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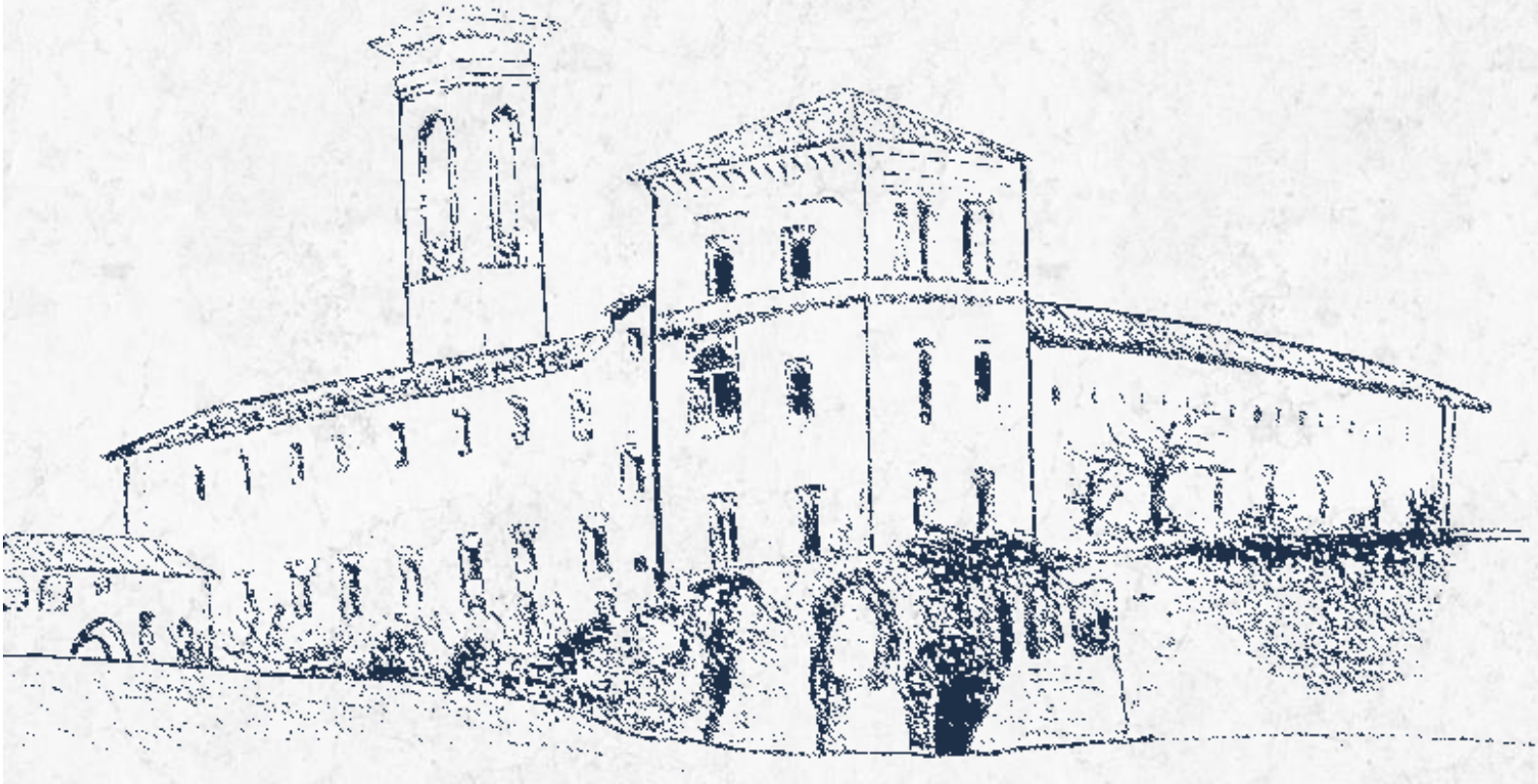

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Can the Employer Determine the Trade Union Organisation? A Recent Lesson from the Czech Republic's Semi-Promotion of Collective Bargaining

