases where the organisers of strikes that have been declared illegal have been dismissed, sometimes even the participants have suffered such disadvantages, but there have also been cases where the labour court has declared such dismissals illegal on the grounds that they were disproportionate sanctions. So employers should use this tool with caution, and we cannot say that this would be a mass employer reaction. At the same time, recourse to the courts is becoming more common, as a first-instance injunction of illegality is usually enough to break a strike. On the contrary, we are not aware of any cases where the employer has claimed damages, either because this option is not generally known by the public or because the sacrifices would be too great for the employer as well.

One of the teachers' strikes also raised a further issue, which has come up repeatedly in connection with the 2024 strike at the Opera House. According to Article 6 of the Sztv.:

"(1) The initiation of a strike or participation in a lawful strike shall not constitute a breach of the obligations arising from the employment relationship, and no adverse action may be taken against the employee on this ground. ...

(4) Social security rights and obligations in connection with the employment relationship shall be governed by the social security legislation, with the proviso that the period of lawful strike shall be counted as service time."

In comparison, the Act 80 of 1997 on the persons entitled to social security benefits and private pensions and on the coverage of these services, Article 8 (c), suspends the insurance:

"c) during the period of exemption from the obligation to perform work (service), unless during the period of exemption from work an average wage or salary (remuneration) or sick pay is paid under the rules of the employment relationship."

Consequently, the insurance is suspended if the striking worker does not receive remuneration for the day in question, i.e. the worker who is legally on strike suffers a disadvantage that is prohibited by Article 6 of the Sztv. To remedy this, it would be sufficient to insert a sentence stating that insurance is not suspended in the event of participation in a strike, even if the worker has not received any remuneration.

Strikers are therefore threatened by the law with a range of sanctions – and in practice they have to endure a range of informal disadvantages. In contrast, the employer, who has two points of stated responsibility under the law, is not subject to any sanctions. The first is the aforementioned duty to provide a minimum service, which cannot be fulfilled without the employer, and the breach of the duty to cooperate. It would be worth reflecting on how this imbalance could be remedied. In our view, this could be a case for the imposition of a compensation for damage or for punitive damages, which could also be applied to such ‚popular' behaviour among employers as the use of scabs.

3.4. Legal status of the strike agreement

The 1992 Labour Code included the clause that a strike agreement – i.e. an agreement to settle a collective dispute – is a collective bargaining agreement.[160] This text is no longer included in the 2012 LC, and the agreement is

160 Article 198 (1) The agreement reached in the course of conciliation (Article 194-195) or the decision of the arbitrator (Article 196-197) shall be deemed to be a collective agreement.

not provided for in the Sztv. As a result, the parties can decide for themselves how to deal with the agreement that ends the dispute, but there is no legal protection for the agreement. A further problem may be whether the peace obligation applies if the agreement does not have the force of a collective agreement, and whether or not it is possible to subsequently organise a lawful strike on issues that the agreement appears to have (or have not) settled. This question may arise if, for example, there are several trade unions at the employer or a group of employees is not satisfied with the agreement.

Given that a lawful strike can only be organised on issues that are not covered by a collective agreement, the agreement resulting from the collective dispute could be considered a collective agreement without further risk, i.e. the 'lost' sentence should be reinstated in the law. This would ensure legal (judicial) protection of enforcement on the one hand, and stabilise industrial peace on the other.

4. THE MORE FREE STRIKE – THE MORE COLLECTIVE AGREEMENTS?

Yes. It is perhaps not difficult to accept that an adequate strike regulation can be seen as a means of promoting collective negotiations and agreements.

Humans are driven by their beliefs. If they expect to make progress in collective bargaining and to achieve results they will take the necessary steps. The situation today is characterised by the difficulty of organising strikes, especially in workplaces where the minimum service level is still a requirement, and the risk of illegality is high. The decision whether to unite around a demand and what strategy to follow to achieve it must be taken against this high level of risk. And we must consider not only whether the demands can be achieved by those who are thinking of organising a strike, but also what else they might lose if they fail – their authority, the trust of their environment, their role in their own micro-environment, and the idea of community and solidarity can be hurt as well. In addition, the court proceedings often required to determine whether a service provided is a minimun service are expensive in the ordinary sense of the word, since it is not possible to go through the procedure without a lawyer.

Simplifying the legal conditions and making it easier to organise a strike would reduce the risk of the decision, while also making it cheaper to strike and the lost wages could be easier considered as an investment in the future. If employees and their trade unions could have confidence that they could use the instrument of strike action in collective bargaining without any particular risk, they would have more confidence in collective bargaining itself.

PROPOSALS IN THIS CHAPTER IN BRIEF

In the chapter on the right to strike, we made the following proposals:

- Use of precise definitions in the legislation (worker, strike, warning strike, collective interest dispute).
- Creating the legal possibility for genuine collective bargaining in the public service sectors, rather than the use of agreements.
- Extension of the right to strike to law enforcement and defence staff.
- Compensating for the prohibition of strikes for those in the law-enforcement and defence services through a compulsory dispute settlement procedure.
- Termination of the 1994 agreement on the exercise of the right to strike by civil servants, deletion of the relevant sentence from the Sztv.
- Deletion of the sentence referring to a similar agreement from the Health Service Relationship Act.
- Enshrining a list of services subject to the minimum service level in the legislation.
- Determining the minimum service level by arbitration instead of court proceedings.
- Sanctioning the employer for breach of his/her obligations to provide a minimum service and of his/her duty to cooperate by means of a compensation for damages to punitive damages.
- To exclude from the cases of an unlawful strike the case where the minimum service level is not provided through the employer's fault.
- Exclude the case from the suspension of social security coverage when the employee does not receive remuneration because of a strike.
- Recognition of a strike agreement as a collective agreement.

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SHADOW REPORT ON THE REGULATION OF COLLECTIVE AGREEMENTS IN HUNGARY

The Shadow Report on the Hungarian regulation of collective bargaining was prepared by labour law researchers to make proposals for an action plan to increase collective bargaining coverage, as required by the Directive (EU) 2022/2041 on the adequate minimum wages. Although the practical role of collective agreements is not only influenced by the labour law context, this analysis only examines labour law factors.

In Hungary, the number of collective agreements has been steadily decreasing, and today only about 18% of employees are covered by collective agreements. A further problem is that collective bargaining exists only at workplace level, some multi-employer or sectoral agreements are an exception. In addition, experience shows that the content of agreements is rather poor, with only half of the collective agreements covering wages.

Our proposals aim to reform the legislation on a number of issues to increase the number of collective agreements. For example, the right of trade unions to conclude collective agreements in the private sector should be made more flexible; the parties should be given a stake in concluding sectoral and national agreements; the legal rights of trade unions should be reviewed and unnecessary obstacles to the right to strike should be removed.

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