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► Workers' representatives in selected Central and Eastern European countries:

Filling a gap in labour rights protection or trade
union competition?

Edited by Cristina Mihes



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► List of Abbreviations and Acronyms

ADEDY	Civil Servants Confederation
ARISTOS	Archives of Trade Union History
ASE	Supreme Labour Council
BD BiH	Brčko District of Bosnia and Herzegovina
BiH	Bosnia and Herzegovina
CA	Collective Agreement
CEECs	Central and Eastern European countries
CSRD	Corporate Sustainability Reporting Directive
EEKE	Employed Consumers Union of Greece
EESC	Economic and Social Committee of the European Union
EFAs	European company-level framework agreements
EIP	Employee involvement and participation
ELINYAE	Hellenic Institute for Occupational Health and Safety
ERGANI	Information System for the submission of Labour Inspectorate/OAED forms
ESEE	Hellenic Confederation of Commerce and Entrepreneurship
ETUC	European Trade Union Confederation
EWC	European Works Councils
GCA	General Collective Agreement
GEMHSOE	General Register of Trade Unions of Employees
GEMHOE	General Register of Employers
GSEE	Greek General Confederation of Labour
GSEVEE	Hellenic Confederation of Professionals, Craftsmen and Merchants
FBiH	Federation of Bosnia and Herzegovina
HLC	Hungarian Labour Code
I & C	Information and consultation
ICFTU	International Confederation of Free Trade Unions
ICFD	Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community
ILO	International Labour Organization
INE GSEE	Labour Institute of the Greek General Confederation of Labour
ITUC	International Trade Union Confederation
KANEP GSEE	Development Centre for Educational Policy
KEPEA GSEE	Information Centre for Workers and Unemployed
LC	Labour Code
LL BD BiH	Labour Law of Brčko District of Bosnia and Herzegovina
LL FBiH	Labour Law of the Federation of Bosnia and Herzegovina
LL in	
the Institutions	
of BiH	Labour Law in the Institutions of Bosnia and Herzegovina
LL RS	Labour Law of Republika Srpska
LLR	Law on Labour Relations
LPAHW	Law on Protection against Harassment at the Workplace
NCA	National Classification of Activities
NGCA	National General Collective Agreement
OBES	Federation of Industrial Trade Unions
OECD	Organisation for Economic Cooperation and Development
OKE	Economic and Social Committee of Greece

OMED	Organization for Mediation and Arbitration
OSH	Occupational Health and Safety
RS	Republika Srpska
SETE	Association of Greek Tourism Enterprises
SEV	Hellenic Federation of Enterprises
SFRY	Socialist Federal Republic of Yugoslavia
SKEEE	Social Inspection Council of the Labour Inspectorate
SVE	Federation of Industries of Greece
SMEs	Small and medium-sized enterprises
TUAC	Trade Union Advisory Committee of the Organization for Economic Cooperation and Development
WCC	Working Conditions Committees
WCG	Working Conditions Groups

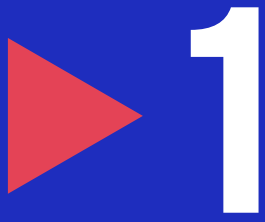
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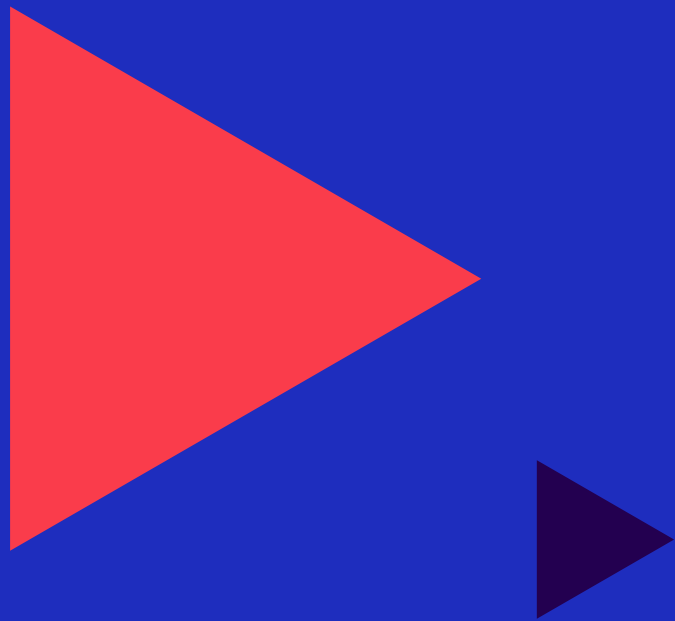
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We would like to emphasize that the responsibility for opinions expressed in the book chapters rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office.



Introduction

By Cristina Mihes



► Introduction

The institution of elected workers' representatives has gained recognition from lawmakers in Central and Eastern European countries in the context of a declining unionization rate and a trend of decentralization of collective bargaining at the company level. However, despite the growing attention, the involvement of elected workers' representatives in collective bargaining has proved to be sporadic and less effective than that of trade unions. In some cases, complicated solutions for determining the bargaining powers of workers' representatives (as established by law) have created legal and practical uncertainties at the company level (Miheš 2020). With a few notable exceptions, although recognized by law, works councils have proved, in practice, a weaker alternative to trade unions. Innovative experiments of expressing a collective voice of unrepresented atypical workers, including those on digital platforms, are emerging timidly through social media.

In this publication, ten legal scholars examine from different angles the research question whether elected workers' representatives fill a gap in labour rights protection or represent trade union competition. For this purpose, the authors of the forthcoming chapters analyse the participation of elected workers' representatives in workplace cooperation, including information & consultation, grievance handling, occupational safety and health (OSH) committees, as well as their role in collective bargaining. Moreover, they look at the relationship between unionized workers' representatives and elected workers' representatives, including works councils. Finally, some of them share their views whether elected workers' representatives could become a collective voice on digital labour platforms.

The Bulgarian paper reveals the existence of longstanding legal gaps and overlaps in the domestic legislation and practice when it comes to regulating elected workers' representation. Many channels of interests are competing over the same functions, resulting in poor outcomes and challenges for the employer. While the law does not set out representation modalities for platform workers, some forms of emerging collective action are taking place within online forums on social media (Kirov and Yordanova 2022). The author cites the innovative experience of the largest professional Facebook group for freelancers in Bulgaria, "Professional and Freelance Services", which had 96,734 members in November 2021. It provides its members with an arena for the discussion of different topics such as taxes, contracts, occupational health and safety and

working conditions, and how to tackle clients who do not meet their financial obligations.

In Bosnia and Herzegovina, the concept of participation of non-unionized workers has been defined by law, which, in the author's view, makes it more effective than regulating participation through a collective agreement or employer's autonomous general act, as the latter may result in inconsistent outcomes. The law of the Federation of Bosnia and Herzegovina explicitly states that if a works council is not formed at the company level, the existing trade union may propose its establishment. Moreover, as a party to a collective agreement, the trade union may authorize the works council and the employer to regulate certain employment-related issues by a written agreement, except those which by law can only be regulated by a collective agreement, such as pay and working time duration. The author argues that works councils should be given more powers as they represent the entire workforce at the company level.

The Greek legislature has prioritized the action of trade unions in protecting labour rights, while the role of elected workers' representatives remains auxiliary and marginal. The powers of works councils are explicitly legislated in case of the presence and/or the absence of a trade union organization in the enterprise. The operation of these councils does not at any point negate the purpose, means and rights of the trade unions, who have a constitutional right to assume the primary role in preserving and promoting collective labour, and the economic and social interests of employees. In the author's view, the cooperation between trade unions and works councils could be critical and important for the post Covid-19 recovery.

The author of the Hungarian paper notes that the 2012 Labour Code has introduced a new right for works councils (elected representatives) to conclude *normatively binding works agreements*. The works council can now conclude agreements with the employer to regulate the terms and conditions of employment, except wages and remuneration. As such, these – quasi collective – agreements can take over the role of collective agreements in cases where there is no collective agreement in force and there is no trade union authorized (that is, with at least "10 per cent" representativity) to enter into a collective agreement. As a conclusion, the author argues that in Hungary, in general, there is still much leeway for further clarification and development of the role of works councils and information and consultation mechanisms. Importantly, a new vision is needed to clarify the expected role and future of the institution of elected workers' representatives.

The Lithuanian paper underscores that the legal framework for workers' representation was at the epicentre of all the labour law reforms undertaken in the country in the last decades. While mentioning that the majority of respondents in a survey among union leaders were of the view that cooperation between trade unions and works councils was vital in the pursuit of common goals, the author notes that, in practice, despite good intentions, no constructive cooperation developed between trade unions and works councils; works councils were not active even in information and consultation procedures; collective bargaining and collective agreements between works councils and employers were uncommon, often teetering on the edge of lawfulness and compliance with the Labour Code; and there was not a single strike called by a works council. Regardless, public presentation of practical examples and publications in the mass media suggested that the divide between trade unions and works councils did not narrow in Lithuania. On the contrary, the alternative provided for the Labour Code became very popular – instead of setting up trade unions or works councils in enterprises to transfer the representation function to a sectoral or regional trade union which then established its units in the particular enterprise. This made the work of works councils more nominal than real, and the information and consultation model failed in practice.

In North Macedonia, the institutionalization of other channels of collective representation of workers besides trade unions, and other types of workers' representatives apart from unionized ones, has taken practical significance through the introduction of the rights to information and consultation in the national labour legislation. In practice, workers usually exercise their rights to information and consultation through a trade union, where present. Trade unions have highlighted various negative practices in which employers would exercise influence over the election of employees' representatives to the detriment of the collective interests of the employees in the enterprises where trade unions were not present. Hence, the hostile perception of unions towards so-called employees' representatives as a "Trojan horse" in Macedonian industrial relations. In the author's view, there is now a window of opportunity to properly regulate workers' participation through an "in the making" new Law on Labour Relations.

In the view of the author of the Polish paper, the decision of a national legislature to extend the right to collective bargaining to workers' representatives should be accompanied by guarantees of independence and freedom for workers to decide who will represent them in negotiations. The lack of any guarantee results in the risk that negotiations will be conducted by persons who do not represent the collective interests – as now is the case in Poland. The author argues that a membership-based organizational structure puts

pressure on workers' representatives involved in the negotiations to have as their main concern the primacy of collective interests over their individual ones. From this perspective, trade unions appear to be a better form of representing the collective interests of workers than elected representatives. In the author's view, the national legislature should have considered these power dynamics rather than extended the prerogatives of workers' representatives, so that they now overlap with those which are traditionally the exclusive competence of trade unions (for example, the right to collective bargaining).

The Romanian paper highlights the piecemeal approach followed by the national legislature when regulating the institution of elected workers' representatives. The author takes the view that Romania's experience so far has shown that the representation of employees by elected representatives is fragile and ineffective. It is fragile because the employer has greater opportunities to influence – often unintentionally – their decisions and the conduct of collective bargaining. In extreme cases, organizing employees in non-union ways may even be encouraged by employers as a tactic to avoid organizing in the company (Donaghey et al. 2011). It is not very effective because, far from being based on traditional trade union construction, it is a quick way of accommodating legal provisions rather than a true expression of workers' negotiable collective interests. Workers' representatives do not usually collect dues, so the support needed to carry out their work most likely comes from the employer. Their contacts with workers' representatives from other companies in the same sector are minimal. The author argues that elected workers' representatives are not part of the national system of industrial relations.

Serbian law and practice recognize elected workers' representatives in works councils and in enterprise committees on occupational safety and health. Despite the legal recognition, the role of elected workers' representatives in Serbia is modest. This is illustrated by a very low number of work councils in companies across the country, and by the fact that, although empowered by law to conclude an "agreement on wages" as a replacement of a collective agreement, this has never happened so far. Serbia's trade unions see works councils as rivals who would undermine their own role in companies and openly oppose their establishment. Moreover, open conflicts between unions and works councils have been recorded (Kurir 2011). Works councils are seen as an instrument of the "manipulative participation" that aims to create an illusion that employees participate in corporate governance (Mojčić 2008, 242). While noting the absence of a collective voice of digital platform workers in Serbia, the author argues that the labour law should be harmonized with the Constitution, so that both workers in non-standard

forms of work and digital workers are extended the right to organize a trade union.

Slovak labour law distinguishes four principal types of workers' representatives: trade union, works council, a shop steward (literally staff trustee in Slovak), and a special type of workers' representatives in occupational safety and health (OSH) committees. Since their introduction into the Slovak legislation in 2002, works councils have been regarded as alternatives and, at the same time, competition to trade unions. The competencies and division of prerogatives have been changed several times, mostly because of politics: right-wing parties' efforts to assign works councils more rights to undermine trade unions and left-wing parties' efforts to maintain trade union power. Their ability to cohabit has been modified several times in Slovakia's legislation. However, in practice, the co-existence of a works council and a trade union organization is exceedingly rare, while the number of works councils amounts to very few.

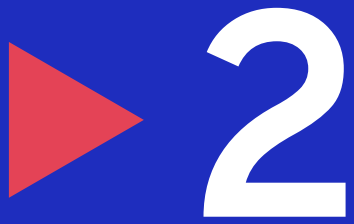
Elected workers' representatives in works councils represent an important pillar of workers' participation

in Slovenia. The author of the Slovenian paper argues that works councils should not be seen as a competitor to trade unions, even though this may be the case in some companies. To avoid competition and strengthen cooperation, the role and purpose of both types of worker representation should be clear to all parties, including the employer.

Ukrainian labour law recognizes both trade unions and elected workers' representative(s) as a party to collective bargaining at the enterprise level. However, the national law only considers elected workers' representative(s) for collective bargaining if there is no trade union. In addition to trade unions and elected workers' representative(s), the Ukraine's labour law also identifies another category of workers' delegates to a "general meeting of workers", inherited from Soviet labour law. Commenting on the multiple contradictions and gaps in national law and practice, the author argues that they reveal a lack of understanding by the state of the further role of workers' representatives in Ukraine's labour law.

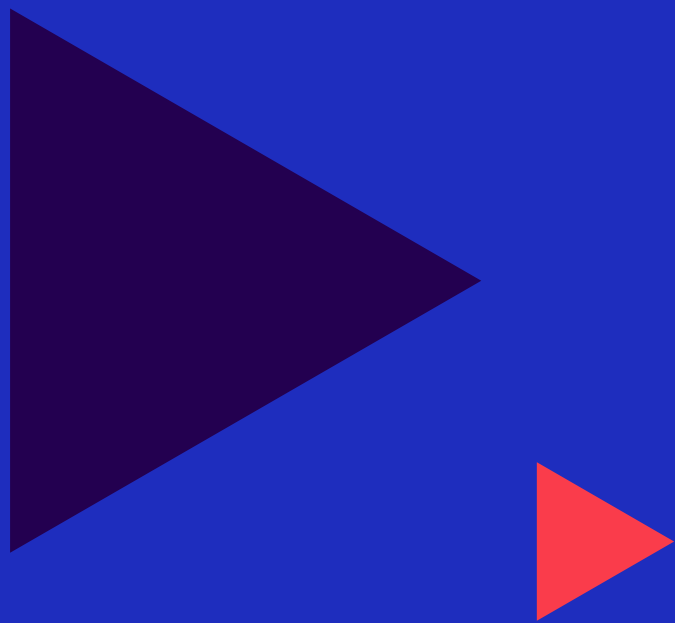
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The case of Bulgaria

By Plamenka Markova



► The case of Bulgaria

A new system of industrial relations in post-socialist Bulgaria emerged within the context of a transition to democracy and a difficult international reintegration of a weak economy (Delteil and Kirov 2016). This period resulted in a change from a compulsory to voluntary system of trade union membership and led to largely non-unionized private sector. These dramatic structural economic changes and the widespread perception of trade unions as the “remnants of the old system” caused a decline in trade union density. Unions are rarely present in the vast number of small and medium-sized enterprises (SMEs) that came into being. Formal mechanisms for representation are weak. The limited power and legitimacy of organized labour, together with an inability of national institutions to emulate Western European practices, has weakened the channels for worker representation.

Of note here, the term workers' representatives in the present report adheres to Workers' Representatives Convention, 1971 (No. 135) in order to avoid misinterpretation. The term refers to those persons who are recognized as such under national law or practice, whether they are: (a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned.

Unlike Western Europe, where socioeconomic systems underwent a slow evolution, industrial relations institutions in Bulgaria had to be established quickly at a time of rapid socio-political change. Social dialogue was set up from scratch without traditions and experiences from the past, while trade unions underwent deep internal reforms and assumed a new identity as social partners. Subsequent industrial relations were shaped by the economic and political changes and in the context of tripartism, developed initially under the impulse of the International Labour Organization (ILO) from 1990 and later in the context of European integration and EU membership since 2007.

As in other Central and Eastern European countries (CEECs), employment relations in Bulgaria are characterized by weak representation and trade union density; dominant company-level bargaining; public relations or façade “tripartism” (meaning that the government is using tripartism to legitimize its own decisions); and a weak employers' movement, often dominated by multinationals (Czarzasty and Kirov 2020).

Collective bargaining in Bulgaria takes place between trade unions and employers' organizations at the industry and company level. Overall, collective bargaining coverage is fairly low. In 2020, there were 1,535 active collective agreements at the company level, covering a total of 266,878 employees, which amounts to coverage of approximately 12 per cent. Most agreements were signed in the public sector, and it is virtually absent from services – both for low- and high-wage earners – where the bulk of employment is concentrated. This situation leaves a significant part of the labour force neither with protection nor collective voice.

Given their diminishing resources, trade unions have faced a dilemma: either preserve their fortresses in manufacturing and public sectors, prospect for new avenues including turning towards atypical workers. Traditional, typical employment dominates the labour market in Bulgaria. That is why employment regulations are focused on typical employment relationships, leaving atypical relationships aside (only a small percentage of employees work part-time, on fixed-term contracts or through temporary agency work).

Industrial democracy and workers' representation became the subject of international and European documents as part of an ongoing discourse on labour rights. The terms “industrial democracy” or “workplace democracy” mean either all forms of participation, including participation through trade unions (collective bargaining and collective agreements, consultations, participation in protests and so on), or envisage mainly participation, which gives the possibility to the whole staff to express its positions (directly or indirectly through its representatives) on issues concerning enterprise management.

Several international organizations, including the International Labour Organization, the Council of Europe and the European Union have adopted instruments regulating the rights of workers' representatives, and the rights to information and consultation are treated in some of them as an element of the European Social Model.

The regulation of employee involvement has been one of the most distinctive features of social and employment policy at the EU level. Barnard gives a useful definition of the specific features of employee involvement in the context of collective labour law (Barnard 2006). First, employee *information* is the least demanding form of employee involvement: it is unilateral and is provided by management to employees or their representatives. In contrast, *consultation* is a process that retains the managerial right to take the final decision and is typically characterized as a process involving the exchange

of ideas, opinions and suggestions within which the threat or use of sanctions is considered inappropriate. Consultation often involves a broad range of issues outside those handled through negotiation (for example,

organizational restructuring and investment strategies). Beyond consultation, *participation* embraces the involvement of employee representatives in board-level representation.'

Bulgarian national labour legislation on information and consultation

Between 1986 and 1988, Bulgaria's socialist planned economy allowed a few forms of direct participation at the level of work teams, enterprise subsidiaries and sometimes at the company level. At the enterprise level, unions were reduced to mere administrative instruments of the self-management organs established by the 1986 Labour Code (hereinafter, LC). Practical problems and rivalries between the two structures soon emerged. Trade unions were further weakened by changes to the mechanism of collective agreement at the enterprise level, and collective bargaining – traditionally the most important union domain – was effectively blocked in 1987 (Tseneva, E. 1991). The LC introduced an "Economic Council",¹ and the goal was to increase enterprise autonomy and decentralize administration. Despite the broad rights of self-management, workers did not become genuine masters of their enterprises through work collectives. The concept of "property transfer" adopted in Bulgaria represented the most radical revision in property relations since the 1950s.

State property was to be transferred initially to the labour collectives of 55 selected enterprises through agreements specifying the rights and duties of the state as the owner and the labour collective as the sovereign master that would manage this property. In August 1988, however, the transfer was terminated, after a series of accounting problems and other technical difficulties (Petkov and Thirkell 1991). Enterprise-level unions were reduced to mere administrative instruments of the self-management organs that were established by the LC. Since the beginning of political democratic change, most forms of workers' participation were neglected because their original purpose was to support the political regime and to reduce the influence of trade unions. Between 1997 and 2007 there was a revival of some "old" forms and the establishment of new forms of direct participation. Furthermore, since the second half of the 1990s, many multinational subsidiaries and other large companies have introduced new management methods, which had also included direct participation.