Martin Štefko *

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

Keywords: *Trade Unions, Collective Bargaining, and Representativeness.*

1. Introduction

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The Charter of Fundamental Rights and Freedoms of the Czech Republic prohibits both limiting the number of trade unions[1] and favouring particular unions within an enterprise or sector. Following the experience of the Revolutionary Trade Union Movement[2] in socialist Czechoslovakia, the legislator enshrined freedom of trade union association as a fundamental value in the Charter. The principle of basic equality among trade unions formed the basis for the Constitutional Court of the Czech Republic to reject the majority principle as a guiding criterion in 2008, when it repealed the relevant provision in the then-new Czech Labour Code[3], which had continued to recognise a trade union organisation based on majority representation. However, as the past 30 years in the Czech Republic have shown, the de facto – and even legal – equality of trade unions remains a chimaera. If the actual number of employees affiliated with Czech trade unions is neither officially tracked nor verifiable, and if unions themselves informally estimate this figure at around 12% of all employees, can this still be considered a sufficient majority to influence government or corporate social policy?

Given this issue, the International Labour Organization (ILO), from its inception, prioritised the representativeness of workers' representatives over equality among them. From the outset, its non-governmental delegates have not been selected by all workers' representatives – nor even by all trade union organisations operating within member states – but solely by the most representative ones. Similarly, tripartite dialogue – the formalised interaction between the government, trade union organisations, and the largest employers' associations – is, according to the ILO, to be conducted not by all trade union organisations, but only by those deemed the most representative[4]. As the ILO Committee of Experts has stated, representativeness does not limit the freedom of association; rather, it enhances it, provided that predetermined and objective criteria are used to establish representativeness[5].

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[1] This is set out in Article 27(2) of the Charter. For the sake of brevity, the term *trade union*, as understood in Czech law, will be used consistently as a collective term encompassing basic trade union organisations, regional trade union organisations, trade union federations, and federations or confederations of trade unions.

[2] It was the only permitted trade union.

[3] Act No. 262/2006 Coll. Labour Code.

[4] Article 1 of ILO Convention No. 144.

[5] Cf. ILO, Freedom of Association Committee of the Governing Body of the ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition 2018, International Labour Office, par. 515 and 1351.

Thus, while there has been a general international move away from the principle of equality among all trade unions – and a corresponding denial of the right of all employees to choose their representative – the Czech legislator has taken a different approach. In contrast, it has introduced a system whereby the representativeness of a trade union is determined by the employer's decision, which is only marginally subject to correction through the will of the majority of the employer's workforce. Such a regulatory approach favours the employer, whose decision cannot be overridden by the majority of unionised employees, but only by the will of all employees – including those who are not, and do not wish to be, union members.

The aim of this article is not to analyse how the amended[6] Section 24(3) et seq. of the Labour Code can be implemented in practice, but rather to assess whether the chosen concept of representativeness remains consistent with the international obligations of the Czech Republic and, if so, whether it fulfils the meaning and purpose of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages. Specifically, the article asks whether, in light of recent European developments, the Czech model has the potential to promote and expand collective bargaining. It must be recalled that the amendment was introduced to implement an EU directive that obliges Member States to actively support and encourage collective bargaining. To this end, the article will first examine the Czech Republic's international and EU commitments, followed by an analysis of national trends in determining representative trade union organisations. Finally, the new Czech regulation will be evaluated in the context of these findings.

2. Representativeness in International and EU Terms

The concept of representativeness of a trade union may be inherently restrictive, as it enables the exclusion of certain trade union organisations from collective bargaining and/or the denial of other—or even all—collective rights based on selected criteria for determining a lack of representativeness. This exclusion may be effected either by the State, typically through legislation, or by the employer through its own measures, whereby it ceases to engage with a particular trade union. International legal protections in this area are primarily designed to guard

[6] The amendment was implemented through by Act 230/2024 Coll. (In Czech: Zákon č. 230/2024 Sb. kterým se mění zákon č. 262/2006 Sb., zákoník práce, ve znění pozdějších předpisů, a některé další zákony).

against the excesses of totalitarian regimes, drawing inspiration from historical experience.
In the international legal framework, several instruments are relevant to the issue of representativeness. These include conventions of the International Labour Organization (ILO), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), and the European Social Charter.
According to Article 8 of the ICESCR, the establishment and activities of trade unions may not be subject to any restrictions other than those prescribed by law and deemed necessary in a democratic society, in the interests of national security, public order, or the protection of the rights and freedoms of others. Furthermore, the Covenant explicitly refers to ILO conventions, stating that its provisions shall not prejudice the content of those conventions.

2.1. The International Labour Organization (ILO)

The ILO Constitution stipulates that non-governmental delegates are appointed by the trade unions "which are most representative of employers or workpeople, as the case may be, in their respective countries"[7]. Representativeness is to be determined on the basis of predefined and objective criteria, established in consultation with the most representative organisations of employers and workers. Trade unions must provide their representatives with adequate supporting documentation.
However, a more detailed regulation of trade union representativeness is conspicuously absent from the International Labour Organization (ILO) conventions. Article 3 of ILO Convention No. 87 and Article 2 of ILO Convention No. 98 leave considerable room for national regulation in this area. Under these conventions, a workers' representative need not be a trade union per se, but may also be another body either elected or delegated by the trade union, or an entirely different body freely elected by the employees (or the employer, in specific contexts) without the participation or involvement of a trade union.
The interpretation of Convention No. 87 by the ILO is primarily derived from a body of decisions by the Committee of Experts, compiled in the

[7] Article 3 (5) of the ILO Constitution.

Digesta[8]. These conclusions affirm that the adoption of statutory provisions governing trade union operations[9] does not, in itself, violate the internationally recognised autonomy of trade unions to formulate their own statutes and rules of procedure – provided that such regulation is general in nature.

Issues arise only where the registry court's decision on registering a trade union's rights and obligations exceeds the discretionary scope legally afforded to that judicial authority[10]. In particular, detailed regulation of a trade union's internal functioning is viewed as problematic unless it is limited to formal or minimal requirements. The regulation of the relationship between trade unions and their basic organisations should remain exceptional, applicable only in unusual circumstances[11]. Even in such cases, trade unions must retain all available means of defence to safeguard their autonomy from undue interference[12].

2.2. The European Convention

Among the relevant international treaties, particular mention should be made of the European Convention on Human Rights, where the freedom of association—enshrined in Article 11—has progressively been interpreted to include the freedom of coalition. The European Court of Human Rights (ECtHR) has held that the freedom to form and join trade unions is protected under Article 11, and this includes the right not to be compelled to join a trade union[13].

Importantly, the right of trade unions to engage in collective bargaining has also been recognised as part of the freedom of association[14]. This includes protection against state interference, such as the exclusion of municipal employees from the right to bargain collectively.

However, in cases involving a conflict between ecclesiastical autonomy and trade union rights, the ECtHR has sometimes prioritised the protection of religious institutions. In one notable judgment, the Court

[8] Cf. ILO. Digesta, *Part Six "Right of organisations to draw up their constitutions and rules" in Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition*.

[9] Cf. Digest conclusion 370.

[10] Cf. Digest conclusion 373.

[11] Cf. Digest conclusion 386.

[12] Cf. Digest Conclusion 386.

[13] Cf. Sørensen and Rasmussen v. Denmark, *Grand Chamber's judgment, Applications nos. 52562/99 and 52620/99*, par. 58, ECHR 2006-I.

[14] Cf. Demir and Baykara v. Turkey, *Grand Chamber's judgment, Application no. 34503/97*.

found no violation of Article 11 in the decision of the Romanian courts to refuse registration of a trade union established by 35 members—including clergy—of the Roman Catholic Church. The refusal was justified on the grounds that the formation of such a union posed a threat to the internal hierarchical structure of the Church, and the Court held that this concern fell within the scope of legitimate protection of ecclesiastical autonomy[15].

2.3. The European Social Charter

The European Social Charter (ESCh) supports the right to collective bargaining under Article 6. According to this provision, States undertake to ensure the effective exercise of the right to collective bargaining by promoting, where necessary and appropriate, mechanisms for voluntary negotiation between employers or employers' organisations and workers' organisations, with the aim of determining terms and conditions of employment through collective agreements.