Workers' involvement

The regulation of employee involvement has been a distinctive feature of social and employment policy at EU level.

Bulgaria's legislation has undergone a metamorphosis with regard to information, consultation and management participation of employees. This is due to a specific and often opposing position held by trade unions. The beginning of political and economic changes in 1989 envisaged participation in management at all levels but was suspended and inoperative in practice – a legacy of a defunct 1986 normative frame.

Clauses for worker participation in management were deleted from the legislation in order not to stand in the way of a revival of free trade unions in the early 1990s. The only element to remain was a general meetings of enterprise workers.² The main rights given to a general meeting (or meeting of elected employee delegates where a general meeting cannot take place) relate to its

role in electing other representatives and approving the draft of a collective agreement where there are several unions in the enterprise and they cannot agree on a common draft to be presented to the employer.³ Workers representatives elected by a general meeting of workers participate in the discussion of enterprise management issues only in the cases provided for by law.⁴ At present, three acts envisage such participation: the Act on Health and Safety at Work, the Act on Commerce and the Act on Higher Education. A general meeting also may decide how a company's social and cultural funds are to be used.

In 1997 the Act on Health and Safety at Work was adopted, according to which enterprises with 50 or more employed workers may establish Working Conditions Committees (WCC), and any other enterprise with 5 to 50 employees may establish Working Conditions Groups (WCG). Half of the composition of WCC/WCG is determined by a general or proxy meeting.

1 Article 30 Repealed, SG No. 100/1992 as well as all of chapter 2 on the working collective in the then Labour Code.

2 Article 6 of the LC (Amended, SG No. 100/1992, SG No. 25/2001).

3 Article 51a, paragraph 3 of the LC.

4 Article 7, paragraph 1 of the LC.

Representatives for information and consultation (non-union representatives)

In 2000, Bulgaria ratified the European Social Charter (revised), including the clauses for information and consultation rights. This period saw the implementation of the Agreement on the Association of Bulgaria to the European Union (1995–2006) and an intensive process of matching Bulgarian labour legislation to the standards of European Community law. EU directives have fostered the formation and revision of institutional arrangements for workplace representation. Directive 2002/14/EC⁵ establishing a general framework for informing and consulting employees in the European Community has been an important landmark. The relation between Directive 2002/14/EC, on the one hand, and Directives 98/59/EC and 2001/23/EC, on the other, constitutes a relation between general and special directives, respectively. They are transposed in Bulgarian labour legislation as general and special legal provisions. The relation between Directive 94/45/EC, as amended by Directive 97/74/EC, and Directive 2002/14/EC follows a similar approach. Directive 2002/14/EC applies to informing and consulting employees in undertakings under Bulgarian law, while Directive 94/45/EC and Directive 97/74/EC apply to informing and consulting employees in undertakings and groups of undertakings within the Community.

During the 1990s, multinational companies began to enter Bulgaria. Some of their subsidiaries, prompted by existing European Works Councils (EWC) and trade union structures at their headquarters, carried out negotiations with Bulgarian staff representatives (frequently trade union representatives) and they were elected to the respective EWCs. Until the beginning of 2007, they had the status of observers. It is worth noting that, in July 2006, Directive 94/45/EC, as amended by Directive 97/74/EC, was transposed in a separate law,

namely the Act on Informing and Consulting Employees in Multinational Undertakings, Groups and European companies.⁵ Directive 2002/14/EC has its own field of application and is applied without prejudice to the implementation of Directives 98/59/EC, 94/45/EC and 97/74/EC.

The provisions of the LC in which Directive 2002/14/EC was transposed can be divided into two thematic groups. The first one consists of article 7 (a)–7 (d) of the LC and regulates the establishment and election of workers' representatives for a period of three years by a general meeting of staff, and rights and obligations regarding informing and consulting the representatives. These representatives are elected in undertakings of 50 or more employees as well as in their independent units of more than 20 employees.

The second group consists of the provisions of articles 130, 130 (c) and 130 (d) of the LC. They regulate the function of an employer's informing and consulting with employees to bolster social dialogue between management and labour. Issues at stake include recent and forecast changes to the economic activity of the undertaking, employment within the undertaking and job security when there is a threat to employment and substantial changes in work organization.

Bulgarian labour legislation has adopted a two-channel system for the representation of employee interests in an undertaking. Along with workers' representatives under article 7 (a) – 7 (d) and Article 130 (c) and (d) of the LC, workers' interests are traditionally represented by trade unions at the undertaking's level. As a whole, the two forms of workers' representation interact with one another and aim to protect and support the interests of employees.

Trade union and elected representatives' rights

The rights given either to the union or to representatives elected to represent workers' social and economic interests (in practice, it will generally be the union) are extensive in the LC. They include the right to be informed and consulted about:

- large-scale redundancies ahead (the union or the workers' representatives have the right to present their position on the planned redundancies to the relevant state authorities);
- business transfer;
- changes to working hours;
- short-time working to cope with a lower volume of work;
- plans to introduce flexible working; and
- permanent positions available to those on fixed term contracts, and full-time positions available to those working part-time, and vice-versa.

They have a right to request information, call for meetings with the employer and have access to all parts of the workplace or company. The LC lays down a timescale for the provision of information – it must come at least a month before the planned measure is undertaken – and consultation should last for two weeks. However, the LC also allows for the employer

and workers' representatives to reach their own agreement on the timing. (There are longer timescales for consultation on redundancy.)

The chairperson of the union at the workplace has a right to time off as specified in a collective agreement, with a minimum of 25 hours a year. This right also applies to employees in union leadership positions at the industrial, regional and national levels. The union has the right to use company facilities for its duties.

Workers' representatives, elected to represent employees' social and economic interests or elected for

the purposes of information and consultation, have a right to time off to fulfil their functions – either through reduced working hours or additional leave.

The specific arrangements for the informing and consultation of employees have almost all been transposed effectively. In addition, the La provides for the necessary legal mechanisms for ensuring compliance, such as the inclusion of these requirements in the enforcement mandate of the General Labour Inspectorate and adequate sanctions.

Legal guaranties for executing these rights

Protection against dismissal

Article 333 of the LC provides protection against dismissal for both key workplace union representatives and elected workers' representatives.

Union representatives in leading positions in the local union organization at a workplace may only be dismissed with the agreement of the central leadership of their union, or by a body approved by the central leadership during their period of office and the subsequent

six months. This also applies to individuals who are employees of the company but hold elected union positions at local, industrial or national level.

Workers' representatives, both those elected to represent social and economic interests and those elected for the purposes of information and consultation, may only be dismissed with the agreement of the labour inspectorate.

Time off and other resources

The chairperson of a union at a workplace has a right to time off as specified in a collective agreement, with a minimum of 25 hours per year. This right also applies to employees in union leadership positions at industrial, regional and national level. The union has the right to use workplace facilities needed to perform its functions.

Workers' representatives, both those elected to represent employees' social and economic interests

and those elected for the purposes of information and consultation, have a right to time off to allow them to fulfil their functions – either through reduced working hours or additional leave.

Training rights

Workers' representatives in a workplace also have a right to participate in training and to be given a commensurate amount of leave. However, the arrangements must be agreed with an employer, either in a collective agreement or other contractual agreements (LC, article 7 (c), paragraph 1, clause 6). They have the right to alert the General Labour Inspectorate of a non-observance of labour legislation (LC, article 130 (b), paragraph 6; article 130 (c), paragraph 4).

Upon refusal to provide information when its nature or consultation would damage an enterprise or legitimate interests of an employer and if a dispute arises over the justification of the refusal, the parties may ask for mediation and/or voluntary arbitration from the National Institute of Conciliation and Arbitration.

Trade unions have insisted that general information and consultation powers in the LC be conceded entirely to them, but the legislation allows **two variants of**

information and consultation representatives' formation: (1) establishment of new structures – information and consultation representatives with restricted powers (only according to the Directive) for enterprises and organizations with 50 or more employees, elected by a general meeting of workers and employees/assembly of delegates upon proposal by employees and trade union structures (article 7 (a) of the LC); and (2) an allowance for a general meeting/assembly of delegates to decide and delegate to trade union structures in the respective enterprises the right to nominate information and consultation representatives independently.

The provisions in the Act on Information and Consultation of Employees and Workers in Community-scale Undertakings, Groups of Undertakings and European Companies are identical to those concerning the national representatives – there are possibilities for direct

elections by the general meeting of the staff/assembly of delegates, or the general meetings/assemblies of delegates can make a decision to delegate to the trade unions the right to nominate the representatives to EWCs and to the representative bodies of European Companies and European Cooperative Societies. These representatives to the supervisory/management bodies in European companies and European cooperative societies are elected by the respective representative bodies.

According to the European Company Survey (Eurofound 2019), only 31 per cent of enterprises in Bulgaria

Participation

Legal provisions for workers' board representation are limited in Bulgaria. Some provisions are spelled out in the Commercial Law, which allow workers' representatives (including trade union leaders) to attend the shareholders' assembly with a consultative vote and/or attend the managing board/board of directors regarding decisions on labour and social issues at the company. Some large companies allow trade union leaders to attend the supervisory board meetings with a consultative vote or even with equal rights to other board members. Such companies are exceptions. Recently, some private and public companies have encouraged direct workers' participation, especially about work organization. Research from the Third European Company Survey (Eurofound 2013) indicates that workers are included in the elaboration and adoption of management decisions in 31 per cent of large enterprises, 37 per cent of medium-sized enterprises and 50 per cent of small enterprises. Various forms of direct participation can be observed in sundry sectors like metallurgy, machinery (including automotive, electronics and electrical engineering), food processing, transport, waste, trade, retail, cooperatives, services and tourism. Multinational subsidiaries are also well represented in the implementation of direct participation.

The rights of all categories of representatives are envisaged in compliance with the directives, including protection against dismissal, training and so forth. Some of the representatives' rights ensuing from Directive 2002/14/EC (for instance, for provision of safe working conditions, paid leave and so on) are executed only after concluding a special agreement with an employer or included as clauses in collective agreements (Direct 2018).

Bulgarian legislation is incomplete on this issue of representation, and there are a number of outstanding gaps. No clearly regulated mechanisms of interaction exist between the separate forms of industrial democracy. Sometimes so many channels of interests are competing over the same functions, that they halt

have official structures for employee representation. Trade unions still play the main role in employee representation, and they coexist in many units with elected employee representatives, other special representatives and usually – OSH committees. However, in many private companies, especially in SMEs, there are no representatives other than OSH committees or groups. In many multinational subsidiaries, in particular in manufacturing and utilities, and large national companies the process of the information and consultation is implemented better. There are Bulgarian representatives in more than 25 European Works Councils (EWCs) at the time of the Survey.

progress. The functions and the rights of the information and consultation representatives need better differentiation to avoid duplication and overlapping.

Trade unions have participated in several projects that aimed to analyse the information and consultation system at the workplace (including the EWC) in four new EU member states and one candidate country. They included transnational exchanges of experience and best practice examples among the partner countries to promote and better the functioning of workplace representation structures and to positively shape industrial relations in the partner countries (Informia 2010; Informia II 2012). The data cited next are taken from the reports of these two projects.

Assessment of the new regulation of workers' involvement

Currently, the Bulgarian legislation provides for a supportive role of elected workers' representatives, in comparison to trade union representation and participation in collective bargaining. Large and some medium-sized companies often have a multitude of internal structures. Most of these company-level structures are either dominated by trade unions, if trade unions are present, or just exist "formally", without having any real activity. However, there are exceptions, mainly in multinational subsidiaries and some large national companies with established information and consultation arrangements, representing all workers, leading to good results, together with well-developed collective bargaining at the company level.

The two trade union confederations opposed these co-participation arrangements, mainly because they feared intervention by employers in the representation system to neglect or eliminate trade unions at enterprise level. Bulgarian employers manifested contradictory attitudes ranging from strong support to overall acceptance of trade unions' positions at some organizations, from reluctant interest among small enterprises to absolute neglect.

Social partners evaluate the situation in the different enterprises and branches/sectors as follows. Some have a more advanced integration of information and consultation (in particular, multinational subsidiaries); others experience a duplication of functions, especially with trade unions and in some cases with elected workers' representatives according to article 7, paragraph 2 of the LC, who are often elected as an alternative to trade unions and whose role diminished

Academia's concerns

Different assessments have been published in the Bulgaria's labour law literature. They are related not only to the duplication of the roles of trade unions and elected representatives but also to the multitude of electoral categories. Professor Mrachkov believes that more varieties of representatives is positive. He emphasizes that the expansion foreseen in the LC, according to which a workers' general assembly may elect separate representatives for information and consultation and to decide on worker representatives' functions under article 7, paragraph 2, if this better, reflects the specific needs and protects to a sufficiently high degree the interests of the staff (Mrachkov 2017). However, there is also a critical attitude towards the system thus created, related to its complexity and ambiguity. There is no convincing answer as to why such complication is necessary. Professor Sredkova argues that the clearest solution would be to retain the representation under LC,

after the last revisions to the LC, except for enterprises with less than 50 employees. The effective functioning of information sharing and consultation in the system of industrial relations at the enterprise level depends not only on the will of the employer and the ability of trade unions to accept this and to limit their own functions but also on the initiative of elected representatives regardless of the way they were elected (by all employees/workers or the delegation of rights to trade union organizations)

Although Bulgaria's legislation complies to a great extent with the European standards of information and consultation, its implementation is still very limited. The reasons for this are gaps in the legislation, lack of information and interest among employees and workers, and envy on behalf of trade unions. The behaviour of the trade unions varies from aspiration for integration into the systems, via attempts to neglect the main requirements of the legislative arrangements, to total refusal to participate in those processes.

Enterprises with such systems in place have proved especially adept at solving economic problems. Nevertheless, mechanisms for better integration of information and consultation are hampered by the duplication of functions with those of trade unions. A solution requires initiative and resourcefulness on behalf of both elected representatives and trade union structures, an initiative that has been missing up till now. In some enterprises the systems function only formally due to a lack of initiative on behalf of the elected representatives and attempts by trade unions to freeze their activities.

article 7, paragraph 2 only – contradictory to the opinion of the trade unions (Sredkova 2014).

The presence of numerous overlapping representatives hinders rather than helps their work and also presents challenges for the employer. The mixture of their competences creates unnecessary strain and transfer of responsibility (Alexandrov 2009; Gevrenova 2009; Chochova n.d.).

In conclusion, it can be summarized that three categories of workers' representatives are regulated in the current labour legislation. Each category on its own grounds has the right to receive information from an employer and to participate in consultations with them. In some cases, information and consultations differ in content; in others, regardless of the fact that they are formally different, the data included in them and the actions of an employer are interdependent, while in others still the information and consultations relate to the same facts and actions of an employer. The law allows

information and consultation procedures to be carried out in a manner that circumvents and even contradicts requirements settled in imperative norms of the LC. This is the result of a mechanical adaptation of various EU directives on workers' representatives and their rights into Bulgaria's legislation.

Social partners so far have avoided directly addressing atypical forms of work, except through campaigns to combat the informal economy. In Bulgaria, there are no specific forms of representation for platform workers. However, some forms of emerging collective action are taking place within online forums in social media (Kirov and Yordanova 2022). The largest professional Facebook group for freelancers in Bulgaria, "Professional and Freelance Services", had 96,734 members in November 2021. It has been providing its members an arena for the discussion of different topics such as taxes, contracts, health and safety and working conditions, and how to tackle clients who do not meet their financial obligations. This Facebook group is relevant in the context of an otherwise representational void, as it illustrates an innovative experience of low-key collective action by atypical workers.

As yet no regulation for platform work has been drafted in Bulgaria. There is an understanding that platform work is usually additional work. It is assumed that most of them work as freelancers without labour contracts or as bogus self-employed. The trade unions assume that they have an interest in working in the informal economy and do not wish to pay social security contributions and taxes, thus losing their labour and social security rights. The platforms do not guarantee compliance with legal

rules, that is, workers are unprotected through the platform.

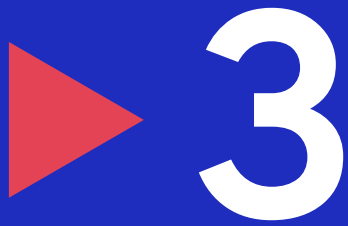
The perceived difference between self-employed workers and platform workers is that the former is looking for professional and career development as well as loyal clients, while the latter are interested in extra income, usually short-term in nature, and mostly during their spare time. However, in Bulgaria there are no organized forms of association for the self-employed.

Within trade unions there is a continuous debate about their possible role concerning platform workers. Most trade union activists still consider that their organizations should focus on workers with standard full-time employment relationships. For this perspective, atypical workers, including platform workers, should not be "eligible" for union representation and protection.

However, in this debate a second voice is warning that trade unions must adapt their views because Bulgaria's labour market is constantly transforming, and alternative employment can only increase.

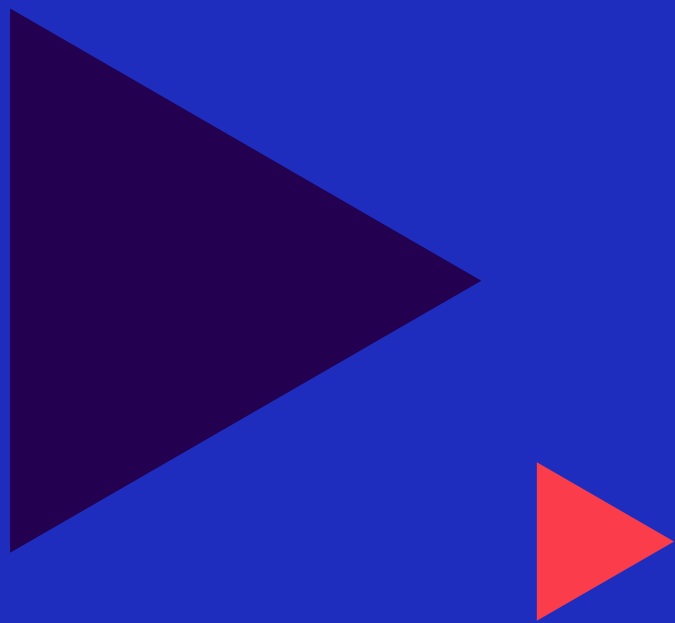
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The case of Bosnia and Herzegovina

by Mehmed Hadžić



► Introduction

Representatives of workers who participate in the protection of their socioeconomic interests and collective and individual rights usually belong to two widely recognized organizations – trade unions and works councils. A trade union is a professional organization of workers that protects the socioeconomic interests of its members. “The concept of a trade union also includes the association of trade unions (at lower levels of organization) into various forms of union organization at the national and international level – trade union federations (sectoral, branch, industrial union) and trade union confederations (so-called union headquarters at national or international levels)” (Lubarda 2013, 815). Employers also establish their associations through which they can more effectively protect their individual interests. The freedom of association has certain limitations aimed at preventing abuse by setting conditions that the trade union and employers’ association must meet in order to become representative, that is, authorized to engage in collective bargaining and to conclude collective agreements. Trade union rights and freedoms in Bosnia and Herzegovina (BiH) are mainly based on International Labour Organization (ILO) Conventions on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), and on the Right to Organise and Collective Bargaining, 1949 (No. 98), which are an integral part of the legal system of Bosnia and Herzegovina.⁶

The right to participation or workers’ participation in the management of a particular work environment represents an additional level of protection of the economic and social interests of workers. Unlike freedom of association, through which both workers and employers can protect their interests, the right to participation is exclusively tied to workers. Elected workers’ representatives represent all employees of a particular employer, regardless of trade union membership, and have powers and responsibilities beyond those that are considered purely trade union-related activities. Depending on the legal regime, participation is regulated by law, collective agreement or autonomous general acts of the employer.

In Bosnia and Herzegovina, the concept of workers’ participation has been regulated by law, which has an *erga omnes* effect. This is a much better solution than regulating participation through a collective agreement or an employer’s general act, as the latter do raise concern re. unitary interpretation and application of the concept.

The content of the legal solutions is largely determined by ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and Workers’ Representatives Convention, 1971 (No. 135), which are an integral part of the legal system of BiH.⁷ According to the latter, workers’ representatives are understood as: (a) trade union representatives and (b) representatives elected by workers in free elections at a given employer (Dedić and Gradašević-Sijerčić 2005, 123–124).

The main point of differentiation between trade unions and works councils as workers’ representatives is the trade union pluralism and the singular nature of works councils. Trade union pluralism means that, in accordance with trade union freedoms, multiple trade unions can be established within the same industry or with the same employer with the aim of protecting the economic and social interests of their members primarily, and then other workers. Unlike trade unions, works councils protect the economic and social interests and rights of all employees, but exclusively with one employer, regardless of whether those employees are members of a trade union or not. In addition, works councils are required to protect the interests and rights of even those workers who may not have voted for the establishment of the works council.

This report will analyse the position of trade unions and works councils as worker representatives in accordance with the national legislation of Bosnia and Herzegovina. Additionally, it will analyse the relationship between trade unions and works councils based on their powers and the possibilities of coordination in their work, as well as alternative action when coordination is not possible.

6 In force as of 2 June 1993.

7 In force as of 2 June 1993.

► 1. Normative framework for the activities of trade unions and works councils

After the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) and the signing of the Dayton Peace Agreement in 1995, labour legislation in Bosnia and Herzegovina was adopted according to its constitutional establishment. Specifically, labour legislation in Bosnia

and Herzegovina consists of the legislation adopted and applied in the Federation of Bosnia and Herzegovina (FBiH), Republika Srpska (RS), Brčko District of Bosnia and Herzegovina (BD BiH) and labour law applicable to BiH state institutions (Gradašević-Sijerčić 2005, 195).

1.1. Trade union rights and freedoms and the activities of trade unions

Trade union rights and freedoms laid down in the labour legislation of Bosnia and Herzegovina based on ILO Conventions No. 87 and 98 and are regulated by the Labour Law of the Federation of Bosnia and Herzegovina⁸ (LL FBiH), the Labour Law of Republika Srpska⁹ (LL RS), the Labour Law of Brčko District of Bosnia and Herzegovina (LL BD BiH)¹⁰, and the Labour Law in the Institutions of Bosnia and Herzegovina¹¹ (LL in the Institutions of BiH). These freedoms include:

The right of workers or employer to freely organize a trade union or employers' association of their choice,

The right to establish a trade union or employers' association without any prior approval,

The freedom of workers or employers to decide to join or leave a trade union or employers' association,

The right to non-discrimination based on membership or non-membership in a trade union or employers' association,

The right to protect the trade union or employers' association from mutual interference in establishing, functioning and managing the trade union or employers' association,

The lawful activities of a trade union or employers' association cannot be permanently or temporarily prohibited.¹²

Trade unions are established in accordance with the laws on associations and foundations of Bosnia and Herzegovina,¹³ the Federation of Bosnia and

Herzegovina,¹⁴ Republika Srpska¹⁵ and Brčko District of Bosnia and Herzegovina,¹⁶ and by registering with competent authorities,¹⁷ trade unions acquire the status of legal entities. According to these laws, a trade union can be founded by three or more individuals. A trade union represents the individual and collective interests of its members in the realization of their economic and social rights in relation to an employer as well as the competent public authorities. Also, trade union representatives can participate in the protection of individual and collective workers' rights. Labour laws introduce the obligation of employers to allow trade union representatives to work without hindrance, both technically, by providing adequate working conditions, and legally, by protecting trade union representatives from being placed in a disadvantageous position by an employer while performing their function, as well as for a certain period after performing their function.

In order to achieve certain collective workers' rights, trade unions in Bosnia and Herzegovina must fulfil an additional requirement, which is representativeness. The obligation to establish the status of representativeness has been introduced to prevent possible abuses, primarily in the conclusion of collective agreements by those trade unions that have a smaller number of members and who might not necessarily represent the will of the majority of workers with an individual employer or in a particular industry. The determination of the status of representativeness in the Federation of Bosnia and Herzegovina is regulated by a *lex specialis* regulation, the Law on the Representativeness of Trade

8 Official Gazette of FBiH, 26/2016, 89/2018 and 44/2022.

9 Official Gazette of RS, 1/2016, 66/2018, 91/2021 – Decision of the Constitutional Court of Republika Srpska, and 119/2021.

10 Official Gazette of BD BiH, 34/2019, 2/2021, 6/2021 and 15/2022.

11 Official Gazette of BiH, 26/2004, 7/2005, 48/2005, 60/2010, 32/13, 93/17 and 59/2022.

12 See provisions of Articles 14-17 of the LL FBiH, 209-212 of LL RS, 12-15 of LL BD BiH, 3-5 of LL in the Institutions of BiH.

13 Official Gazette of BiH, 32/2001, 42/2003, 63/2008, 76/2011 and 94/2016.

14 Official Gazette of FBiH, 45/2002.

15 Official Gazette of RS, 52/2001 and 42/2005.

16 Official Gazette of BD BiH, 41/2020 and 44/2022.

17 At the level of Bosnia and Herzegovina, in the Federation of Bosnia and Herzegovina, and in Republika Srpska, trade unions are registered in the register of associations and foundations maintained by the competent Ministry of Justice. In the Brčko District of Bosnia and Herzegovina, the trade union is registered in the register of associations maintained by the Basic Court of the Brčko District of Bosnia and Herzegovina.

Unions and Employers' Associations,¹⁸ and in Republika Srpska, Brčko District of BiH, and at the level of BiH institutions, by the respective labour laws.

In the territory of the Federation of Bosnia and Herzegovina, a trade union is deemed representative if (a) it is registered with the competent authority as prescribed by law at least 12 months prior to filing a request for the determination of representativeness, (b) it is primarily financed from membership fees and other own sources, (c) it meets the condition of having at least 20 per cent of members relative to the total number of employees in the Federation of Bosnia and Herzegovina, in at least five sectors or industries in accordance with the data of the statistics authority, that is, of another authority keeping appropriate records in BiH, that is, in the Federation of Bosnia and Herzegovina, and (d) it is active in at least three Cantons in the Federation of Bosnia and Herzegovina.¹⁹ In terms of a sector or industry, a trade union is deemed representative if: (a) it is registered with the competent authority as prescribed by law at least 12 months prior to filing a request for the determination of representativeness, (b) it is primarily financed from membership fees and other own sources, (c) it meets the condition of having at least 15 per cent of members relative to the total number of employees in the sector or industry in the territory of the Federation of Bosnia and Herzegovina, in accordance with the data provided by the statistics authority, that is, of another authority keeping appropriate records in BiH, that is, in the Federation of Bosnia and Herzegovina.²⁰ At the level of employer or company in the Federation of Bosnia and Herzegovina, for a trade union to be representative, in addition to meeting the conditions related to registration and financing mentioned above, it must have at least 20 per cent of the members in relation to the total number of employees of the employer.²¹

For a trade union to be representative in Republika Srpska and Brčko District of BiH, it must also be registered with the competent authority and predominantly financed by the membership fees of its members.

In terms of the number of members of a trade union in the Republika Srpska, for a trade union to be representative at the level of Republika Srpska, at least five per cent of the total number of employees in Republika Srpska must be members in at least three areas, regions and sectors, according to the data of the Republic Institute of Statistics. A trade union in which no less than ten per cent of the total employed in the area, region or sector

are members is considered a representative union in the area, region or sector. A representative union at the employer is considered any trade union in which no less than 20 per cent of the employees are members of the total number of employees of the employer.²²

In Brčko District of BiH, a trade union is considered representative for the territory of the District if it has at least 30 per cent of members in at least three sectors, in relation to the total number of employees in the District, according to the data of the Agency for Statistics of BiH. A trade union is considered representative in a field, area or branch if it has at least 10 per cent of the total number of employees in that field, area or branch. A trade union is considered representative for a specific employer or company if it has at least 20 per cent of the employees out of the total number of employees at that employer or company.²³

In the Federation of Bosnia and Herzegovina, Republika Srpska, and Brčko District of BiH, if no trade union at the level of the entity, sector or employer fulfils the membership requirement, the trade union with the largest number of members is considered representative. In terms of the number of trade union members, there is no distinction made between fixed-term or indefinite employment contracts with full-time or part-time working hours.

At the level of institutions in Bosnia and Herzegovina, a "representative trade union" refers to a trade union registered at the level of Bosnia and Herzegovina, or two or more trade unions that act together, whose membership represents a majority of employees of a single employer at the employer's headquarters.²⁴

The main powers of representative trade unions at all levels in Bosnia and Herzegovina, among others, are to participate in collective bargaining and conclude collective agreements, and to delegate their representatives to bipartite and tripartite bodies composed of representatives of government bodies, employers' associations and trade unions at all levels.

According to a ruling of the Constitutional Court of Republika Srpska from 2017, legal norms that introduce the representativeness of trade unions are not in conflict with the provisions of ILO Conventions No. 87 and 98 and the European Convention on Human Rights and Fundamental Freedoms, as the legal definition of representativeness criteria does not limit universal freedoms and rights to trade union organization established by these international acts.²⁵ Additionally,

18 *Official Gazette of FBiH*, 103/2021.

19 See provisions of article 5 (1) and article 9 of the Law on the Representativeness of Trade Unions and Employers' Associations.

20 See provisions of article 5 (1) and article 7 (1) of the Law on the Representativeness of Trade Unions and Employers' Associations.

21 See provisions of article 5 (1) and article 6 of the Law on the Representativeness of Trade Unions and Employers' Associations.

22 See provisions of articles 217-219 of LL RS.

23 See provisions of articles 138-139 of LL BD BH.

24 See provisions of article 92 of LL in the Institutions of BiH.

25 See the ruling of the Constitutional Court of Republika Srpska No. U-10/16 of 25 January 2017.

the representativeness of unions is not established *ex officio* by the competent public authorities or employers, but the interested trade union must prove

its representativeness in a legally regulated procedure in order to participate in collective bargaining.²⁶

1.2. Establishment and authorities of the works council

In Bosnia and Herzegovina, there is a legal form of regulating employee participation in decision-making within an employer's organization, according to the so-called German homogeneous model, under which "works councils represent all employees, regardless of whether they are members of a trade union or not, and trade unions do not have the right to directly determine the number of members of works councils" (Lubarda 2013, 1090).²⁷ The normative framework for establishing and operating works councils is found in labour laws as *lex generalis* regulations, as well as in the Law on Works Councils²⁸ in the Federation of Bosnia and Herzegovina (LWC FBiH), and the Law on Works Councils²⁹ in Republika Srpska (LWC RS) as *lex specialis* regulations. In the Brčko District of BiH, the Labour Law contains provisions that regulate the possibility of establishing a works council, but a *lex specialis* regulation that would regulate the way in which it is established, and its authorities, have not yet been enacted.

Employees at an employer in the Federation of Bosnia and Herzegovina who have at least 30 employees in employment, and at an employer in Republika Srpska who have at least 15 employees, have the right to form a works council and thus participate in decisions regarding their economic and social rights and interests. Employees in the armed forces, police, administrative bodies and administrative services do not have the right to form works councils.³⁰ Employees are not obligated to form a works council, but solely at their own discretion decide whether they want to form a works council and thereby provide themselves with an additional level of

protection of their rights. The proposal for the formation of a works council in the Federation of Bosnia and Herzegovina can be submitted by a representative trade union or at least 20 per cent of employees of the total number of employees at an employer. The proposal for the formation of a works council in Republika Srpska can be submitted by at least one-third of the total number of employees at the employer or the competent body of the trade union, which has at least 20 per cent of the total number of employees employed by an employer.³¹

The number of members of the works council in the Federation of Bosnia and Herzegovina is determined based on the number of employees at the employer, with the works council not having fewer than three and not more than nine members.³² In Republika Srpska, the number of members of the works council ranges from 5 to 15 depending on the number of employees at an employer.³³ If the employer has formed more organizational units outside the headquarters, multiple works councils can be formed, with the number of employees in the organizational unit being higher than 100 in Republika Srpska. In that case, the main works council is formed, consisting of representatives of works councils in organizational units. The procedure for the election and revocation of members of a works council in the Federation of Bosnia and Herzegovina and Republika Srpska is regulated in detail by laws on works councils.³⁴

Unlike trade unions, the works council does not have the status of a legal entity because it represents the interests of all employees solely in relation to the employer.

1.2.1. Rights and authorities of works councils

The works council has the authority to monitor the implementation of laws, collective agreements and other regulations that are important for the realization of workers' rights. In Republika Srpska, the works

council has the right to provide opinions and proposals to the employer on all issues that the council considers significant for the realization and protection of workers' rights. The works council also monitors whether the

26 See the ruling of the Constitutional Court of Republika Srpska No. U-42/10 of 20 April 2012.

27 In addition to the homogeneous model, there are also the so-called French tripartite model (members directly elected by employees, appointed members by trade unions and employers) and the Belgian bipartite model (equal numbers of representatives from employees and employers) (*Ibid.*).

28 *Official Gazette of FBiH*, 38/2004.

29 *Official Gazette of RS*, 26/2001.

30 See provisions of article 119 of LL FBiH, article 208 of LL RS, article 2 of LWC FBiH, article 2 LWC RS. In addition, the LWC RS explicitly states that nor do employees in the judiciary have the right to establish a works council.

31 See provisions of article 3 of LWC FBiH and LWC RS.

32 See provision of article 4 of LWC FBiH.

33 From 15 to 50 employees – five members; from 51 to 250 employees – seven members; from 251 to 500 employees – nine members; from 501 to 750 employees – 11 members; from 751 to 1,000 employees – 13 members; more than 1000 employees – 15 members. See provision of article 8 of LWC RS.

34 See provisions of articles 7–20 of LWC FBiH and provisions of articles 12–25 LWC RS.

employer pays social security contributions and, in that sense, has the right to access relevant documentation from an employer.

The obligations of the employer in the Federation of Bosnia and Herzegovina and Republika Srpska towards the works council regarding certain issues are to inform the works council, consult with the works council and seek prior approval from the council when making certain decisions.

The obligation of the employer to inform and consult with the works council in the Law on Works Councils of Republika Srpska is normed in a general manner. An employer is obliged to inform the council about the state of occupational safety and working conditions of workers, changes in wages and other issues of importance for the material and social position of workers. The obligation to consult is fulfilled by the employer by considering the opinions and proposals of the council, and if not accepted, the employer is obligated to inform the council promptly of the reasons for non-acceptance. The president of the council has the right to attend the meetings of the management board and other bodies of the employer, without the right to participate in decision-making.³⁵ Specificity in the context of informing Republika Srpska is an explicit legal obligation of the council president to inform workers in writing or verbally, through media or by other appropriate means, about the council's work and the status of the realization and protection of workers' rights. The council president may consult with workers on certain matters within the council's jurisdiction in order to adopt council positions on those matters.

In the Federation of Bosnia and Herzegovina, the employer's obligations to inform and consult with the works council are more precisely defined through legal provisions regarding when and in which matters the council is informed and consulted. The employer informs the works council at least every six months about issues affecting their interests in the employment relationship, especially concerning:

- the state and results of business operations,
- developmental plans and their impact on the economic and social position of employees,
- changes and fluctuations in wages,
- workplace safety and measures to improve working conditions,
- other issues important to the rights and interests of employees in the employment relationship.³⁶

Before making a decision significant to the rights and interests of employees (such as the adoption of work regulations, mass layoffs, employment plans, transfers and dismissals, health and safety protection, the introduction of new technologies and so on), an employer is required to consult with the works council regarding the intended decision. Within a period of seven calendar days, a works council can agree with the decision an employer intends to make, oppose it (provide comments and suggestions) or not express an opinion on the decision if no comments are deemed necessary. The employer is not bound by the opinions or proposals of the works council, but if they fail to consult, then their decision is void.³⁷

The third legal obligation of the employer towards the works council is to obtain prior consent from the works council when making certain decisions, thus introducing the obligation of joint decision-making between the employer and the works council. In Republika Srpska, the employer must obtain the consent of the works council if they intend to terminate the employment contract of the president of the works council. In the Federation of Bosnia and Herzegovina, the employer must obtain the consent of the works council if they intend to make a decision regarding:

- the dismissal of a member of the works council,
- the dismissal of an employee whose ability to work has changed or who is at risk of becoming disabled,
- the dismissal of a male employee over the age of 55 or a female employee over the age of 50,
- the collection, processing, use and disclosure of employee data to third parties.

If the works council does not respond in writing within eight days in Republika Srpska, or ten days in the Federation of Bosnia and Herzegovina, it is deemed that the employer's decision has been approved. If the works council refuses to give consent to the employer's decision, the dispute is referred to arbitration.³⁸ In the Federation of Bosnia and Herzegovina, the employer is not required to obtain prior consent if there is no works council or trade union in place at the time of the decision.³⁹

In the Federation of Bosnia and Herzegovina, a works council can also enter into written agreements with an employer to regulate certain employment issues that apply to all employees of the employer. These agreements cannot regulate issues such as salaries, working hours and other matters that are mandatory or regulated by a collective agreement unless the parties to

35 See provisions of article 29 and 30 (3) of LWC RS.

36 See provisions of article 22 LWC FBiH.

37 See provisions of articles 23–25 of LWC FBiH. For more, see Dedić and Gradašević-Sijerčić (2005, 124–125).

38 See provisions of article 191 of LL RS and article 26 of LWC FBiH.

39 See the ruling of the Supreme Court of the Federation of Bosnia and Herzegovina, No. 39 0 Rs 061888 21 Rev of 30 August 2022.

the collective agreement authorize the works council and employer to enter into an agreement on these matters.⁴⁰

Considering the legal solutions in the Federation of Bosnia and Herzegovina and Republika Srpska, it can be observed that there are differences in the scope of authority of the works council and the obligations of the employer towards the works council. This can

lead to serious problems in practice if an employer has organizational units in both entities. The question of discrimination in the work of councils in different entities arises, where the right to joint decision-making (requesting prior consent) will be recognized for one issue in one entity, but only the right to consultation for the same issue in another entity (Grubešić 2013, 757).⁴¹

2. The relationship between trade unions and works councils

The key question in relationships between trade unions and works councils is whether their parallel existence contributes to a better and more comprehensive protection of workers or represents an obstacle to more efficient protection of workers' rights. The answer to this question lies primarily in the position of trade unions and works councils in relation to employers. If there are several active trade unions in one employer, each trade union protects the rights of their own members first, and only then the rights of other workers. Unlike trade unions, works councils protect the interests of all workers of the employer. This does not mean that these two workers' organizations cannot coordinate and achieve synergy in protecting the interests of workers of a certain employer.

An analysis of legal solutions in the Federation of Bosnia and Herzegovina and Republika Srpska shows that a trade union represents an alternative to a works council in protecting the economic and social interests of workers and protecting their rights. In the Federation of Bosnia and Herzegovina, it is explicitly stated that if a works council is not formed at an employer, then the trade union has obligations and authorities that, based on the law, relate to the works council.⁴² Additionally, a trade union has the following powers in relation to a works council:

May propose the establishment of a works council.

Convenes a meeting of employees if a works council has not been established at the employer, at which all employees appoint an electoral commission and decide on the proposal for the establishment of a works council.

May propose a list of candidates for the election of members of the works council.

May request the exclusion of a member of the works council due to non-performance of duties and powers established by the Law on the Works Council or other laws.

As a party to the collective agreement, the trade union may authorize the works council and the employer to regulate certain employment-related issues by a written agreement, which cannot be regulated by the collective agreement, such as pay, working time duration and other issues that are mandatory regulated or regulated by the collective agreement.

The trade union, together with the works council, prepares a report on economic, social and other issues that are of interest to employees, as well as a report on the work of the works council.

The works council collaborates with the trade union to protect and promote the rights and interests of employees.

A member of the works council can also be a member of the trade union.

Representatives of the trade union may attend meetings of the works council, without the right to participate in decision-making (Hrle 2008, 10–11).

However, the works council is not an alternative to the trade union, because in a workplace where a works council has been formed but no trade union operates, whether representative or not, the works council cannot take over the role and responsibilities of the trade union. The Law on Works Councils of the Federation of Bosnia and Herzegovina explicitly states that a works council cannot participate in strike preparation, employee lockout or a collective labour dispute that could lead to a strike.⁴³ Although these provisions are not in the Law on Works Councils of Republika Srpska, it is clear that a works council can only exercise those powers determined by the law and is not authorized to take over the responsibilities of the trade union,⁴⁴ with the exception that in a workplace where a works council has been formed, the trade union is must seek the council's

40 See provision of article 27 of LWC FBiH.

41 According to the author, if the powers of works councils in both entities are considered, in relation to European standards, it can be concluded that domestic legislation meets the minimum standards provided for by Directive No. 2002/14/EC.