Article 6(2) has traditionally been interpreted by the European Committee of Social Rights (ECSR) as placing a positive obligation on States to encourage collective bargaining by trade unions, rather than to hinder or restrict it. The underlying rationale, once again, is the economically weaker position of employees and trade unions in relation to employers.

However, this right does not imply that all trade unions are automatically entitled to participate in collective bargaining or to conclude collective agreements. Access to the bargaining process may be subject to a representativeness criterion. That said, any such limitation must not be excessive or disproportionate. The European Court of Human Rights (ECtHR) has rejected the principle of parity—i.e., the mandatory inclusion of all trade unions in negotiations—as a requirement under Article 11 of the European Convention on Human Rights[16].

When both the French[17] and Spanish legislatures allowed entities other than trade unions to negotiate collective agreements, the ECSR interpreted Article 6(2) of the ESCh to mean that such an arrangement is only permissible in exceptional circumstances. Specifically, this would apply where trade unions are either unwilling or factually unable to recruit members, despite State efforts to support their existence. Even in such

[15] Cf. Sindicatul "Păstorul cel Bun" v. Romania, *application no. 2330/09, Grand Chamber's judgment*.

[16] Matica Hrvatskih Sindikata v. Croatia, *application no. 116/2015, pars. 59 and 80*.

[17] Articles L. 2232-21 to L. 2232-29-2 of the French Labour Code. The amendment was made by Act No. 2018-217 of 29 March 2018.

cases, procedural safeguards must ensure that the resulting collective agreement reflects the genuine will of the employees concerned[18].

2.4. Union Law

Regarding EU law, the key provision is contained in Article 28 of the EU Charter of Fundamental Rights, which guarantees the right to collective bargaining and the right to take collective action. These rights are granted to trade unions, but also extend to other representative bodies, including "practitioners and employers or their respective organisations". According to the Court of Justice of the European Union (CJEU), while social partners are not public law entities, they may be able to implement EU acts through collective agreements. However, such agreements must pursue legitimate objectives. In the event of a conflict with the prohibition of discrimination, the measures adopted must be necessary and proportionate to achieve the intended objective[19].

The CJEU has interpreted that both collective agreements and collective actions, such as strikes, fall within the scope of EU law[20]. However, it further held that although these are fundamental rights, they are subject to limitations imposed by EU law[21].

Primary EU law provides for the involvement of representative trade unions, and a specific methodology has been developed to identify them, although this is not explicitly outlined in primary law. Representative organisations are understood as trade unions with an EU dimension, which are involved in collective bargaining within their country and are relevant to specific sectors. However, a *numerus clausus* applies in some cases, meaning that only one trade union may be identified as representative for each country[22]. Thus, there is a tradition in EU law of reviewing the representativeness of trade unions in relation to Article 154 TFEU. This review is carried out by Eurofound, and it was conducted in 2023 for sectors such as inter-sectoral social dialogue, the woodworking

[18] Matica Hrvatskih Sindikata v. Croatia, *application no. 116/2015, pars. 59 and 80.*

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

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

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

[22] Rego, R., & Espírito-Santo, A. (2023). Beyond density: Improving European trade unions' representativeness through gender quotas. European Journal of Industrial Relations, 29(4), 415-433.

industry, the furniture industry, and professional football[23].
Regarding secondary legislation, mention should be made of Directive 2001/86/EC, which supplements the Statute for a European Company concerning employee involvement. This directive provides for the establishment of a special negotiating committee to ensure the exercise of employees' collective rights. However, the Directive does not specify the procedure for determining which employee representative will nominate members of the special negotiating committee or the criteria for their selection. It does, however, regulate the primacy of employee representatives over the election process, stating: "Without prejudice to national legislation and/or practice laying down thresholds for the establishment of a representative body, Member States shall provide that employees in undertakings or establishments where there are no employee representatives, through no fault of their own, have the right to elect or appoint members of the special negotiating body". Notably, there is no provision granting the employer the right to designate an employee representative.
Finally, reference should be made to Directive 2022/2041, which requires Member States to promote the ability of the social partners to negotiate collective agreements. This Directive led to amendments in Article 24 of the Labour Code. However, it does not provide further regulation regarding the determination of representativeness.