42 See provision of article 31 (3) of LWC FBiH.

43 See provision of article 29 of LWC FBiH.

44 This provision was also omitted from the preliminary draft of the Law on Works Council of the Federation of Bosnia and Herzegovina from November 2020.

opinion before deciding to go on strike.⁴⁵ However, this opinion of the council does not bind the trade union.

A works council, as an institutional form of employee participation at the employer, can protect economic and social interests and workers' rights only to the extent determined by the laws on works councils and only in relation to a specific employer. The works council does

not have any means to put pressure on the employer except in exceptional cases when the employer must seek prior approval of the council when making certain decisions. According to current legal regulations, the council primarily has the role of controlling the employer's work in those areas of its business that affect the economic and social status of workers.

► 3. Conclusion: Should works councils have greater powers in protecting workers' rights?

The relationship between trade unions and works councils is not competitive but coordinative, always keeping in mind the basic premise that the goal of both is to protect the socioeconomic interests of workers and their rights in relation to work. The relationship between trade unions and works councils is primarily determined by their position towards the employer, regulated by adopted international standards and national legislation. A trade union is obliged to protect the interests of its members in relation to the employer primarily as a social partner at the employer level, in certain activities or sectors, or at the national level. Accordingly, trade unions are authorized, subject to meeting representativeness requirements, to conclude collective agreements at different levels and to protect the socioeconomic interests of their members through the establishment of a binding normative framework. Additionally, only trade unions can organize a strike and call on workers to participate in a strike, thereby pressuring the employer to fulfil their demands.

Unlike trade unions, a works council, as an institutional form of participation, is established to exercise the right to participate in decision-making at an individual employer. A works council represents all workers of an individual employer in exercising the rights of information, consultation or co-decision. In order to protect the right to participation by labour legislation in Bosnia and Herzegovina, the possibility was left for a trade union to propose the establishment of a works council or to assume the competencies of a council when it is not formed. In that sense, based on the previous

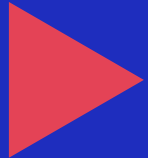
analysis, a trade union represents an alternative to the competencies of the works council in exercising the rights of workers' participation in decision-making.

The open question in relation to trade unions and works councils is whether the works councils should have greater powers to protect the individual and collective rights of workers. Would granting these powers to the works council weaken the acquired position of the trade union and lead to parallelism in the protection of workers' rights, potentially weakening the level of protection? The answer should be sought in the position of the trade union as an alternative to the competencies of the works council.

For those employers where a trade union operates, the works council should remain at the level of the body through which the institutional form of workers' participation is exercised. However, for those employers where a trade union is not established, or where a trade union branch does not operate, the works council should be given competencies by a trade union, primarily through the possibility of the works council being a party to collective bargaining and the possibility of the works council organizing and leading a strike. In this way, the gap in protecting the economic and social interests of workers would be filled for those employers where, for any reason, the right to trade union organization could not be realized. These competencies of a works council would be exercised exclusively at the level of an individual employer and would aim to protect the economic and social interests of all workers there.

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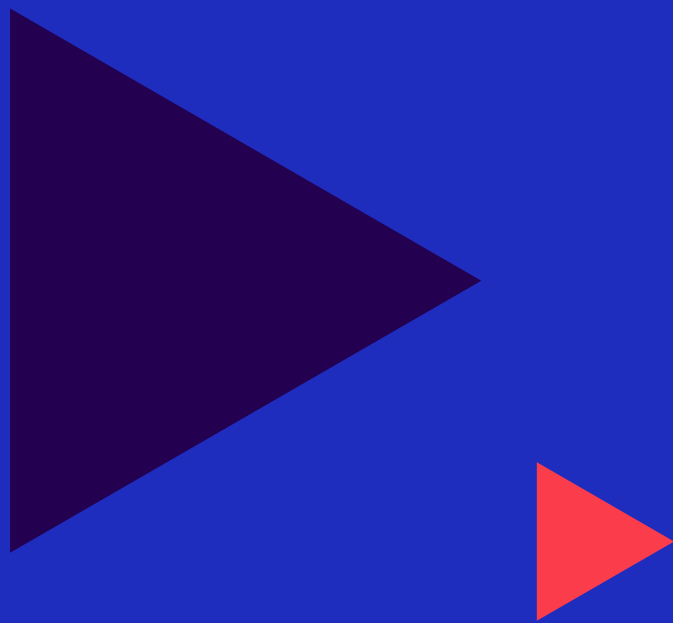
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4

The case of Greece

By Athina Malagardi



► The case of Greece

The right to organize, the right of workers to form and join workers' organizations of their own choosing and the right of employers to form and join employers' organizations enjoys fundamental rights status in international, European, and national labour laws. Freedom of association has been recognized by the International Labour Organization (ILO) – alongside the effective recognition of the right to collective bargaining – as a fundamental principle and right at work (ILO Declaration on Fundamental Principles and Rights at Work, 1998) (Dorssemont 2020). The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), as one of the 10 fundamental ILO Conventions, was ratified by Greece in 1962.

Greece's 1975 Constitution⁴⁶ democratized labour relations and extended and enlarged the existing list of fundamental rights. Trade union freedom and action are enshrined in the Greek Constitution.⁴⁷ Specifically, article 23 (I) of the Greek Constitution requires the State to take the necessary measures to safeguard trade union freedom and the unimpeded exercise of the rights associated therein against any prejudice to them within the meaning of the law. Thus, the Constitution establishes trade union freedom, placing at the same time the State under an obligation to take any steps necessary for its free exercise. Law 1264/1982 on the "Democratization of the trade union movement and the protection of workers' trade union freedoms" was adopted to establish several key trade unions⁴⁸ freedoms, such as protection and facilitation of trade union activities. The institutional framework on freedom of association was reinforced by another important legislative act, Law 1876/1990 on Free Collective Bargaining and Other Provisions, which was adopted unanimously by the political parties of the Greek Parliament and created the legal conditions for the development and expansion of collective bargaining

in Greece based on the clear precedence that it gave to collective agreements vis-à-vis legislative intervention.

According to article 1 of Law 1264/1982, trade unions are divided into three levels: primary, secondary and tertiary. At the topmost tertiary level lies the Greek General Confederation of Labour (GSEE) (Greek General Confederation of Labour 2007). Tertiary trade unions (confederations) are associations of federations. Secondary trade union organizations are federations and labour centres. Federations essentially constitute the main branch of the Greek Trade Union movement embodying a vertical trade union structure. A federation is an association of at least two unions covering (a) the same industry or similar industries (that is, sectors of economic activity or "sectoral federations") or (b) the same occupation or similar occupations ("professional federations"). Greece also hosts a federation of trade unions of public utility or general interest services corporations/companies. Labour centres are a component of secondary trade union organization that have a horizontal geographical structure. Labour centres are regionally based and normally follow the division of the country in prefectures (Yannakourou and Soumeli 2014). Every major regional town in Greece has a labour centre. A labour centre consists of at least two unions or a local union branch that have their headquarters in the same locality. Central labour centres, for example, in Athens and Thessaloniki, lead in the organization of further actions. The GSEE counts 154 secondary trade unions as members (81 labour centres and 73 federations), which in turn have a membership of around 2,000 primary trade unions throughout Greek territory.⁴⁹ **Primary trade unions** in Greece are autonomous and numerous, with over 2,000 in the country. The term encompasses sectoral trade unions, with regional or national coverage, professional and enterprise unions,

46 Available online: [Constitution of Greece](#).

47 For a full list of Greek trade unions, see <https://library.fes.de/fulltext/bueros/athen/00740003.htm#E9E4>.

48 Unions, as independent workers' organizations constituted for the purpose of furthering and defending the interests of workers, play a key role for better remuneration and working conditions. Union membership, union density and unions' bargaining power have a great impact on workers' conditions. The density in Greece in 2016 was 19 per cent. Available online: [ILO Data Explorer](#).

49 Available online: <https://gsee.gr/domi/>

including associations of persons – also considered first-level trade unions (see ILO 2011; ILO 2020, 57).⁵⁰

In the Greek labour relations system, workers under **private** contracts may join or are entitled to join primary-level trade unions that belong or may belong to the structure of the GSEE; workers employed under **public** contracts, for instance, civil servants, may join or are entitled to join primary-level trade unions that belong or may belong to the Civil Servants Confederation (ADEDY).

According to Law 1264/1982, trade unions' main objectives are the safeguard and promotion of labour, economic, insurance, social and trade union interests of workers. Trade unions are prohibited from engaging in gainful activity but may form non-profit consumer or

credit cooperatives, maintain premises and libraries, and provide training courses to their members. They may also set up special funds to serve certain extraordinary purposes for the cooperation and mutual assistance of their members. Trade unions, to achieve their objectives, shall be entitled, *inter alia*, to (i) report to administrative and other authorities on any matter concerning their purposes, members, labour and professional relations and interests of their members; (ii) report to administrative and judicial authorities' any violations of labour and insurance legislation and regulations or organizations that concern themselves or their members.

The General Confederation of Greek Workers (GSEE)

The GSEE (in Greek ΓΣΕΕ), established in 1918, is the major high-level tertiary trade union organization in Greece, representing all workers employed in Greek territory under private law, dependent on their employment relationship. At the national level, the Confederation represents, *vis-à-vis* government and employers, the bulk of workers in the private sector and the broader public sector (public utilities, banks and so on) through its affiliated members from 73 branch federations and 81 labour centres nationwide. The GSEE negotiates the conclusion of National General Collective Agreements (NCGAs with employer representative organizations⁵¹ and, according to the law, has the power to declare nationwide strikes as well as solidarity strikes. Following the establishment and development of bipartite and tripartite structures in Greece, the GSEE has an institutional right to appoint representative and to participate in a range of social policy institutions, dispute settlement bodies, committees and so on, with decision-making and advisory powers on labour-related matters. Organizing, raising membership levels, gender issues and further enhancing international work are

high on the agenda as are wider social issues such as education, health services, cost of living, environment, and consumers' rights. Its primary purpose is to defend the interests of all private sector workers in Greece. The GSEE is a member of both the European Trade Union Confederation (ETUC) and the International Trade Union Confederation (ITUC) and leads Greek representation of employees in ILO procedures. The GSEE's primary responsibility is to represent the country's labour force and to safeguard against economic and social consequences of economic instability and anti-labour measures, in addition to job protection and occupational safety and health. The GSEE embodies the unity of the trade union movement in Greece: many different ideological trade union groups are represented throughout the Confederation's membership. GSEE's confederal bodies are the national Congress, the General Council, the Administrative Board, the Executive Committee, the Presidium, the Audit Committee and the organizational or thematic Secretariats. At the European level, the GSEE is affiliated with the ETUC since 1976.⁵² At the international level, the confederation historically

50 ILO's "Policy Recommendations on Individual and Collective Labour Dispute Settlement Systems, and Facilities for Trade Union Officials and Members to Exercise their Rights" from 2020 stated: "The Office understands that Law 4024/2011 allowed so-called 'associations of persons' to conclude collective agreements in companies without a union. Under Law 4024/2011 these 'associations of persons' can sign firm level collective agreements, provided that 60% of the workforce belong to the 'association of persons'. The representativeness of the 'association of persons' in the negotiations for the conclusion of such agreements was seen as particularly problematic, especially in the context of SMEs that make up the majority of Greek companies. Ever since their introduction, 'associations of persons' have substantially undermined the role of trade unions at enterprise level, in particular, during the years of the economic crisis, and have become signatory parties to the majority of firm-level agreements from 2012 onwards, most of which resulted in wage cuts, at least in 2012." It is noted that the economic conditions and its new legislative framework especially under Law 4024/2011 (article 37), which allowed the capacity of signature of collective agreements in enterprises level except for its primary trade unions of L. 1264/1982 and by associations of persons, affected the collective negotiations. Meanwhile, already in 2011 the ILO High Level Mission on Greece stated that: "The High-Level Mission understands that associations of persons are not trade unions, nor are they regulated by any of the guarantees necessary for their independence. The High-Level Mission is deeply concerned that the conclusion of 'collective agreements' in such conditions would have a detrimental impact on collective bargaining and the capacity of the trade union movement to respond to the concerns of its members at all levels, on existing employers' organizations, and for that matter on any firm basis on which social dialogue may take place in the country in the future."

51 The employers' organizations negotiating and signing the national general collective agreement are the **Hellenic Federation of Enterprises (SEV)**, the **Association of Greek Tourism Enterprises (SETE)**, the **Hellenic Confederation of Professionals, Craftsmen & Merchants (GSEVEE)**, the **Hellenic Confederation of Commerce and Entrepreneurship (ESEE)** and the Federation of Industries of Greece (SVE).

52 Available online on the GSEE's website: <https://gsee.gr/domi/>

has been affiliated with the International Confederation of Free Trade Unions (ICFTU) since its founding in 1950 (except when its affiliation was interrupted by military dictatorship in Greece). The GSEE also is affiliated with ITUC since its founding Congress in 2006. Moreover, the GSEE is a member of the Trade Union Advisory Committee (TUAC) to the Organisation for Economic Co-operation and Development (OECD) and the EU Economic and Social Committee (EESC).

In the wake of the global financial crisis an economic austerity programme implemented in Greece had a profound impact on labour market institutions and practices. In the period between 2010 and 2018, the GSEE refuted the economic arguments used to

legitimise the austerity policy implemented in Greece; it argued that this policy has not in any way justified the overt and multiple interventions of the State in the enactment of workers' fundamental rights nor accounted for the failure of State to observe in practice its obligation to respect the international minimum standards of work that are binding for Greece. On these grounds, the GSEE sought recourse in the national courts and submitted complaints and observations to European and international monitoring bodies. International monitoring bodies, in their rulings and recommendations, have recognised repeatedly the continuous violation of international norms that protect a significant number of human rights, including labour and trade union rights.

The Civils Servants Confederation (ADEDY)

The ADEDY was established in May 1926 as the Civil Servants' Confederation, and it is affiliated with the ETUC. ADEDY is a tertiary trade union organization of

civil servants and public sector workers in Greece and has made a significant contribution to the development of the trade union movement.⁵³

The development and structure of works councils in Greece

In Greece ILO Convention 135 was ratified by Law 1767/1988 on Works Councils and Other Labour Provisions – Ratification of International Labour Convention 135" (*Official Gazette A' 63*), as amended and in force by Law 2224/1994 (*Official Gazette A' 112*). For protection, provision of facilities and method of electing the members of works councils, the provisions of Law 1264/1982 for the Democratization of the Trade Union Movement and the Securing of Trade Union Freedoms of Workers (*Official Gazette A' 79*) are used.

According to Law 1767/1988, employees at an enterprise employing at least 50 people have the right to elect and form a work council for their representation in the company. The works council can exist alongside primary level unions. If there is no trade union in the company, enterprises with 20 employees or more can form a works council. In accordance with article 3 of ILO Workers' Representatives Convention, 1971 (No. 135), elected representatives, namely, who are freely elected by the workers of the undertaking, are considered workers' representatives. Works councils consist of: (a) 3 members in enterprises with up to 300 employees, (b) 5 members in enterprises employing between 301 and 1,000 employees, and (c) 7 members in enterprises employing more than 1,001 employees. For the calculation of the number of members of the boards,

the number of employees in the enterprise at the time of the elections is considered (Pappas 2014).

Greece has a substantial share of micro and small enterprises. Micro enterprises with 1-9 employees represent 96 per cent of all enterprises, employing 55 per cent of the labour force (compared with less than 30 per cent in the EU-28). Greece also has the highest percentage of self-employed people in the EU28 at a rate of more than 32 per cent (14 per cent in the EU-28) (ILO 2016). In that context the role and presence of the works council are limited. Additionally, the Greek legislature has prioritized the action of trade unions in enterprises, and for this reason workers councils were not developed, and their role remained auxiliary. Their position is clearly less powerful than that of a union and they have not been widely set up, other than in larger companies. They are found only in a few companies (only 126 Works Councils existed in 2005 and just under 2 per cent of Greek undertakings covered by the regulation have established a works council so far) (Carley, Baradel and Welz 2005).⁵⁴ Where they exist, they work closely with the local or company union, and then there is little chance of a works council (see Ioannou 2019, 124; Koutroukis and Jecchinis n.d.).

Article 4 of Law 1767/1988 provides that the elections for the nomination of the members of the works council are held every two years with direct and anonymous voting (with the electoral system provided for in article 12 of

53 Available online on ADEDY's website: <https://adedy.gr/omospondies/>. Forty-five federations took part in the 32nd Congress of ADEDY in November 2004. The number of voting natural members amounted to 290,070 individuals, and 771 delegates took part. ADEDY reported it had some 253,564 voting members at its congress in November 2016.

54 Their figures show that Germany leads with 113,000 works councils, followed by France (30,000).

Law 1264/1982). Every employee who has completed two months in the company has the right to vote for works council and to be elected to these positions (except for those appointed for educational purposes). Article 5 stipulates that the elections are conducted by electoral committees elected by the General Assembly of workers and consisting of three members. Also, the electoral commissions ensure the conduct of the elections, count the votes, and announce the winners. In addition, they keep minutes of the elections and communicate the result of the elections to the union or unions of the enterprise, to the employees, to the employer and to the corresponding secondary trade union organization.

The General Assembly consists of all the employees in the company. The regular general meetings of the workers are convened every six months by the works council, and they elect their presidium consisting of at least three members. The invitation to the general assembly contains the items on the agenda and is communicated to the employer, the management board of the relevant trade unions and the employees at least ten working days in advance. During the general assembly, representatives and works council review their work. The first general assembly determine the nature and responsibilities of the divisional general assemblies.

Participation of trade unions and elected workers' representatives

The ILO Labour Administration Convention, 1978 (No. 150), establishes that the member states that have ratified this convention – like Greece – shall make arrangements within the labour administration system to secure the consultation, cooperation and negotiation between public authorities and the most representative organizations of employers and workers.⁵⁵ Additionally, ILO Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), also ratified by Greece, states that each member of the ILO that ratifies this Convention undertakes to operate procedures that ensure effective consultations, with respect to the matters concerning the activities of the ILO set out in Article 5, paragraph 1 of Convention No. 144 between representatives of government, employers and workers.⁵⁶ The social actors' respective voices thus should be heard when new labour laws and employment policies are discussed or when employment programs at the national, regional, or local level are evaluated or reformed (ILO 2017). Additionally, regulatory provisions on worker participation are contained in article 19 of the ILO Convention C-155. Article 12 of the ILO Recommendation R 164 describes additional specific rights and possibilities for employees and their representatives with respect to worker participation.

For national social dialogue, the actors are the national social partners signing the NGCA (GSEE, SEV, ESSEE, GSEVEE, SETE, SVE). The most representative trade union of workers under dependent employment contracts is the GSEE. Social participation and social control are also endorsed and sought as a state obligation by the ratification of (i) fundamental ILO Conventions, such as Conventions Nos. 29, 87, 98, 100, 111 and 187; (ii) governance conventions, such as Conventions Nos.

81, 122 and 144; and (iii) technical conventions, such as Conventions Nos. 102, 142, 150, 154, 156, 160 and 190.

Fiscal austerity programs in Cyprus, Greece, Ireland, and Portugal have led to a measurable deficit of tripartite social dialogue. Greece has delivered very negative results regarding **tripartite social dialogue** in comparison to other countries (GSEE et al. 2015).⁵⁷ Additionally, the COVID-19 pandemic did not lead to a revitalization of the social dialogue (Kousta 2021; Molina 2022). No less than **24 national tripartite social dialogue structures** exist, some covering broad socio-economic fields, others covering specific subjects. Most of them are, however, inactive. The Economic and Social Committee (OKE) was established by Law 2232/1994 as a national institution for social dialogue for the consultation of economic and social policies between government and social partners. The Committee is unique in that it is independent from the government; thus, it is **not** tripartite in the strictest of terms. Nonetheless, the powerful opinion of OKE is mandatory before any final adoption of a measure or a decision by the government in the fields of labour relations, social security issues, investments, tax measures, competition, growth, exports, consumer protection and general social and economic policy. OKE can likewise express its opinion on other matters. OKE consists of representatives from 26 organizations grouped in three areas: entrepreneurs and employers; workers in the private and the public sector; other productive systems and social groups (farmers, consumers, local authorities, large families, people with disabilities, among others). Thus, OKE – although not a tripartite body as such since only employers and workers are represented – is a central institution for social dialogue because of its role in hosting institutionalized consultations between government and social partners

55 See Article 5 of [ILO Labour Administration Convention, 1978 \(No. 150\)](#).

56 See [Convention C144 - Tripartite Consultation \(International Labour Standards\) Convention, 1976 \(No. 144\)](#).

57 The GSEE policy paper specifies that tripartite bodies under the Ministry of Labour, though they could play a more essential role, have presented significant weaknesses in fields such as the decision-making process, the absence of assessment based on international principles and standards of international organizations (such as the ILO), the absence of preparatory consultations, the lack of a confidentiality clause on the subjects discussed, the lack of a monitoring mechanism for the application of decisions, the absence of providing feedback to the participants as far as the adoption of suggested proposals is concerned and the absence of regular evaluation of their work.

at the stages of drafting or prior to passing legislation, or before major policy decisions are taken. Since 2021, the GSEE has not participated in the OKE due to a dispute over the selection of its president.⁵⁸

GSEE participates in a number of tripartite committees that convene weekly including: the National Social Dialogue Committee; the National Employment Committee; the National Commission on Social Protection; the Supreme Labour Council, which has a further division focusing on the implementation of the "Roadmap on Tackling Undeclared Work" which was established by Law 4468/2017 (ILO 2016); the Council of Social Security; the Social Inspection Council (SKEEE) of Labour Inspection; and the Council for the Health and Safety of Workers (OSH).

Representatives of works councils in Greece can participate at their respective enterprise's Health and Safety Committee as participation is also foreseen through Occupational Safety and Health (OSH) legislation (Georgiadou 2013). According to laws 1767/1988⁵⁹ and 2294/1994, a work council decides in conjunction with the employer on preparation of a company "Occupational Health and Safety regulation". In addition to this, they co-decide on the reintegration into the workplace of persons with disabilities due to any previous work accidents in the company.

Furthermore, **bipartite social dialogue** in Greece has played two main roles: first, complementing tripartite social dialogue by varying the geometry in social dialogue processes, and second, acting as a mechanism to manage the labour market and industrial relations. These roles were essential during the COVID-19 crisis in dealing with the implementation of companies' safety and health regulations. It should be noted that two important institutions in the field of collective bargaining and OSH issues are autonomous and governed by Greek national social partners: (i) the Organization for Mediation and Arbitration (OMED),⁵⁹ its purpose being to support free collective bargaining between workers' organizations and employers or individual employers by providing mediation and arbitration services and (ii) the Hellenic Institute for Occupational Health and Safety (ELINYAE).⁶⁰ Through its activities and initiatives in the fields of research, information, consultation support and training, ELINYAE supports employees and enterprises in their efforts to provide safe and healthy working environments, and it is the main institution for the collection and dissemination of OSH knowledge in Greece. These two examples are a good social dialogue practice where social partners, despite disagreement and often in an adverse climate, have cooperated successfully and proved to be effective in setting up durable, operative, and efficient institutions.

Workers' representatives in collective bargaining

Collective bargaining – a process of social dialogue

The Greek legislature has prioritized the action of trade unions in the enterprises, and for this reason the powers of the works council are limited (Koukiadis 2008). In the absence of a trade union organization in the company or non-regulation by collective agreement, the works council has the following rights:

The **right to co-decision** with the employer or with their representative, on issues that primarily concern the quality of their work within the company.

It does not concern issues that are already regulated by law or collective labour agreement. In any case, if the works council secures a regulation more favourable

to employees than the existing ones, then it prevails (principle of favourability).

The list of issues that can be decided jointly by a works council and employer are as follows:

1. Introduction to internal regulation.
2. Establishment of health and safety regulations.
3. Preparation of informative programs when they are adopted in the enterprise, new methods of organization, as well as for the use of new technologies.
4. Staff training through continuous training or further training, especially when the company adopts new technologies.
5. Use of audio-visual media, in the context of work, and the effective protection of employees' personal data.
6. Reintegration of employees who, after a company work accident, became disabled. In these cases,

58 Available online: [Decision of Counsel of State 990/2021](#).

59 Available online: [Welcome to OMEA](#).

60 Available online: See: [About | ΕΛΙΝΥΑΕ \(elinyae.gr\)](#).

consultation takes place between the works council and the employer to find a sustainable solution through the placement of these workers in jobs that are suitable for them.

7. The realization of cultural, entertainment, social events and so forth for company employees.
8. Programming of regular leaves.

In the case of an agreement between the parties, on the above matters, it shall be drawn up in writing and shall have regulatory effect upon its signature.

For all the above matters, a written agreement is drawn up, which is valid from its filing with the competent department of the Ministry of Labour and has regulatory force. The agreement is posted on the works council notice board. In the event of a dispute between the employer and the works council regarding the regulation of the above issues, the dispute shall be resolved through the process of mediation and referral to arbitration, in accordance with articles 15 and 16 of Law 1876/1990 (*Official Gazette 27 A*). The above responsibilities are exercised by the works council, since the company does not have a trade union organization, and these issues are not regulated by a Collective Labour Agreement.

B. Submission of proposals concerning measures to improve working conditions. Also, works council can propose ways to improve the company's productivity.

C. Timely information by the employer or his representative on a number of issues determined by law, namely:

- Any change in the legal status of the enterprise.
- For the cases of total or partial transfer of ownership, expansion or contraction of its facilities, company or a specific part of it.

Introduction of new technological methods and techniques in the enterprise.

For any changes in the personnel structure, which will either result in a reduction or an increase of the number of employees of the company. The council is also aware of the cases of the number of employees being placed on availability or on a rotating basis.

The annual investment planning for the company's health and safety measures.

In addition, an employer is obliged to provide the works council of their enterprise with any information relevant to the matters for which the law defines the possibility of co-decision (see above).

In any case agreements between employers and works councils do not bind trade unions to seek more

favourable arrangements for workers under collective agreements (article 8, paragraph 2 of Law 1767/1988).

The role played by trade unions and employers' organizations in collective bargaining comprise shaping the regulatory environment and its policies, coordination of bargaining processes, the provision of relevant services for their members and the negotiation of collective agreements. They are central actors in the international normative framework that gives effect to the fundamental principles and rights at work, including freedom of association and the effective recognition of the right to collective bargaining. Given their importance in the governance of work, their representativeness is essential to the effectiveness of organized interest representation in collective bargaining and to the legitimacy of its outcomes (ILO 2022). Following years of fiscal adjustment programs and austerity measures, plus two years of emergency policies to manage the COVID-19 pandemic, collective bargaining appears to be heading towards normality (ILO 2021a). New efforts are now being made to build a "better normal".

In Greece, pay and working conditions are agreed upon by the contracting parties' respective trade unions and employers' organizations of the sector/occupation, or the employer alone in the field of enterprise, and are set after direct negotiations between them, by signing the relevant Collective Agreements (CAs). In case the negotiations fail, the parties may have recourse to OMED for mediation and/or arbitration services. In case an arbitration award is issued, this is equal to and has the same effect as the CAs (Law 1876/1990, article 15, §6c). The subject of the bargaining, and therefore content of each Collective Agreement, according to article 2 of Law 1876/1990, is *inter alia* the minimum wage amount, the various allowances and the working hours for each sector or enterprise or workers' specialty respectively. The bargaining limit is set by the relevant time provisions in force regarding minimum wage and salary, that is, the remuneration threshold that can be agreed between employers and workers.

In Greece the role of trade unions in collective bargaining – including legal conditions, outcomes, and the right to strike – is active and crucial. Trade unions and employers' organizations regulate their own interrelations. The main expression of collective autonomy is the right to free collective bargaining enshrined in the Greek Constitution.⁶¹ Furthermore, according to Law 1876/1990 concerning free collective bargaining and other provisions, the role of the representatives of workers in collective bargaining is active. According to article 4 of Law 1876/1990, *trade unions of workers and employers and individual employers shall have the right and obligation to negotiate for the purpose of drawing up a collective agreement*. The party exercising the right to negotiate shall notify the other party in writing

61 Available online: [Constitution of Greece](#).

about the locale and the matters under negotiation. The persons authorised to negotiate shall be notified in the same document. The other party must enter negotiations within 10 working days of notification and appoint its representatives. This period shall be limited to 24 hours in the case of matters which, by their nature, require immediate action. *The appointment of trade union representatives for negotiation is made by decision of their Board of Directors unless statutes provide otherwise.* Negotiations shall be conducted in good faith with the intention of settling a collective dispute, and the parties in question shall explain the grounds for each proposal or counterproposal. The workers shall be entitled to comprehensive and precise information from the employers as well as any other information likely to facilitate negotiations on the issues under consideration; this shall apply to financial information and economic and personnel policies of the enterprise concerned. The state authorities, for their part, shall supply all the necessary information regarding national economic developments, employment in various sectors of the economy and prices and wages. The trade unions representing the workers of a given enterprise, sector or occupation shall

be entitled to take part in negotiations that concern them. They shall be bound by any collective agreement drawn up at the outcome of such negotiations in so far as they are cosignatories to the agreement. Official minutes of the negotiations shall be recorded and signed by the representatives of the parties concerned.

A collective agreement, as a substantive outcome, may cover matters such as: (1) the establishment, terms of application and duration of such individual employment contracts as come within its field of application; (2) exercise of trade union rights in the undertaking, provision of facilities to union officials, procedures for the deduction at source of trade union dues and the transfer of the latter to the appropriate organizations; (3) social security – excluding those relating to pensions – in so far as the provisions of the agreement on such matters do not contravene constitutional provisions or the policies of state social insurance institutions⁶²; (4) implementation of enterprise management policy, in so far as such policy directly affects industrial relations; (5) interpretation of the clauses contained in the collective agreement; (6) tackling violence and harassment in the workplace and so on.

Collective agreements in Greece

As regards the types of collective agreements and competence to conclude them as amended by [article 53, chapter A of Law 4635/2019](#), collective agreements shall be distinguished by five types: (a) **national general**, which concerns employees throughout the country, signed by GSEE and employers organizations (SEV, SETE, ESSE, GSEVEE, SVE); (b) **sectoral** that concerns the employees of more than one similar or related enterprises of a city, region or the whole country; (c) **enterprise agreements** which concern the employees of a holding or enterprise; (d) **national occupational agreements** concerning the employees of a certain profession and of the specialties related to that profession throughout the country; (e) **local occupational agreements** which concern employees of a certain profession or of the related specialties of a specific city or region.

NGCAs shall be concluded by high-level, tertiary workers' organizations (GSEE) recognized as the broadest representative on a Pan-Hellenic scale and employers' organizations like SEV, SETE, GSEVEE, ESEE and SVE. The national social partners generally have negotiated and signed the NGCA. However, Law 4093/2012 changed

this institutional process because it established a State-defined process of minimum wage definition and took away the capacity of the social partners to define the minimum wage of all workers, irrespective of their membership in a trade union organization. This change was a severe setback for social dialogue and collective bargaining in Greece since the collective bargaining system was based on national level bargaining and the NGCA did not only establish minimum wage but also working conditions and workers' rights. The NGCA of 2010–2012 was the last version to include a definition of the minimum wage in Greece (Georgiadou 2013; European Trade Union Institute 2020).

Sectoral agreements shall be concluded by primary- or secondary-level trade unions covering workers, irrespective of their occupation or specialization, of similar or related undertakings in the same sector and by employers' organizations.

Enterprise collective agreements shall be concluded, in order of priority, by trade unions of the undertaking covering its workers or, in the absence of a trade union in the undertaking, by an association of persons

62 Pension matters that cannot be the subject of collective labour agreements are meant to include the modification, either directly or indirectly, of the employers/employee contribution ratio, the transfer of the burden, either in whole or in part of regular contributions or contributions for recognition of previous insurance periods, as well as the establishment of special funds or accounts, financed by the employer, granting periodic pensions benefits or lump-sum benefits.

⁶³irrespective of the category, position or qualification of the workers in the undertaking and, where these are lacking, by the respective sectoral organizations at first instance and by the employer. If there is more than one trade union within the enterprise and all of them consequently have the competence to form collective agreements, in practice, only one of them has the ability of form collective agreements. According to article 6, paragraph 1 of Law 1876/90 that ability is attributed to that trade union which is the most representative. Mostly representative is that trade union which has a majority of members, according to the number of paid members who voted in the last elections for the formation of the management.

National co-occupational collective agreements shall be concluded on the part of workers by secondary or primary-level co-occupational trade unions of a Pan-Hellenic scale. From the employers' point of view, national occupational collective agreements are concluded by employers' organizations with a wider representation or nationwide scope. **Local co-occupational collective agreements** shall be concluded by co-occupational trade unions of workers, whether primary or secondary, of a local nature and by employers' organizations. **National and local co-occupational and sectoral collective agreements** may lay down specific conditions or may even exclude workers employed, for instance, by social enterprises, non-profit legal persons or enterprises facing serious economic stress like insolvency, legal challenges, or restructuring. By decision of the Minister of Labour and Social Affairs, after consulting the Supreme Labour Council, the criteria for exempt enterprises must be specified; exempt collective agreements and any relevant matter shall be determined for the application

of this provision and the adoption of measures to protect existing jobs, specific to any business.

It is noted that the **"most favourable arrangement"** clause was introduced by Law 1876 in 1990, and it established that if there was a conflict between the collective bargaining agreements, then the one with the most favourable conditions for workers would prevail (ILO 2014, 152). This principle was changed in 2010, with Law 3845/2010 which allowed for lower-level agreements could derogate specific provisions in higher-level agreements, thus enterprise-level collective bargaining agreements could differ from the sectoral agreements; this regulation was reinstated at the end of the Economic Adjustment Program on 20 August 2018. Also **the mechanism of the extension** of sectoral collective agreements was suspended by [article 37, paragraph 6 of Law 4024/2011](#), from 27 October 2011, for as long as the Medium-term Fiscal Strategy Framework (2012–2015) was in force. This provision was replaced by article 5, paragraph 2 of Law 4475/2017, according to which the suspension of the application of the provisions of Law 1876/1990 on the declaration of a collective agreements as generally mandatory was valid until the end of the Economic Adjustment Program, that is, until 20 August 2018. Consequently, as of 21 August 2018, the mechanism for the extension of sectoral employment contracts was reinstated through their declaration as mandatory to cover those employees who are not union members and those who work in companies that are not employers' unions members. By decision of the Minister of Labour – issued after the opinion of the Supreme Labour Council (ASE) – a collective agreement, which already binds employers who employ at least 51 per cent of the sector's employees, can be extended and declared

63 The association of persons is established by at least three-fifths of the employees in the company, regardless of the total number of employees in it and without its duration being subject to a time limit. If, after the formation of an association of persons, the condition of the participation of three-fifths of the employees in the company, which is required for its formation, ceases to be met, it is dissolved, without any other wording. In No. 819/50/16-1-2012 Interpretive Circular of the Ministry of Labour Regulations on Collective Bargaining' of Law 4024/2011, the following remarks were made: "The association of persons as established by the provisions of Law 4024/2011, differs in relation to the association of persons of No. 1 of Law 1264/1982, firstly because it has an indefinite duration and secondly because it has the right conclusion of an operational collective labour agreement. It is clarified that in every company, if there is no other trade union organization (association), a single association of persons may be formed and for the formation it is required to draw up a founding act by at least three-fifths of the employees in the company."

On the association of persons, see ILO Policy Recommendations on Individual and Collective Labour Dispute Settlement Systems, and Facilities for Trade Union Officials and Members to Exercise their Rights from 2020, which stated: "The Office understands that Law 4024/2011 allowed so-called 'associations of persons' to conclude collective agreements in companies without a union. Under Law 4024/2011 these 'associations of persons can sign firm level collective agreements, provided that 60% of the workforce belong to the 'association of persons'. The representativeness of the 'association of persons' in the negotiations for the conclusion of such agreements was seen as particularly problematic, especially in the context of SMEs that make up the majority of Greek companies. Ever since their introduction, 'associations of persons' have substantially undermined the role of trade unions at the enterprise level, in particular, during the years of the economic crisis, and have become signatory parties to the majority of firm-level agreements from 2012 onwards, most of which resulted in wage cuts, at least in 2012."

It is noted that the economic conditions and its new legislative framework especially under Law 4024/2011 (article 37), which allowed the capacity of signature of collective agreements in enterprises level except for its primary trade unions of Law 1264/1982 and by associations of persons, affected collective negotiations. Meanwhile, already in 2011 the ILO High-Level Mission on Greece stated that: "The High-Level Mission understands that associations of persons are not trade unions, nor are they regulated by any of the guarantees necessary for their independence. The High-Level Mission is deeply concerned that the conclusion of 'collective agreements' in such conditions would have a detrimental impact on collective bargaining and the capacity of the trade union movement to respond to the concerns of its members at all levels, on existing employers' organizations, and for that matter on any firm basis on which social dialogue may take place in the country in the future."

as generally mandatory for all employees of the sector. Until 2011, the coverage – or not – of 51 per cent of the employees of a sector was certified by the individual declaration of each employer. The new regulations now stipulate that the employers' organization that has signed the sectoral agreement itself will declare who and how many are its members to determine whether 51 per cent of employees are covered. The procedure followed for verifying the coverage – or not – of 51 per cent of all employees in the sector is detailed in the [Circular of the Ministry of Labour 32921/2175/13-6-2018](#). Finally, the extension and declaration of the collective agreement as generally mandatory for all employees of the sector is valid from the date of publication of the decision of the Minister of Labour in the domestic *Gazette*, while under the previous regulations the extension was valid from

the date of submission of the relevant application to the Ministry of Labour. The impact of the above changes on wages and the architecture of collective bargaining during the economic adjustment programmes was strong (Ioannou and Papadimitriou 2013).

According to ILOSTAT data, the **coverage by collective agreements** fell sharply from 83 per cent in 2009 to 42 per cent in 2013, to 15 per cent in 2014, to 16.7 per cent in 2015, 17.8 per cent in 2016, 18.7 per cent in 2017 and 25.8 per cent in 2018 before COVID-19 pandemic.⁶⁴ The main drivers for this fall were the abolition of the extension mechanism and the favourability principle which upended the hierarchy of norms described above.

The following table could show the signature of the collective agreements in Greece since 1990 until 2022.

Table 1. Collective agreements in Greece since 1992

Collective agreements in Greece since 1992															
	National General Collective agreements		Co-occupational				Sectoral National and Regional		Enterprise Collective Agreements		TOTAL			%	
	CA	AD	National		Regional		CA	AD	CA	AD	CA	AD	CA + AD	CA	AD
			CA	AD	CA	AD									
Under Law 1876/1990															
1992			28	12	14	5	66	8	63	7	171	32	203	84.2	15.8
1993	1		50	11	26	2	98	15	105	2	280	30	310	90.3	9.7
1994	1		44	14	26	2	99	17	117	4	287	37	324	88.6	11.4
1995	1		41	14	25	4	64	13	108	2	239	33	272	87.9	12.1
1996	1		46	16	20	6	76	18	242	3	385	43	428	90	10.1
1997			44	14	25	8	69	96	143	4	281	52	333	84.4	15.6
1998	1		51	13	16	10	87	28	137	7	292	58	350	83.4	16.6
1999			23	20	18	9	70	19	115	3	228	51	279	81.7	18.3
2000	1		54	15	22	4	98	17	122	6	297	42	339	87.6	12.4
2001			34	12	24	1	60	22	146	5	263	40	303	86.8	13.2
2002	2		43	19	32	6	96	20	175	11	348	56	404	86.1	13.8
2003			28	25	26	8	52	26	168	5	274	64	338	81.1	18.9
2004	1		37	16	43	4	101	22	216	10	398	52	450	88.4	11.6
2005			37	18	24	8	84	15	234	20	379	61	440	86.2	13.8
2006	1		42	17	34	6	100	24	224	7	401	54	455	88.1	11.9
2007			23	14	20	3	73	19	202	7	318	43	361	88.1	11.9
2008	1		43	17	27	2	117	25	215	15	403	59	462	87.2	12.8
2009			15	11	12	5	47	30	215	12	289	58	347	83.3	16.7
2010	1		33	8	14	6	31	21	227	11	306	46	352	86.9	13.1
Under Law 1876/1996 as amended by Law 3899/2010															
2011			15	5	7	1	23	12	170	9	215	27	242	88.9	11.1
Under the Law 1876/1990 as amended by Act of Ministerial Council 6/2012															
2012			4	1	6		19	7	975		1,004	8	1,012	99.2	0.8
2013	1		4	-	10		9		409		433		433	100	0.0
Under Law 4304/2014															
2014	1		3		5		10	2	286		305	2	307	99.3	0.7
2015	1		5		7		6	11	263	1	282	12	294	95.9	4.1
2016	1		2	3	6		7	7	318	4	334	14	348	96	4
2017	1		4	1	6		10	2	244	2	265	5	270	98.1	1.9
2018	1		6		9	1	15	11	300	1	331	13	344	96.2	3.7
2019			5		4		10	5	193		212	5	217	97.7	2.3
2020	1		1	2	3	1	7	6	159	3	171	12	183	93.5	6.5
2021	1		5		6		12	4	179		203	4	07	98	2
2022	1		4		6		20				219	250		100	

Source: OMED 2022.