3. National Approaches

The trend in recent decades has been to regulate the freedom of trade union association within the constitutional provisions of national states. This is exemplified by Article 27 of the Czech Charter of Fundamental Rights and Freedoms, Article 39 of the Italian Constitution, Article 3(3) of the German Basic Law, Articles 12 and 59 of the Polish Constitution, and Articles 36 and 37 of the Slovak Charter of Fundamental Rights and Freedoms[24], among others. All these provisions guarantee the right of workers and employers to form and join their organisations. Only the

[23] Eurofound (2023), Representativeness of the social partners in European cross-industry social dialogue, Sectoral social dialogue series, Dublin.
[24] Cf. Articles 54 to 57 of the Portuguese constitution, Article 41 of the Romanian constitution, Article 77 of the Slovenian constitution, and Articles 281 and 371 of the Spanish constitution. Cf. Ribeiro, A.T. *The Scope of Representation of Trade Unions in Portugal: A New Reality? In: E-Journal of International and Comparative LABOUR STUDIES*, Volume 12 No. 03/2023, p. 82 et seq.

Italian Constitution explicitly requires trade unions to undergo a registration procedure; however, the provision under Article 39 of the Italian Constitution has yet to be implemented. Consequently, in Italy, the activity of trade unions is covered by Article 39, § 1, which guarantees the freedom to establish and join a trade union. Thus, Italian trade unions are private, non-recognised associations, and the collective agreements they conclude are not universally applicable[25]. The Slovenian Constitutional Court has expressly confirmed the right of the Slovenian legislator to regulate the obligation for a trade union to register in the relevant register[26]. Similarly, Czech and Polish legislation sets forth a registration procedure for trade unions.

Scholarly discourse has previously divided legal orders regarding the representativeness of trade union organisations into two categories: open or closed systems. Some legal systems avoid strict regulation of trade unions altogether. In contrast, open legal systems allow for an examination of whether a trade union has the highest number of members. In legal systems without precise regulations on representativeness, it is very difficult to measure anything. Closed legal orders do not offer this possibility; instead, certain trade unions or associations are declared representative without further consideration. Notably, some previously closed legal systems, such as France, have transitioned to open ones. Open legal systems must establish methods for quantifying the number of members in a particular trade union[27].

In Czech case law, the employer has the right to know which trade union is representative, a principle not unique to Czech law. The German Constitutional Court[28] also holds that such a restriction follows from the nature of property protection and is required by constitutional law.

Generally speaking, legal systems in countries such as Germany, Ireland, Portugal, and Sweden[29] oppose explicit regulation of representativeness. In these jurisdictions, the legitimising factor is not based on counting members. Instead, other criteria, such as tradition (e.g., Belgium), the

[25] See, for example, Treu, T. Labour law in Italy 2023. Wolters Kluwer.

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

[27] Cf. Prigge, W.-U. (2001). Gewerkschaftliche Repräsentativität in pluralistischen Systemen: Belgien und Frankreich. Industrielle Beziehungen: Zeitschrift für Arbeit, Organisation und Management, 8(2), pgs. 200-220.

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

[29] Under Swedish legislation, the trade union is the sole representative of the employees.

sectoral principle (e.g., Denmark and partially Austria[30]), or the success in the collective bargaining process, materialised in the conclusion of a collective agreement (e.g., Germany and Sweden), determine representativeness. In these systems, only trade unions are granted the right to collective bargaining. However, in Germany and Sweden[31], an employer can negotiate a collective agreement with any active trade union in their company. Moreover, the German Supreme Court recently reconsidered its case law and accepted that an employer may negotiate multiple collective agreements with various trade unions. This contrasts with the previous rule that employers were, in principle, bound by only one collective agreement[32]. The implementing regulation can be found in Article 77(3) of the Act on Co-Determination in the Workplace[33]. Although German works councils may negotiate certain agreements, these may not exclude or replace the collective agreement. Under German law, the negotiation of a collective agreement is considered a sign of a trade union's representativeness. In contrast to Czech tradition, a trade union with fewer members in Belgium can still be recognised as representative[34]. However, other states also lay down legal requirements for a trade union to emerge at the employer level and, therefore, establish a certain number of members to be recognised as a trade union or representative trade union. In these legal systems, trade unions are defined by both material and formal characteristics. In terms of numbers, the limit on the number of employees required is the lowest under Slovak legislation, which requires only two trade union members. Czech regulation sets the limit at three employees, while Polish regulation requires at least 10 employees. The English regulation sets a limit of 10% of the members in the unit formed for collective bargaining purposes. The French regulation grants the right to appoint an employee representative for employers with 50 or

30 In Austria, the chambers (German: Arbeiterkammern), whose membership is compulsory, are the only ones that can represent employees before labour courts and specialised courts for social security benefits.

31 The German prerogative reserved to the trade union only is called Tariffähigkeit. Waas, B. *Who is allowed to represent employees? The capacity to bargain collectively of trade unions* in Davulis/Petrylaite (ed.). *Labour Market of the 21st century: Looking for flexibility and security, Vilnius*, 2011, p. 164.

32 BGB decision of 7 July 2010, Case No 4 AZR 549/08.

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

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

more employees, but this applies within a specific electoral unit[35].
In the UK, there is a process for the voluntary and compulsory recognition of the existence and operation of a trade union. For statutory recognition of a trade union, membership of at least 10% of the employees in the relevant constituency (with a minimum of 21 persons) is required. The Central Arbitration Committee verifies the number of members of the trade union[36]. Austrian law also provides for the representativeness of trade unions, and these rules are applied, for example, in the inter-union collective agreement of 13 April 1999, the collective agreement for public schools of 23 February 2000, and the collective agreement of 4 October 2016 for the bargaining area of sanitary workers[37].
In Slovak law, whether a trade union is active at the employer level is decided by an arbitrator in the event of a dispute. If the parties to the conflict cannot agree on the appointment of an arbitrator, the Slovak Ministry of Labour appoints the arbitrator upon either party's proposal[38].

3.1. French Measurement of Representativeness and, in Particular, Influence

Since 2008[39], seven criteria have been required for achieving representativeness under French law, such as respect for the values of the Republic[40], independence[41], existence for at least two years[42], influence,

[35] Article L. 2143-3 of the French Labour Code.
[36] The CAC is the body of the Department for Business & Trade Arbitration.
[37] For participation in contract negotiations, trade unions whose membership in their respective bargaining areas reaches the prescribed minimum percentages (10% or 5%) shall be considered representative. The representativeness of unions shall be determined as of 30 November of each year, based on union dues collection authorisations submitted to the Governing Body.
[38] Act 76/2021 Coll. And Section 230a of the Slovak Labour Code. In Slovak: Zákon č. 76/2021 Z.z. a ust. § 230a zákonníka práce.
[39] Until then, the five unions—the CGT, CGC, FO, CFTC, and CFDT—were simply considered representative. The other unions were obliged to prove their representativeness.
[40] Respect for republican values includes freedom of expression, political, philosophical, and religious freedom, as well as the rejection of discrimination, fundamentalism, and intolerance. French case law holds that "a trade union that praises discrimination based on an employee's origin does not respect these values," as the Court of Cassation ruled on 9 September 2016, Case No. 16-20.605.
[41] The criterion of financial transparency allows for verification of the use and origin of funds. To this end, the law requires trade unions to produce and publish accounting documents as evidence of this criterion. The Court of Cassation has expressed the legal

number of members, amount of dues, and the so-called share of votes[43]. The criteria relating to respect for the values of the Republic, independence, and financial transparency must always be met and assessed independently. The other criteria relating to influence, membership and contributions, length of existence, and share of votes are subject to a comprehensive overall assessment[44]. Only representative trade unions have certain rights, particularly the right to bargain collectively. Of course, a trade union can also lose its status as the organisation with the most members.

This means that once these criteria are fulfilled, they are considered met throughout the electoral cycle. However, a trade union's representativeness is not a homogeneous concept but is demonstrated in varying quality and quantity at company, sectoral, group, national, and inter-sectoral levels[45].