Ability to conclude collective labour agreements.

Article 6 of Law 1876/1990 regulates the ability to conclude collective labour agreements and the legalization of representatives. The following parties shall have the capacity to conclude collective agreements: (a) trade unions of employees and employers of all levels in the field of their activity, as well as associations of persons under the terms and conditions of paragraph 5 of Article 3 of the L.1876/1990 (where is described the written procedure of the agreement and where it should be submitted), if they are entered in the respective registers. Specific to the NGCA, the most representative tertiary trade union organization has the capacity to conclude a collective agreement. For all the other types of collective agreements referred to in article 3 L.1876/1990 as described above (the sectoral, the enterprise, the national co- occupational and local co- occupational collective agreement), the most representative trade union organization on the part of workers within the scope of the collective agreement have the capacity to conclude a collective agreement. (b) Any employer for the employees she/he employs in her/his business.

The criterion for the **representativeness** of trade unions shall be the number of workers who voted in the last elections for management. The criterion of representativeness of the employers' organization is

the number of employees who are associated with an employment contract with members of the organization or their members up to a natural person, a sole proprietorship, or a company, as they result from the General Register of Employers' Organisations (GEMHOE). The capacity, competence and/or representativeness to conclude a collective agreement, as well as the existence and legal nature or character of a trade union or employers' organization, may be challenged by bringing an action before the Single-Member Court of First Instance of the defendant's seat or domicile. The workers' union, the individual employer and the employers' organization have a legitimate interest in filing such an action.

According to the new legal framework of articles 83 and 96 of Law 4808/2021, all trade unions, associations of persons and employers' organizations, and in particular those which conclude collective agreements and/or appoint their representatives in the administrations of the bodies supervised by the Ministry of Labour and Social Affairs, as well as in its collective bodies, are obliged to register in the public registries of Trade Unions of Employees⁶⁵ and Employers' Organizations respectively kept in the ERGANI information system of the Ministry of Labour and Social Affairs.⁶⁶

Application of collective agreements to workers

According to article 8 of Law 1876/1990, the NGCA lay down minimum non-wage working conditions applicable to workers throughout the country. These workers include employees with an employment relationship under private law in the public sector, legal entities governed by public law and local authorities. In accordance with the above article, as amended and in force today, Labour Collective Agreements and Arbitration Awards, having the same effect (article 16 of Law 1876/1990), are binding upon workers and employers

who are in dispute or are members of contracting trade unions of the sector or occupation, within their local, occupational and temporal scope, unless these are declared universally binding, by decision of the Minister of Labour and Social Affairs, in conformity with the provisions of paragraph 2 of article 11 of Law 1876/1990 as in force. In the cases where the employer is bound by an enterprise-level labour collective agreement, its regulatory terms govern all workers of the enterprise (article 8, paragraph 3 of Law 1876/1990), and if the

⁶⁵ With new **Law 4808/2021, the Ministry of Labour and Social Affairs establishes a General Register of Trade Unions of Employees (GEMHSOE)**, in which the following data are kept: (a) statutes of the trade union and any amendments thereof, as well as any act of dissolution thereof, (b) number of members of the trade union who took part in elections for management, (c) composition of its governing bodies and the relevant (c) minutes/reports, (d) seat of the trade union and contact details and (e) its financial statements where there are state or co-financed sources of funding in the organization itself or in its affiliated entities. By decision of the Minister of Labour and Social Affairs, it is regulated any matter relating to the creation of the Register of Trade Unions of Employees and Employers' Organizations, the publication of its data and any necessary technical details as well as the provision of information in relation to the data of the register and the observance of the protection of personal data, in particular in relation to the representativeness of trade unions and employers' organizations as amended by [article 96 of Law 4808/2021](#).

⁶⁶ According to article 83 of Law 4808/2021, it is stated *inter alia* that if a trade union organization does not register with GEMHSOE or does not file in it the elements of paragraph 4 or does not keep them up-to-date, then, for as long as the omission lasts and until it is remedied, **the following rights of the trade union organization and its executives are specifically suspended, which, either to be exercised or to control their exercise**, they require the restoration of the specific omission, namely: a) Until any omission related to the elements of paragraph (a), (b) and (c) of paragraph 4 is remedied, the right of the trade union organization to negotiate collectively and draw up collective labour agreements, in accordance with article 6 of Law 1876/1990, the protection of trade union executives against dismissal and transfer, in accordance with article 14, with the exception of the per (b) and (c) of paragraph 5, and the rights of the trade union organization and its executives, in accordance with articles 16 and 17. Especially for the protection of trade union executives, it is suspended after ten (10) days have passed: (aa) from the elections and (ab) from the formation of the Board of Directors in a body and since it has not been submitted to GEMHSOE, either the election record, which also shows the order of election of the elected, or the constitution decision. (b) Until any omission related to the elements of paragraph (d) of paragraph 4 is remedied, any financing of the trade union organization or an entity connected to it from state or co-financed resources is suspended and not paid. Concerning this new regulation, the Labour Centre of Athens appealed at the Council of State, and according to the Court Decision the provisions of the law on the creation of the general register for trade unions are unconstitutional and contrary to the ECHR as presented in the next section.

employment relationship is regulated by more than one labour collective agreements in force, the provisions on concurrent implementation shall apply (article 10 of Law 1876/1990). The terms of individual employment contracts which derogate from the regulatory terms of labour collective agreements are more prevalent if they provide greater protection to workers (article 7, paragraph 2 of Law 1876/1990) (Ministry of Labour and Social Affairs n.d.).

The terms of the national general collective agreement shall be codified, under the responsibility of the signatory parties, within fifteen (15) days of its signature. If this deadline expires without action, they are codified by a decision of the Plenary Session of the Supreme Labour Council within (15) days from the expiration of the above deadline and are subject to the same formalities. Collective agreements and arbitration decisions must

contain a codification of all their terms in force, including both those first agreed with the collective arrangement in question and those which may remain in force, failing which only the codified provisions shall apply as added by [article 97 of Law 4808/2021](#). According to article 14 of Law 1876/1990, if collective bargaining fails, then the parties concerned shall have the right to request mediation services or to resort to arbitration. The terms for the use of mediation and arbitration and the whole procedure shall be determined by the conclusion of relevant clauses in collective agreements or, in the absence of such clauses, by mutual agreement of the negotiating parties. In the absence of such agreements the mediator provides a proposal to the parties to be approved or not by them. Mediation and arbitration services in general and those provided by OMED mediators and arbitrators are based on the principles of good faith, objectivity, and impartiality.

Right to strike in Greece

If social dialogue fails, one available measure is the recourse to strike. In Greece lockouts are explicitly prohibited. Industrial action is perhaps the most high-profile aspect of social dialogue, at least in terms of media coverage, public impact, and attention. At the same time, in certain circumstances, the absence of strike action could indicate the non-use of the right to strike and/or weak social dialogue. **The right to strike is a constitutional right in Greece.** Article 23 of the Constitution stipulates that: "The State shall adopt due measures safeguarding the freedom to unionise and the unhindered exercise of related rights against any infringement thereon within the limits of the law" and "Strike constitutes a right to be exercised by lawfully established trade unions to protect the financial and general labour interests of working people." From the wording of the Constitution, it is evident that particular attention is given to striking as a means of promoting the rights of working people. Pursuant to article 20 of Law

1264/1982, "striking is a workers' right for the protection and advancement of their financial, labour, trade union and insurance interests and as an expression of solidarity for these purposes." Article 19 of Law 1264/1982 and the Greek courts have established detailed rules about the proportionality of strikes. **Additionally, according to article 29 of Law 1264/1982**, striking is a workers' right exercised by trade unions: (a) as a means of safeguarding and promoting the economic, labour, trade union and insurance interests of workers and as a manifestation of solidarity for the same purposes and (b) as a manifestation of solidarity between workers of undertakings or holdings dependent on multinational companies and workers in undertakings or holdings or at the headquarters of the same multinational company since the outcome of the latter's strike will have a direct impact on the economic or labour interests of the former. A strike in case (b) is declared only by the most representative tertiary trade union.

Mandatory trade union agreement

Strikes may be called by primary trade unions only by a decision of the general assembly of their members, which may authorise the **administrative board** to authorise the decision in terms of the strike commencement, its nature, the addition of new demands, and so on. However, for brief, non-repeated stoppages of a few hours, a decision of the primary union's board of directors is sufficient. The same applies to primary, secondary, and tertiary trade unions covering broader regions or nationally. In

terms of an enterprise whose staff is non-unionised, the decision may be taken by the region's labour centre. A solidarity strike with employees of another enterprise of the same multinational company is only called by a GSEE.

It is noted that in Greece, only trade unions have the right to declare a strike. The works councils cannot declare a strike in Greece.

Notice to the employer

To exercise the right to strike, including short-term work stoppages, an employer or their trade union must be notified at least 24 hours before it takes place. The notice is in writing, served by a bailiff to the employer or

employers concerned and includes the day and time of the start and duration of the strike, its form, the demands of the strike and the reasons for them as amended by [article 91 of Law 4808/2021](#).

Security and safety personnel availability

For a strike to be lawful, the trade union organization which calls a strike must ensure that emergency staff remains available in sufficient numbers to guarantee the safety of the plant and equipment and prevent disasters or accidents for the duration of the strike. Regarding the security and minimum guaranteed service personnel during the strike, the trade union organization is obliged to have the necessary staff for the safety of the company's premises and the prevention of disasters and accidents (security personnel). A minimum number of services from organizations, enterprises, and holdings, that provide public utilities, in addition to security personnel, must be available to meet the basic needs of society during the strike period as described in Law 4808/2021. These minimum needs are defined as at least one-third of the service normally provided. This last change in the law to establish a one-third service threshold was criticized heavily by the GSEE, claiming that the right to strike is invalidated since the imposed

limitations and conditions prevent its exercise, in terms of effectiveness protected by article 23, paragraph 2 of the Constitution (GSEE 2021).

Furthermore, a strike may be considered unlawful based on whether the objectives pursued are unlawful and on the principle of proportionality which allows judges to decide each time whether the benefit anticipated by the strikers is greater than the financial loss to the employer. There is a considerable volume of case law according to which strikes are declared unlawful based on the principle of proportionality. In 2011 alone, 445 strikes and work stoppages were recorded, including many national strikes (ILO 2014, 151). Also, protests and strikes in the public sector by teachers, public transport workers and others became common. In 2013, Greece was among the four EU member states with the highest levels of social unrest (Yannakourou 2015).

Works councils

As stated earlier, the operation of works councils is participatory and advisory, and the powers of the works councils are limited compared to those of trade unions. Their position is clearly less powerful than that of the Union and they have not been widely set up, other than in larger companies. The functioning of the councils does not negate the purpose, means, and rights of the trade unions and it aims to improve working conditions in line with the development of the enterprise. Agreements between employers and works councils do not bind trade unions to seek more favourable arrangements for workers by means of collective agreements.

In the absence of a trade union organization in the company or non-regulation by collective agreement, the works council has the **right to co-decision** with the employer or with his representative, on issues that primarily concern the quality of their work within the company. It does not concern issues that are already regulated by law or collective labour agreement. In any case, however, if the works council secures a regulation more favourable to the employees than the existing ones, then this, as more favourable to the employees, prevails (principle of favourability). The list of eight issues that can be jointly decided by a works council and an employer have been presented earlier and are exercised by a works council, since a company does not

have a trade union organization, and these issues are not regulated by a Collective Labour Agreement. In case of disagreement between an employer and the works council for the settlement of the above, the dispute is resolved through the mediation procedure and referral to arbitration, in accordance with articles 15 and 16 of Law 1876/1990.

Additionally, the works councils have the **right to submit proposals** concerning measures to improve working conditions and terms. Also, the works councils' study and propose ways to improve the productivity of all factors of production and nominate the members of the Health and Safety Committee from among their members.

Furthermore, they have the **right to timely information from an employer** (article 13 of Law 1767/1988) or their representative on a number of issues determined by law, namely, any change in the legal status of the enterprise in the cases of total or partial transfer, expansion or limitation of its facilities, company or its parts, the introduction of new technology, any changes in personnel which will impact the number of employees of the company (layoffs or hiring). A council also should be aware of the cases of the number of employees being placed on availability or on a rotating basis, the annual investment planning for the company's health and safety measures. In addition, an employer is obliged to provide

a works council with any requested information and will be relevant to the matters for which the law defines the possibility of co-decision (see above).

A works council has the right to be informed about the planning of any overtime work, a company's general financial performance and production planning, the balance sheet, and accounts. An employer is not obliged to inform the works councils about matters classified as business confidential issues by the applicable legislation, such as banking, legal secrecy, matters of national importance or patents. Also, the members of the works council have an obligation not to communicate to third parties, without the employer's consent, information that refers to confidential matters related to its competitiveness. Finally, members of the works councils and the employer decide together about the timing of each joint meeting and what information that can be communicated to third parties. Regarding the obligation for consultation (article 14 of Law 1767/1988), if there is no trade union in the company, works councils consult with an employer about managing collective redundancies.

The Greek legislature has prioritized the action of trade unions in enterprises and for this reason workers councils developed insufficiently, and their role has remained auxiliary, their position clearly less powerful than that of a union and they have not been widely set up, other than in larger companies. They are found only in a few companies (only 126 Works Councils existed in 2005 and only some two per cent of Greek undertakings covered by the regulation have established a works council so far) (see Carley, Baradel and Welz 2005).⁶⁷ Where they exist, they work closely with the local or company union; if there is no union then there is little chance of a works council (see Ioannou 2019, 124; Koutroukis and Jecchinis n.d.).

Agreements between employers and works councils do not bind trade unions to seek more favourable arrangements for workers under collective agreements (article 8, paragraph 2 of Law 1767/1988). The works council cooperate with the trade union organization of

the enterprise and inform it about the matters of their competence. This cooperation is defined by the general assembly at regular intervals. With the same procedure, cooperation with the corresponding secondary and tertiary trade union organizations can be determined. The administrative board of the company's trade union organization can call the works council to an informative meeting on serious matters.⁶⁸

Article 12 of Law 1767/1988 amended by Law 2224/1994, explicitly and clearly described the relation of the works councils with the trade unions. The operation of the works councils is participative and consultative and aims to improve the working conditions of workers in step with company development. The operation of these councils does not at any point negate the purpose, means and rights of the trade unions, which with their actions, in accordance with articles 22 and 23 of the Constitution and Law 1264/1982, preserve and promote the labour, economic, insurance, social and union interests of employees (Kardaras 2006).⁶⁹

The members of the works councils shall enjoy the protection afforded to the management of the trade unions by the provisions of paragraphs 5, 9 and 10 of article 14 and article 15 of Law 1264/1982 regarding the possibility of and procedure for termination of their employment contracts and their transfer. Those who resign for any reason before the end of their term of office are excluded. Employers, persons acting on their behalf or any third party shall be prohibited from engaging in acts or omissions intended to impede the exercise of employees' rights under this law and in particular: (a) influence workers by means of threats of dismissal or other means of preventing the exercise of the rights conferred by this law, (b) support the candidacy of employees by financial or other means and (c) intervene in any way in the work of the general meetings of the employees of the undertaking. The status and activities of the members of the boards exercised under this law cannot constitute grounds for their unfavourable treatment by the employer.

67 Their figures show that Germany leads with 113,000 works councils, followed by France (30,000). Greece has the least.

68 Koutroukis and Jecchinis write:

[...] but, in fact, only a moderate number of works councils were established by 1990. The Ministry of Labour reported in 1989 that 189 works councils have been formed in the period 1988–89, and the GSEE estimates that, by the end of 1993 there were at least 300 works councils operating in the major industrial cities. The SEV expressed the view that works councils will not work with the structure of Greek companies, which are generally small in terms of employee members, but also because of the sectional structure of the trade union movement which devolves considerable power to local trade union officials and representatives (O'Kelly 1991). In practice and despite the legislative establishment of company level employee participation) Law 1767/1988 was unable to activate participative processes in the economy's private sector. Indeed, according to research conducted by the Labour Ministry in the mid-1990s only 126 works councils were recorded across the entire territory of Greece, while 2,290 domestic enterprises employed 50 workers or more and 4,151 employed 20–49 workers. Consequently, the same research concluded that works councils had been established in roughly 5.5 per cent of enterprises with 50 or more employees and in roughly 2 per cent of enterprises with 20–49 employees (Gatis 1998). Moreover, participating institutions have not been developed at all in small enterprises employing less than 20 workers which constitute the majority of workplaces in Greece

69 See Kardaras, presenting at the 17th International Congress of Comparative Law, who suggests that although Law 1767/1988 about works councils in Greece has been underused, the negotiation at the enterprise in two levels is necessary and not superfluous. Because trade unions are more combative about their demands they may strike. On the other hand, the Works Council are peaceful by law, and they aim not only to satisfy the promotion and protection of the interests of the employees but also the good of the enterprise, as stated in article 12, paragraph 1 of Law 1767/1988.

Recent changes in law and practice

Recent changes brought about by the adoption of Law 4808/2021 have introduced new regulations concerning

the organization, action, and operation of legally constituted trade unions.

Trade union registration

One of the most important changes to the current legal framework has been the registration of trade unions in GEMHSOE. Athens's Labour Centre and a first-level union acted and appealed this legal change at the Council of State due to concern about the protection of employees'

fundamental rights guaranteed by the Constitution and widespread processing of personal data in violation of the rules and guarantees of General Data Regulation. Additionally, GSEE has recourse to the Hellenic Data Protection Authority regarding the issue.⁷⁰

Protection of trade union action

For the members of the works' councils, the legislation spells out a protection regime similar to the one provided for trade unions by Law 1264/1982 (paragraphs 5, 9 and 10 of article 14 and article 15) which are being implemented *mutatis mutandis*. Thus, the following recent changes cover works councils in Greece:

Regarding trade union freedoms and rights (see article 14 of Law 1264/1982, as amended by [article 88 of Law 4808/2021](#)), the State shall be obliged to implement the measures necessary to ensure the unimpeded exercise of the right to the establishment and autonomous operation of trade unions. Employers, persons acting on their behalf and any third party shall be prohibited from engaging in any act or omission intended to impede the exercise of workers' trade union rights, and in particular: (a) exert influence on workers, whether or not to establish a trade union; (b) impose or prevent in any way or by any means the membership of workers in a particular trade union; (c) require workers to declare their participation in, non-participation in or withdrawal from a trade union; (d) support a trade union by financial or other means; (e) intervene in any way in the administration, operation and action of trade unions; and (f) treat workers favourably or unfavourably due to their union

membership status. Employers may not join a trade union. The termination of the employment relationship for lawful trade union action shall be null and void for: (a) the members of the management of the trade union, in accordance with article 92 of the Civil Code; (b) the members of the provisional department, in accordance with article 79 of the Civil Code, management of a trade union appointed by the court, in accordance with article 69 of the Civil Code; or (c) members of the management provisionally elected at the time of the establishment of a trade union. The prohibition shall apply during their term of office and one year after its expiry. The above protection shall be granted to the following extent: (a) if the organization has up to 200 members, five members of the management are protected, (b) if the organization has up to 1,000 members, seven members of the management are protected, (c) if the organization has more than 1,000 members, nine members of the administration are protected, as amended by [article 88 of Law 4808/2021](#). By the new abovementioned regulation by the L.4808/2021, it is being decreased, compared to the past regulation, the number of protected members of the management from seven to five, from nine to seven and from eleven to nine, accordingly.⁷¹

Committee for the Protection of Trade Union Executives

For the members of the works' councils, the legislation creates a protection regime similar to the one provided for trade unions by Law 1264/1982 (paragraphs 5, 9 and 10 of article 14 and article 15) which are being implemented *mutatis mutandis*. Thus, the following recent changes cover the works councils in Greece:

Regarding article 15 of Law 1264/1982 on the Committee for the Protection of Trade Union Executives, as repealed by article 101 of Law 4808/2021, for the existence of one of the grounds referred to in article 14, paragraph 10, before the termination of the employment relationship, a committee shall decide by majority vote, the decision of

which shall be subject to appeal and which shall consist of: (a) the president of the court of first instance of the district in which the employee performs his work, if at least two presidents are serving in the court of first instance, or otherwise a judge of first instance appointed by the president in the order referred to in article 11 (3); (b) by a representative of the chamber of commerce and industry of the region, and if there is no chamber of commerce of the association, and when a case involving an industrial employee is heard, the industrialists' association, where one exists, shall nominate one of its representatives to sit on the committee instead of

70 Available online: <https://gsee.gr/tag/ge-mi-s-o-e/>.

71 See GSEE's position on this change at: See GSEE's positions against this article and the draft Law 4808/2021: [Οι θέσεις της ΓΣΕΕ για το εργασιακό νομοσχέδιο - Γ.Σ.Ε.Ε. \(gsee.gr\)](#)

the representative of the chamber; (c) by an employee representative nominated by the most representative tertiary organization as repealed by article 101 of Law 4808/2021. The Committee's repeal of article 15 of Law 1264/1982 was criticized by GSEE as a measure to destroy the protection of protected trade unionists since its existence expedites a relatively rapid settlement of the

issue of the assistance of the grounds for dismissal of trade unionists; the GSEE added that the referral of the issue of the dismissal of the protected trade unionist exclusively to the courts without preceding the judgment of the Committee will cut out a dismissed trade unionist from their job as well as trade union action, combined with a sclerotic pace of justice (GSEE 2021).