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

The most controversial but essential criterion regarding representativeness is the number of votes of the trade union. The share of votes is calculated based on the votes obtained by each trade union in the elections to the works councils. It is determined according to the level considered—company, sectoral, or inter-sectoral. Representativeness of trade unions in

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opinion that the publication of accounting documents solely on a trade union's public Facebook page is insufficient, cf. Court of Cassation decision of 13 June 2019, Case No. 18-60.030.

[42] This criterion aims to prevent the formation of new trade unions immediately before elections. A trade union must have existed for at least two years in the sector and in the area.

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

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

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

a sector means that a trade union must obtain at least 8% of the votes cast to be considered representative[46].

3.2. Czech Regulation

The Czech Constitutional Court stated, "If collective bargaining is to be a mechanism of social communication and democratic procedural resolution of potential conflicts threatening internal peace, then it is also linked to the requirement of legitimacy (representativeness)"[47]. Thanks to this intervention by the Constitutional Court, the representativeness of a trade union has been, and continues to be, addressed in Czech law in the case of an extension of a higher-level collective agreement. In this context, the relevant higher-level trade union body in a given sector acts on behalf of the largest number of employees[48]. In addition to this arrangement, representativeness has remained regulated in Czech collective labour law in the case of European companies[49] and the Insolvency Act[50]. In both cases, the legitimisation of the trade union organisation through the majority is again required[51]. The interpretation of the European company regulation is somewhat more complex, where the legislator has even attempted to regulate the weight of the trade union's vote[52].
According to the traditional Czech notion of representativeness in company collective bargaining, an association of three employees in an employment relationship is sufficient for a trade union to operate within an employer. This is not unusual in Europe, where other countries have traditionally resisted greater legal regulation of employee representatives. Previous Czech practice of small, essential trade union organisations,

[46] The Court of Cassation has held that a trade union that is not representative at the beginning of an election because it did not participate in the election cannot become representative during the same election cycle by joining an organisation that has already achieved representativeness at the beginning of the election, even if that organisation is not representative.
[47] Constitutional Court judgment of 11 June 2003, Pl. ÚS 40/02.
[48] Cf. decision of the Municipal Court in Prague, No. 14 A 80/2017-43 and the Municipal Court in Prague, 14 A 64/2017-66.
[49] Cf. Section 55(4) of Act No. 627/2004 Coll. on the European Company.
[50] Under Section 67 of Act No.182/2006 Coll., the Insolvency Act, as amended, provides that "*If several trade unions operate side by side at the debtor, the trade union with the largest number of members or the association of trade unions with the largest number of members shall have this right, unless the trade unions operating at the debtor agree otherwise.*"
[51] Thus, a trade union with a simple majority of employees is representative.
[52] Cf. Section 55(4) of Act No. 627/2004 Coll. on European Companies, as amended.

while sometimes impractical, has been in line with international law[53]. Nevertheless, legal practice has brought several complications, and the legislator addressed them by amending the Labour Code.

The Czech legislator adopted a procedure whereby, if trade unions do not unite on collective bargaining, they are obliged to inform the employer within 30 days of the commencement of such negotiations[54]. The employer will then designate the trade union organisation or organisations with the largest number of members. The key question in this new arrangement is how the employer repeatedly determines which union, or group of unions, has the largest number of members. Moreover, the employer will need to have this knowledge at a specific time, likely at the start of, and during, collective bargaining, in order to properly prepare for future collective bargaining developments and alternatives. He will then have to repeat this procedure in every collective bargaining session if it is conducted again in the years to come[55].

The courts have repeatedly mentioned in case law that an employer can undoubtedly invite a trade union to have the number of its members verified by a notary public or a lawyer. However, there is a fee for this service that must be paid. If the employer refuses to pay the costs of the notary or lawyer, this may be a problem for the trade union. In addition, it should be noted that in the Czech Republic, a tradition of employer donations has developed, to which not all trade unions operating in the same establishment are entitled. Thus, one can imagine that by repeatedly asking for proof of membership through paid services, an employer could effectively exclude from negotiations a union that does not have adequate financial resources to satisfy the employer's demands[56].

Leaving aside these practical problems of ascertaining the number of

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[53] For example, the interpretative practice of Article 6 of the European Social Charter has supported the functioning of trade unions as representatives of employees.

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

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

[56] If at least three trade union members do not want to come forward and declare themselves members of a particular trade union, then the employer requires, for example, that a notary verify the number of employees. Still, the employer does not want to pay the costs associated with this verification. Act No. 120/2025 Coll forbade this practice.

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

4. Conclusion

The development of collective labour law is significantly influenced by local traditions and historical developments, leading to regional differences in how representativeness is determined. In most democratic countries, a genuine trade union is active in protecting the rights of employees, not overburdening the employer, operating according to its statutes, and conducting constructive collective bargaining with the employer. The criteria must be capable of identifying a representative trade union, especially in situations where multiple trade unions exist within a single employer.

A trade union is a corporation, and its legitimacy has always, and continues to, derive from the association of its members. More members equate to more political power, as well as more funds from membership dues. When multiple trade unions operate within an employer, it is crucial to identify a representative trade union to negotiate collectively at the company level. In a democratic society, the majority principle makes sense, provided that it is verifiable and demonstrable that the majority has expressed its will—that is, a specific trade union or group of trade unions represents a significant portion of the workforce. Examples from other countries support this approach, where representative trade unions are favoured over non-representative ones in open legal systems.

The principle of representativeness has traditionally been seen in the Czech Republic[57], as well as abroad, as a safeguard against the abuse of law by trade unionists. However, it should not be used as a tool to enforce a uniformity of views or representatives. Some countries have had negative experiences with this during the Nazi and Communist periods. The ECtHR has rejected the principle of parity, meaning the mandatory representation of all trade unions, as a criterion for representativeness.

[57] Cf. Constitutional Court *judgment of 5 October 2006, Pl. ÚS 61/04*, par. 47. Supreme Administrative Court *decision No. 1 Ads 72/2018-46*.

With the enactment of Act No. 230/2024 Coll., the Czech legislator addressed the issue of trade union representativeness to promote collective bargaining. From the perspective of international regulation, a simple majority of the employees represented is an acceptable criterion for representativeness, provided that such a criterion is discussed with the most representative trade unions and employers' associations, and is established in advance through binding law. The requirement for a simple majority of employees is not unconstitutional, even according to Czech case law, and it is also recognised abroad. Therefore, the solution introduced by the amendment to the Labour Code, as set out in the new wording of Section 24(4), can be identified as one possible approach. However, it would be more common to link the designation of a representative trade union to the conclusion of a collective agreement, rather than pre-selecting a suitable contracting party.

Moreover, the legislator has left the determination of the procedure for how the employer will verify the number of trade union members to practice. From an international perspective, the Czech legislator's lack of clarity on this matter cannot be considered appropriate or beneficial. If the legislator genuinely wants to aid collective bargaining, the procedure for verifying the number of employees in each trade union should be regulated, including the method and the period for which this verification is applicable. There are enough foreign models and experiences to draw from. A particularly elegant approach is the Slovak regulation, which uses an arbitrator, or the French model, which allows the court to make the decision[58].

Therefore, although the number of affiliated workers is undoubtedly an important quality, other conceptions of trade union representativeness can be found in foreign legislation. For example, in German law, following the Second World War and under pressure from the American, British, and French occupying forces, a dual system of representation was intentionally created, with works councils and trade unions as two distinct representatives of employees who must complement each other. Sectoral affiliation can also serve as a legitimising factor, as seen in Denmark, Germany, and Sweden, where there is a strong tradition of high unionisation. Another well-known factor is union-wide or constituency-based elections. In France, legislation allowed for the recognition of a trade union organisation by a decision of a specific body. In Sweden and

[58] Such a procedure would also help the Czech mediation and arbitration system, which is in poor shape. For all the application problems, let us mention the low number of disputes resolved by arbitrators in the Czech Republic.

Germany, the employer selects the trade union when concluding a collective agreement. However, in these systems, the legitimacy of a trade union is not determined solely by the employer's decision about which union is representative.

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