Elected workers' representatives as a collective voice on digital platforms.

Digital labour platforms have created unprecedented opportunities for workers, businesses, and society by unleashing rapid innovation on a global scale. At the same time, they pose serious threats to decent work and fair competition. It is widely accepted that the COVID-19 pandemic has accelerated changes that were already under way, both in society and at work. These include the expanded use of digital platforms and related technological innovations like cloud computing and the use of big data and algorithms. Many businesses have relied on digital labour platforms to keep operating, reach new markets, and reduce costs. But there are challenges. This new business model allows platforms to organize work without having to invest in capital assets or to hire employees. Instead, they mediate between the workers who perform the tasks and clients and manage the entire work process with algorithms. Workers on digital labour platforms often struggle to find sufficient well-paid work to earn a decent income, creating a danger of working poverty. Many do not have access to social protection, particularly during a pandemic. They are frequently unable to engage in collective bargaining that would allow them to have these, and other issues addressed (ILO 2021b).

In Greece, "digital platforms" are undertakings that act either directly or as intermediaries, and through an online platform connect service providers, businesses or third parties with users or customers or consumers and facilitate transactions among them or transact directly with them. Article 70 of the recently adopted Law 4808/2021 stipulates that, especially for digital platforms, employees with independent service/work contracts *are entitled to form unions, declare a strike, negotiate collectively, and draw up collective labour agreements*. According to articles 69 and 70 of Law 4808/2021, digital platforms shall be linked to service providers by employment contracts or independent service or work contracts (Eurofound 2021). A contract between a digital platform and a service provider **shall be presumed not to be an employment contract** if the service provider

is entitled, under its contract, cumulatively: (a) to use subcontractors or substitutes to provide the services it has undertaken to offer (this condition is fulfilled even if the digital platform requires the subcontractors and substitutes of the service provider to have undergone training, wear a uniform, comply with health and safety conditions, have undergone appropriate health examinations and generally comply with the general conditions for the provision of services, health, and safety applicable to service providers, contractually linked to that platform); (b) to select the various projects that the digital platform proposes to undertake or to unilaterally set the maximum number of such projects that it will undertake each time, which may be altered, provided that it is always determined unilaterally by the service provider; (c) to provide its independent services to any third party or to perform works for any third party, including competitors of the digital platform; (d) to determine the time of provision of its services, within given timeframes, adapting it to its personal needs and not based on the interests of the digital platform. The trade unions and the GSEE criticized this new regulation which introduces a **negative presumption of non-existence of dependent work**, since service providers are entitled, based on their contract, to use subcontractors or substitutes, to provide their own independent services to any third party, to determine the time of providing their services themselves, and so on. Trade unions and the GSEE added that the regulation is problematic given that the correct legal characterization of legal relationships is judged *ad hoc*, in this particular case, based on the characteristics that, in practice, constitute the physiognomy of legal relationships. The need to protect this category of workers requires the establishment of a presumption in favour of their dependent work (see GSEE 2021; Travlos-Tzanetatos 2023).

It is noted that due to very recent legislation, there are no available reliable data on works council or trade unions action on this issue so far.

► Conclusion

Greece has a significant share of micro and small enterprises. Micro enterprises with 1 to 9 employees represent 96 per cent of all enterprises, employing 55 per cent of the labour force (compared with less than 30 per cent in the EU-28). Greece also has the highest percentage of self-employed people in the EU-28 at a rate of more than 32 per cent (14 per cent in the EU-28). According to Law 1767/1988, employees at an enterprise employing at least 50 people have the right to elect and form a works council for their representation in the company. The works council can exist alongside the primary level unions. If there is no trade union in the company, enterprises with 20 employees or more can form a works council. In that context the role and presence of works councils are limited, and Greece's total number of works councils is among the lowest in the EU (Carley, Baradel and Welz 2005).

The Greek legislature has prioritized the action of trade unions in the enterprises, and for this reason works councils were not developed in Greece and their role remained auxiliary and marginal. Their position is clearly less powerful than that of unions, and they have not been widely set up, other than in larger companies. The powers of works councils are legislated explicitly in case of the presence and/or absence of a trade union organization in the enterprise, giving the first word to the trade unions. Greek legislation explicitly describes the relation of works councils with trade unions. The

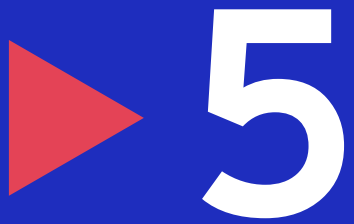
operation of the works councils is participative and consultative and aims to improve the working conditions of the workers in relation to the development of the company. The operation of these councils does not at any point negate the purpose, means and rights of the trade unions, which, with their action in accordance with articles 22 and 23 of the Constitution and Law 1264/1982, preserve and promote the labour, economic, insurance, social and union interests of employees. Agreements between employers and works councils do not bind trade unions to seek more favourable arrangements for workers under collective agreements. Works councils cooperate with the trade union organization of the enterprise and inform it about the matters of their competence.

Trade unions in Greece are central actors in the governance of work, the protection of labour rights and promoting the labour, economic, insurance and social interests of workers. Following the fiscal adjustment programs and austerity measures implemented in Greece from 2010 to 2018 and recent emergency policies to manage the challenges presented by the COVID-19 pandemic, many issues such as collective bargaining seem to be heading towards normality. New challenges are part of the road to recovery, building a "better normal", and the role of trade unions and works councils could be critical and important to ensure a recovery.

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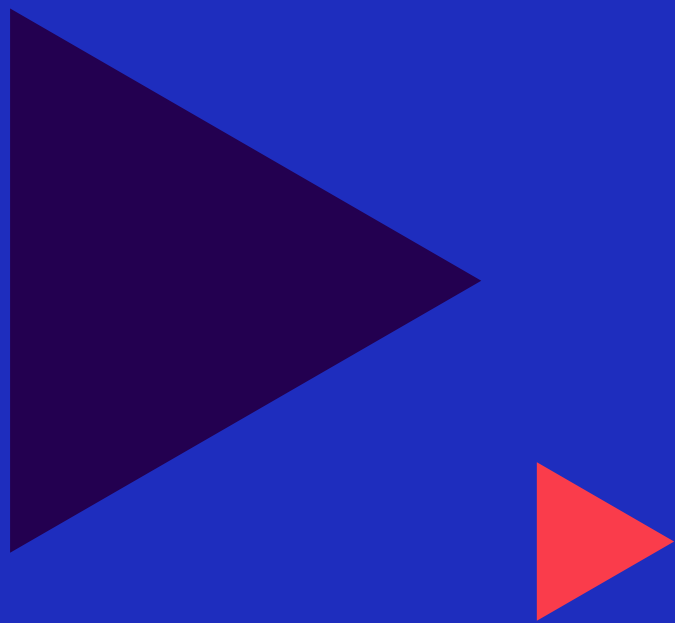
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The case of Hungary

By Attila Kun



► 1. Workers' representation via elected representatives in Hungary

Hungary's new Labour Code (Act I of 2012) (HLC), among others, re-regulated the legal position of trade unions and slightly increased – and restructured – the role of works councils (and shifted some trade union rights to works councils). In general, the re-regulation of the legal position of trade unions and works councils has not brought about a meaningful revitalization of workers' representation (or industrial relations) and has caused quite a few uncertainties and tensions.

Hungary has developed a dual channel workplace representation scheme, with parallel works councils and unions at the company level (as a "faint" copy of the German model) since 1992. In other words, workplace representation in Hungary is provided both by local trade unions (tasked with collective bargaining) and

by elected works councils (tasked with information sharing and consultation – hereinafter: I & C), with the balance between the two varying over time. According to some commentators, the "hidden agenda of the 2012 Labour Code was to curb unions' workplace influence" (Neumann, Berki and Edelenyi 2014, 435). Meanwhile, the strengthening of the other channel – that is, elected representatives – has also been mostly superficial. Figures from Eurofound's 2019 European Company Survey show that slightly over 10 per cent of establishments in Hungary have some form of official employee representation. This may be either through the union or through the works council. Hungary's figure is far away from the EU27 average of 29 per cent (Eurofound and Cedefop 2020, 111; Fulton 2021).

1.1. Worsening legal position of trade unions?

The HLC provided for the following important modifications to trade union (and their representatives') rights:

The new rules reduce labour law protection available to trade union representatives for carrying out their functions in enterprises. The former rules granted protection (most importantly against dismissal) to each and every trade union representative without numerical limits, while the new rules restrict the number of protected officials (from one to five officials, depending on workplace size,⁷² plus one further representative who is nominated by the highest body of the trade union).

The right/power of veto (*kifogás* in Hungarian) of trade unions against unlawful measures by an employer negatively affecting workers has been eliminated from the HLC.⁷³

The HLC moderates the mandate of trade unions for monitoring of working conditions (and shifts this mandate to works councils).

Time-off for union activity has been decreased and legal possibility to demand pecuniary compensation for unused exempt working time by union officials has been terminated (once important income for trade unions).

Some information and consultation rights shifted to works councils exclusively, and some information is now available for trade unions only on request.⁷⁴

Works councils are mandated for consultations instead of trade unions in cases of restructuring the employer's organization (collective redundancy, transfer).

Dedicated time-off (paid leave) for union activists for purposes of union-organized education has been abolished.

Most of these rules are dispositive (except in relation to businesses in public ownership), so collective agreements may – in principle – derogate from the law. Thus, in principle, collective agreements still may provide for improved operating conditions for trade unions, including extended protection for trade union representatives, pecuniary compensation for unused time-off and so on. However, in practice, it is very challenging for trade unions to achieve such agreements. Public opinion and employers criticized the former – more generous – rules sharply for a disproportionate number of protected representatives, union abuse of extensive time-off (and/or its cash compensation) and so forth. Accordingly, employers prefer the new standard – less "union-friendly" – rules described above and rarely are keen on concluding agreements in favour of trade unions (of course, in some cases there are good,

⁷² For instance, establishments/premises with an average headcount of up to 500 employees can have only one protected trade union official.

⁷³ This is an institution that was based on the specific role of trade unions in the socialist system and that the regulation thereof by law is not reconcilable with the market economy; it unreasonably and dysfunctionally restricts the proprietary rights of employers falling under private law.

⁷⁴ Furthermore, the employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation covers facts, information, know-how or data that, if disclosed, would harm the employer's legitimate economic interest or its functioning. The wording of this section of the Labour Code (article 234) is particularly vague.

well-established cooperative relationships between the management and unions and collective agreements maintain – or even extend – former union privileges on a voluntary basis). In general, as Gyulavári and Kártyás also note, the new regulatory context poses an enormous challenge for Hungarian trade unions. “Whether they can grow up to their new role under the changed legal circumstances and become an equal bargaining partner with employers is yet to be seen” (2015, 58) In general, the taste for collective action by Hungarian unions is very low (Neumann and Boda 2011, 76–96).

With collective bargaining highly decentralized in Hungary (and the coverage of sectoral/industry agreements being quite limited), the legal position of company-level union branches is a crucial issue. A first draft of the HLC from July 2011 attempted to diminish the rights of trade unions radically, but the government signed a special “last minute” agreement with a few national trade union associations just before its adoption

1.2. Shifting role of works councils?

At first sight, the rights of works councils (WCs) appear to be strengthened:

WCs have become the primary (and often the sole) partner of the employer as far as information and consultation are concerned (for example, in case of collective redundancies, if there is no WC, according to the textual interpretation of the law, the employer does not have to comply with the consultation obligations of the EC Directive⁷⁵). Furthermore, it has become general practice that employers shall ask for the works council’s opinion prior to passing a decision on any action plans and adopting regulations affecting a large number of employees.⁷⁶

Task of monitoring of working conditions and compliance has been shifted to WCs from TUs as it is the responsibility of the works council to monitor the

in December 2011. Therefore, the changes were not as radical as originally planned. However, the cutbacks in trade unions’ rights and the corrosion of unions’ operating conditions are considerable – especially in the interpretation of trade unions – and they may have a negative impact on unions’ functionality (for instance, undermining trade unions’ bargaining position, a drop in union services provided for members and so on). Some expert opinions suggest the changes might imply a drive towards further individualization of labour relations.

Overall, labour relations in Hungary are characterized by a weakening of the freedom to organize and trade union rights, an increasingly meaningless (national and sectoral) reconciliation of interests, and a contradictory regulatory environment (Szabó 2021). Furthermore, the entire collective bargaining system seems to fade away and struggle with fundamental structural problems (Gyulavári and Kártyás 2022, 114).

observance of the rules relating to employment (but the HLC does not assure effective, concrete legal means to WCs to carry out this new task, so this stipulation is rather programmatic and shallow).

A new right to conclude normatively binding works agreements (equivalent to collective agreements) has been introduced (see below in details).

However, the participation and co-determination rights of works councils still are weak (for example, the only real co-determination right of Hungarian works councils relates to the appropriation of welfare funds⁷⁷). It is also remarkable that the HLC’s chapter on works councils does not use the notion of “consultation” itself. Instead, legal terms as “giving opinion”, “requesting information” and “initiating negotiations” are applied. Thus, the slightly more rigorous legal consequences

75 It must be noted that this rule is problematic in light of the Directive 98/59/EC and its interpretation (see especially: C-383/92 Commission v UK [1994] ECR I-2479). The Court pointed out in the Commission v UK case, that Member States must take all measures necessary to ensure that workers are informed, consulted and in a position to intervene through their representatives in the event of collective redundancies.

76 Section 264 of the Labour Code. It even provides for an exemplificative list about the most important actions of the employer, where such “consultation” is required:

- a) proposals for the employer’s reorganization, transformation, the conversion of a strategic business unit into an independent organization;
- b) introducing production and investment programs, new technologies or upgrading existing ones;
- c) processing and protection of personal data of employees;
- d) implementation of technical means for the surveillance of workers;
- e) measures for compliance with occupational safety and health requirements, and for the prevention of accidents at work and occupational diseases;
- f) the introduction and/or amendment of new work organization methods and performance requirements;
- g) plans relating to training and education;h) appropriation of job assistance related subsidies;
- i) drawing up proposals for the rehabilitation of workers with health impairment and persons with reduced ability to work;
- j) laying down working arrangements;
- k) setting the principles for the remuneration of work;
- l) measures for the protection of the environment relating to the employer’s operations;
- m) measures implemented with a view to enforcing the principle of equal treatment and for the promotion of equal opportunities;
- n) coordinating family life and work;
- o) other measures specified by employment regulations.

77 Section 263 of the HLC.

and well-established – EU-law-based – context of “consultation”⁷⁸ are overshadowed in this context.

Section 234 of the HLC places considerable pragmatic limits on information and consultations rights. According to this provision, the employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation covers facts, information, know-how or data that, if disclosed, would harm the employer’s legitimate economic interest or its functioning. Furthermore, the representatives acting in the name and on behalf of works councils or trade unions are not authorized to disclose any facts, information, know-how or data which, in the legitimate economic interest of the employer or in the protection of its functioning, has expressly

been provided to them in confidence or to be treated as business secrets, in any way or form, and are not authorized to use them in any other way in connection with any activity in which this person is involved for reasons other than the objectives specified in this Code. Any person who is acting in the name or on behalf of the works council or trade union shall be authorized to disclose any information or data acquired in the course of his activities solely in a manner which does not jeopardize the employer’s legitimate economic interest and without violating rights relating to personality. The very open, flexible wording of Section 234 has been heavily criticized by both trade unions and works councils.

1.3. Non-union bargaining: ‘Quasi’ collective agreements?

The HLC has introduced a new right for works councils (elected representatives) to conclude *normatively binding works agreements*. “Before the 2012 reform, works council agreements had a very different legal nature, since the law stipulated that only ‘issues pertaining to the privileges of a works council and its relations with the employer’ shall be set forth in such an agreement” (Gyulavári and Kártyás 2015)⁷⁹ (having only a contractual, relative effect). The works council can now, under Section 268 of the Code, conclude agreements with the employer to regulate the terms and conditions of employment with the exception of wages and remuneration. As such, these – quasi collective (cf. Kun Attila 2019, 333–356): – agreements can take over the roles of collective agreements. These normatively binding works agreements (concluded by “cooperative”, participatory, elected WCs at the company and plant level) offer the subsidiary possibility for works councils (and employers) to substitute for collective agreements under specific conditions. Such works agreements can qualify as “employment regulations” (that is, sources of law) for the purposes of the HLC (§ 13). Such works agreements are valid only in cases where there is no collective agreement in force and there is no trade union authorized (with at least “10 per cent” representativity) to enter into a collective agreement.⁸⁰ In principle, this provision can be useful (especially in SMEs – small and medium-sized enterprises) as only a modest number

of industry collective agreements (with a wider scope) have been concluded and trade union density is low in Hungary. Under these conditions, all terms and conditions of employment may be regulated in these normatively binding works agreements and all possible derogations offered by the Code can be utilized (similarly to collective agreements⁸¹). Only wage bargaining is excluded from the scope of these agreements (which remains the exclusive competence and monopoly of trade unions).

Berke makes two important remarks in this context. First, a works agreement may be concluded along with (or under the force of) the sectoral (subsectoral) collective agreement covering the employer or multiple employers. Thus, this will fit into the system of rules in accordance with a general rule under § 277, section (4) of the LC. Second, although the works agreement may not provide for the remuneration of work, the LC does not prohibit the employer – on the basis of § 16 – from undertaking a “unilateral commitment” in this respect (and from doing so even through the termination criteria relating to the validity of the works agreement) (Berke 2015, 125).

There are some crucial theoretical and practical risks related with such normatively binding works agreements (or “quasi” collective agreements). According to some academics, this legal possibility may undermine the effectiveness and the very idea of collective bargaining,

78 According to Section 233 of the HLC, “consultation” shall mean the establishment of dialogue and exchange of views between the employer and the works council or trade union. Consultation shall take place with a view to reaching an agreement, in such fashion as consistent with the objective thereof and ensuring: (a) that the parties are properly represented; (b) the direct exchange of views and establishment of dialogue; (c) substantive discussions. The employer may not carry out the proposed action during the time of consultation, or for up to seven days from the first day of consultation (“suspended effect”), unless a longer time limit is agreed upon. In the absence of an agreement the employer shall terminate consultation when the said time limit expires.

79 See article 64/A of the 1992 Labour Code, introduced by an amendment to the original text in 1995.

80 § 268, Section (1) of the HLC.

81 In this regard, it is important to note that the HLC has significantly extended the regulatory role of collective agreements for the advancement of a more flexible, more reflexive, more autonomous system of employment regulation. In the new system, collective agreements may differ from the general rules implied in the Code, also for the detriment of employees (in other word, this is the fully dispositive, absolute permissive character of the Code, as a main rule; the Act lists only the cases in which such a deviation is not allowed). As a consequence, there are less cogent and/or relatively dispositive rules in the Code. As such, the Code strengthens the parties’ contractual freedom, reducing the regulatory role of the state. The structure of the Act is very difficult because of this complex system of derogations.

mainly because of the following reasons: the presumed loyalty of “cooperative” WCs; the impartial status of WCs; the weak bargaining capacity of WCs (for example, a lack of labour law protection for members⁸²; a lack of autonomous legal personality of the council as part of the employers’ organizational structure; WCs prohibition from organizing strikes and so forth), plus the lack of strong co-determination rights to meaningfully pressure employers. All in all, the danger of docile, “yellow” – or “puppet” – WCs and unbalanced derogations are at stake. Employers can be motivated to facilitate the creation of “yellow(ish)” works councils in order to be able to profit from the flexible agreements concluded with partner-like works councils (for more on this “secret weapon” for employers, see Szabó 2013, 211). On the

other hand, from a more optimistic perspective, such agreements might, in theory, serve as the first step (or “stepping stone”) of any collective arrangements in SMEs (particularly, those without any structure of industrial relations). At this stage, it is very difficult to objectively assess the possible, longer-term effect of this “new” legal possibility. No data is available about the actual number of works council agreements, yet their number is certainly low (if not negligible). The conclusion of such agreements is not a trend since the passing of the HLC (basically the same rule was in force in the period from 1999 to 2002 – under an earlier right-wing government – and it neither resulted in a considerable number of “quasi” collective agreements nor harmful practices).

1.4. Lex imperfecta nature of I & C rights?

Section 236 (1) of the HLC states: “A shop steward, or a works council shall be elected if, during the half-year prior to the date when the election committee was established, the average number of employees at the employer or at the employer’s independent establishment or division (‘fixed establishment’), is higher than fifteen or fifty, respectively.” From this imperative wording of the law, it seems as if the law makes the establishment of a works council compulsory, but no concrete obligations are set forth in this regard, and failure to operate a works council is not sanctioned (*lex imperfecta*). Employees therefore are not obliged to elect a works council, and the employer – self-evidently – cannot be held liable if the statutory conditions are met and the works council is not established.⁸³ As a consequence, works councils are a rare exception. The Hungarian Central Statistical Office (KSH) regularly asks employees (aged 15–64) about their knowledge of elected workers’ representatives⁸⁴ at the workplace. According to data from 2020, from some 3.7 million employees only 615,000 answered that they know about the operation of works council (public works council) or shop steward at the workplace (while 2.4 million answered “no”, and 698,000 answered “no information”).⁸⁵ Brameshuber remarks that an approach that favours I & C as an employee right and not as an obligation for employers or Member States prevails in the majority of Member States, but she also indicates that “more in-depth research is needed to assess whether the voluntary representation rights currently mainstream in the Member States are enough to achieve the aim of the

ICFD⁸⁶ to “consolidate a general and permanent right to I&C of employees at national undertaking/establishment level” (Brameshuber 2021, 248–249).

The HLC has removed the effective sanctions safeguarding the observation of co-determination and consultation rights (under the previous legislation, violation of rights of participation resulted in null and void legal action of the employer,⁸⁷ while the HLC does not expressly stipulate any sanction) (*cf.* Hungler 2020). Accordingly, participation and co-determination rights of works councils might be labelled as soft laws or “lex imperfecta”.⁸⁸ In a non-litigious procedure, a finding of illegality may be made, but consultation cannot be compelled,⁸⁹ and no targeted sanctions are institutionalized. This situation is certainly not in line with article 8 (Protection of rights) of Directive 2002/14/EC – which foresees “effective, proportionate and dissuasive sanctions”.

Section 262 (1) of the HLC declares that “works councils shall monitor compliance with the provisions of employment regulations”. As mentioned earlier, this mandate to “monitor” working conditions and compliance once was the explicit mandate of trade unions. Even if this mandate formally has been shifted from trade unions to works councils, the law does not assure effective, concrete legal means to works councils to carry out this task, so this stipulation remains programmatic and shallow.

82 Only the chairman of the works council enjoys labour law protection (against termination of employment). See § 260, sections (3)-(5) of the HLC.

83 Cf.: Commentary of the HLC, Wolters Kluwer (online). § 236.

84 Works/public works council, shop steward or health and safety representative elected by the employees at the workplace.

85 Központi Statisztikai Hivatal [Hungarian Statistics Office]. Available online: https://www.ksh.hu/docs/hun/xstadat/xstadat_evkozi/e_munkmin_9_18_03_03a.html?fbclid=IwAR0WEPGQszlq8vtp_MjxsYcG8VSAxjrlxzGFiaCSglKn7s8P_wft52we1yA.

86 ICFD – Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

87 Naturally, any argument in favour of invalidity of the employer’s decision in the case of non-fulfilment of the I&C obligations might infringe on the employer’s freedom to conduct a business (article 16, Charter of Fundamental Rights) (*cf.* Brameshuber2021, 251).

88 The Code only declares that the employer, the works council or the trade union may bring an action within five days in the event of any violation of the provisions on information or consultation. The court shall hear such cases within fifteen days in non-contentious proceedings (section 289).

89 Curia, EBH 2014. M.24.

► 2. A few Central and Eastern European characteristics and potentials of workers' representation

2.1. Trade unions and elected representatives

In terms of Hungary, Gyulavári and Kártyás conclude that the entire collective bargaining system seems to fade away and struggle with fundamental structural problems (Gyulavári and Kártyás 2022, 114). Other authors add that labour relations in Hungary are characterised by a weakening freedom to organize, weakening trade union rights, an increasingly meaningless (national and sectoral) reconciliation of interests and a contradictory regulatory environment (Szabó 2021). Even though these statements are specifically formulated in relation to Hungary, their main messages can be generalized across the region to some extent. According to Eurofound, a group of countries in the EU “hardly [has] any coverage” of collective bargaining: Estonia (6 per cent), Czechia (9 per cent), Lithuania, Malta, Poland (all 10 per cent), Slovakia (12 per cent) and Hungary (13 per cent). Except for Malta, these countries are all post-socialist countries. “The rate tends to be low in countries where the main level of collective bargaining is the company. The highest rates can be found in countries where multi-employer sector-level collective bargaining is dominant, and, in particular, where there is a pervasive extension mechanism” (EurWork 2022). In sum, the strength and

autonomy of social partners – the basic precondition of sound industrial relations – suffers from structural problems in most post-socialist countries (Casale 1997, 33). Bronstein argues that “the major difficulty stems from the fact that the practice of collective bargaining presupposes the existence of behavioural patterns and a culture of collective action that has not had time to take root in the relatively short period that has elapsed since the downfall of communism” (2006, 215).

As a consequence, it seems that one of the channels (representation through trade unions) of the dual workforce representation system is highly dysfunctional in many post-socialist CEE countries, leaving a “vacuum”, in which other, more institutionalised channel (non-union, elected worker representation) might play an enhanced role in the future.⁹⁰ In other words, often there is no real risk of “undermining” the position of the trade unions, which is a general, main precondition for the operation of elected representatives pursuant to ILO standards (article 5 of –ILO Workers’ Representatives Convention, 1971 (No. 135)).⁹¹

2.2. Legal culture in the region

Comparative research shows that “we need to understand EIP (employee involvement and participation) in decision-making in relation to the organisational and social contexts in which they occur” (Prouska, Avgoustaki, Psychogios and Wilkinson 2022). On the one hand, according to some opinions, post-socialist societies are – by default, as a reaction to the past – often “very individualistic, highly segmented and lack a strong grassroots institutional network” (Tóth, Neumann and Hosszu 2012, 152), which is not a good foundation for sound and democratic, autonomous labour relations. On the other hand, post-socialist countries, in general terms, are still characterised by a dominantly “statist system of the regulation of employment standards”

(Muszyński 2020, 6),⁹² as a pivotal legacy of the past. In other words, “one peculiarity of CEE legal systems is not only their reliance on statutory regulation but also their (hyper-) positivist approach to the interpretation and application of the law” (*Ibid.*). These two general cultural features have consequences for the nature of collective representation in the region, rendering the position of autonomous collective bargaining challenging from the outset, while – theoretically – setting the scene for some forms of legislative (statist) intervention in this regard (for example, in relation to the possible, cautious, tentative reinforcement of the role of elected representatives).

90 While many I & C rights and obligations existed in many “Western” continental Member States before the adoption of the related EU directives, this was not the case in most new member states; the I & C “culture” inflicted by EU-law was new to them, and they had to make adjustments to implement these directives (Brameshuber 2021, 240).

91 “Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives” Article 5 of ILO Workers’ Representatives Convention, 1971 (No. 135).

92 The author also remarks that “due to the highly formalised and hierarchical approach adopted by courts in CEECs, a few judgments that are unfavourable for workers can simply expand and legalise actions that are within the grey area of legality”.

2.3. Sectoral- versus company-level representation

Directive (EU) 2022/2401 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union establishes a framework for adequacy of statutory minimum wages with the aim of achieving decent living and working conditions, promoting collective bargaining on wage-setting and enhancing access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements. A very compelling aspect of the Directive is its emphasis on the desired enhancement of collective bargaining coverage rates, and it sets out detailed expectations for the introduction of monitoring mechanisms and data collection on the coverage rate of collective bargaining and on the evolution of minimum wages, as well as for their regular reporting. In terms of collective bargaining coverage, the reference threshold is 80 per cent as applied by the Directive,⁹³ which is simply and obviously unattainable in many

CEE countries, particularly without strong sectoral and cross-sectoral-level bargaining. As stated before, sectoral-level negotiations are either weak or non-existent in many post-socialist countries (including Hungary) (Gyulavári and Kártyás 2022, 18). In sum, the Directive could (and should) be an important impetus for collective bargaining at the sectoral level in CEE countries (cf. Kun and Szabó 2023, 216–223). As such, indirectly – and tentatively in the long-run – it might contribute to a shift in trade union activity from the habitual company level in the region to a higher, sectoral level. Accordingly, new terrains / vacuums might open at the company level, primarily for elected, law-mandated structures of workers' representation (such as works councils). Naturally, this assumption is greatly hypothetical and speculative, and it depends on many factors, but in principle it might be realistic.

► 3. Hints from EU-law: New perspectives for workers' representation?

Some fragments of developments in recent EU laws – direct or indirect, explicit or implicit – have relevance and potential in terms of workers' representation: namely, the regulatory arenas of whistleblowing, corporate sustainability reporting, platform work, corporate sustainability due diligence, AI and Transnational Company Agreements. Accordingly, this report avoids describing the “classic” EU-regulated fields of information and consultation, which are investigated in the literature in great detail (for example, Brameshuber

2021; Moreira and Martins 2021; Pisarczyk and Wieczorek 2021; Senatori and Rauseo 2021). (Note that the consolidation of existing EU Directives⁹⁴ on the I & C of workers has been on the agenda – controversially – for almost a decade now.⁹⁵)

These distinct, randomly and subjectively selected developments in topical fields of EU law – both hard and soft – also described briefly below share some common characteristics which might render them highly relevant in terms of workers' representation. First, one way or

93 Article 4 (2): “In addition, each Member State in which the collective bargaining coverage rate is less than a threshold of 80 % shall provide for a framework of enabling conditions for collective bargaining, either by law after consulting the social partners or by agreement with them. Such a Member State shall also establish an action plan to promote collective bargaining. The Member State shall establish such an action plan after consulting the social partners or by agreement with the social partners, or, following a joint request by the social partners, as agreed between the social partners. The action plan shall set out a clear timeline and concrete measures to progressively increase the rate of collective bargaining coverage, in full respect for the autonomy of the social partners. The Member State shall review its action plan regularly and shall update it if needed. Where a Member State updates its action plan, it shall do so after consulting the social partners or by agreement with them, or, following a joint request by the social partners, as agreed between the social partners. In any event, such an action plan shall be reviewed at least every five years. The action plan and any update thereof shall be made public and notified to the Commission.”

94 The rights pertaining to information and consultation of the workforce under Community law are currently some of the most fragmented in the EU legislative body. In total, more than 15 directives deal with information and consultation in either a general or specific sense. Currently four major European directives form part of the social acquis in this regard: Directive on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EC), Directive on European works councils (2009/38/EC); Directive on employee involvement in the European Company (2001/86/EC), and the European Framework Directive on information and consultation (2002/14/EC). Besides this general frame, a range of directives secure the right of information and consultation of workers in specific situations, such as in the cases of collective redundancies (98/59/EC) or the transfer of undertaking (2001/23/EC). Available online: <https://www.worker-participation.eu/EU-Framework-for-I-C-P/Information-and-Consultation>.

95 A “fitness check” exercise was carried out as part of the Commission's 2010 work programme and the results were published in 2013 (REFIT). Considering this, in April 2015, the Commission initiated a social partner consultation under article 154 (2) of the Treaty on the Functioning of the European Union (TFEU) on consolidation (“recast”) of the EU Directives on information and consultation of workers. After years of silence on this matter, “a new framework for information, consultation and board-level representation” has been called for again by the European Parliament resolution of 16 December 2021 on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005 (INI)), 17–30.

another, the listed legal arenas and developments all aim to influence corporate policies and steer corporate compliance (in a broad sense). As the main default functions of works councils (elected representatives) usually include monitoring compliance and channelling the interests of employees into company policies and internal self-regulation, they seem to be exceptionally relevant players in this regard. Second, all the listed legal arenas represent rather “progressive”, emerging topics. Seeing that the main default functions of works

councils (elected representatives) typically relate to new strategic corporate decisions, introduction of new technologies and so forth, workers' representatives again seem to be exceptionally relevant. Third, some of the selected “progressive” legal initiatives (as sketched below) explicitly refer to the related roles of workers' representation, while others, without doing so, inherently imply it. In sum, it seems that EU laws and EU policies, by hook or by crook, increasingly attempt to “mainstream” a culture of I & C.

a) Whistleblowing

The new Whistleblowing Directive⁹⁶ (2019) requires EU Member States to implement rights and obligations concerning whistleblowers, private organizations and the Member States themselves in national law.

In outlining its reasoning, Recital (41) of the Directive notes that “without prejudice to the protection that trade union representatives or employees' representatives enjoy in their capacity as such representatives under other Union and national rules, they should enjoy the protection provided for under this Directive both where they report in their capacity as workers and where they have provided advice and support to the reporting person.”

Recital (54) also states that “third parties could also be authorised to receive reports of breaches on behalf of legal entities in the private and public sector, provided they offer appropriate guarantees of respect for independence, confidentiality, data protection and secrecy. Such third parties could be external reporting

platform providers, external counsel, auditors, trade union representatives or employees' representatives.”

Article 8 of the Directive is about the obligation to establish internal reporting channels and it lays down that “Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law.” Probably this is one of the Directive's most important rules: in brief, companies with at least 50 employees must set up internal reporting channels to allow workers to report breaches of EU law. Although the Directive does not mention explicitly the proper design, functioning, promotion and so forth of internal reporting, channels should ideally be accomplished in close cooperation with workers' representatives. For instance, German law ensures the co-determination rights of the relevant employee representatives when introducing or modifying a whistleblower system (Oppenhoff 2021).

b) Corporate sustainability reporting

On 5 January 2023, the Corporate Sustainability Reporting Directive (CSRD)⁹⁷ entered into force. This new Directive modernizes and strengthens the rules concerning the social and environmental information that companies must report. A broader set of large companies, as well as listed SMEs, will now be required to report on sustainability – approximately 50,000 companies in total.

Several official documents (“soft laws”) of the EU mention such ambitious goals as the following in this regard: “workers' voice must be a key component of EU initiatives to ensure sustainable and democratic corporate governance and due diligence on human rights, including with regard to labour, and on climate

change and the environment, as well as to reduce the use of unfair practices, such as labour exploitation and unfair competition in the internal market.”⁹⁸

Trade unions and workers' representatives will not only be ultimate beneficiaries of quality sustainability reporting (among others in order to better engage in social dialogue and consultation),⁹⁹ but they should also play an active role in the whole process of reporting. Recital (52) of the CSRD Directive states the following:

Member States should ensure that sustainability reporting is carried out in compliance with workers' rights to information and consultation. The management of the undertaking should therefore inform workers'

96 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

97 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

98 European Parliament Resolution of 16 December 2021 on democracy at work: A European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005 (INI)), 3.

99 Recitals 9 and 14 of Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

representatives at the appropriate level and discuss with them relevant information and the means of obtaining and verifying sustainability information. This implies for the purpose of this amending Directive the establishment of dialogue and exchange of views between workers' representatives and central management or any other

level of management that could be more appropriate, at such times, in such fashion and with such content as would enable workers' representatives to express their opinion. Their opinion should be communicated, where applicable, to the relevant administrative, management or supervisory bodies.

c) Platform-work

A proposed Directive¹⁰⁰ on improving working conditions in platform work (2021) is principally focused on individual rights, and intervention of workers' representatives is mostly envisioned as support of individual positions and claims (Purificato and Senatori 2023). However, article 9 of the proposed Directive explicitly deals with information and consultation, and it foresees that Member States

shall ensure information and consultation of platform workers' representatives or, where there are no such representatives, of the platform workers concerned by digital labour platforms, on decisions likely to lead to the introduction of or substantial changes in the use of automated monitoring and decision-making systems.

d) Corporate sustainability due diligence

On 23 February 2022, the Commission adopted a proposal for a Directive on corporate sustainability due diligence.¹⁰¹ The aim of this proposed Directive is to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance. The new rules aim to ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside Europe.

workers' representatives throughout the due diligence process, including the development and implementation process".¹⁰²

Certain official documents ("soft laws") of the EU indicate that the planned Directive on mandatory due diligence requirements (covering companies' operations, activities and their business relationships, including supply and subcontracting chains) should ensure "the full involvement of trade unions and

Article 9 of the Proposal sets out the obligation for Member States to ensure that companies provide for the possibility to submit complaints to the company in case of legitimate concerns regarding those potential or actual adverse impacts, including in the company's value chain. Companies are required to grant this possibility to persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact, to trade unions and other workers' representatives representing individuals working in the value chain concerned, and to civil society organizations active in the area concerned.

e) Artificial Intelligence (AI)

The Proposal for a Regulation on artificial intelligence was announced by the Commission in April 2021.¹⁰³ The first ever legal framework on AI seeks to address the risks of AI and positions Europe to play a leading role. It aims to address risks of specific uses of AI, categorizing them into four different levels: unacceptable risk, high risk, limited risk and minimal risk. AI systems used in employment are classified as high-risk. High-risk AI systems are permitted, but developers and users must adhere to regulations that require rigorous testing, proper documentation of data quality and an accountability framework that details human oversight.

Those using high-risk AIs will likely be obliged to complete rigorous risk assessments. In our view, the process of "risk assessment" should ensure the full inclusion of workers' representatives throughout the process.

As noted by the European Parliament, for instance, "introducing new digital technologies has the potential to have a positive impact on the work environment if they are implemented and monitored in a trustworthy manner, which will require timely and meaningful information and the consultation of workers' representatives."¹⁰⁴ Furthermore, it is underlined that

100 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM/2021/762 final.

101 Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

102 European Parliament resolution of 16 December 2021 on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), 12.

103 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM/2021/206 final.

104 European Parliament resolution of 16 December 2021 on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), 13.

trade unions and workers' representatives should have the necessary access and means to assess and evaluate digital technology prior to its introduction and that social dialogue structures, information sharing and consultation are key to providing the necessary support for workers to better build and participate in the uptake

and monitoring by social partners of digital technology at the workplace.¹⁰⁵

Rainone also notes that AI in the workplace "undoubtedly results in circumstances that require the launch of I & C processes with workers' representatives" (2022, 244).

f) Transnational Company Agreements

As a rule, the competences of European Works Councils (EWCs) are limited to information and consultation. Nonetheless, European company-level framework agreements (EFAs) negotiated by EWCs and/or trade unions has been a clear trend, especially in the 2000s. Findings of leading research in the field suggest that, in practice, EWCs go beyond their formal information

and consultation role more frequently than is realized by either academics or policymakers – as well as many trade unions (Müller, Platzer and Rüb 2013). This shows the potential of structures for information sharing and consultation for dynamic development and that some forms and margins of negotiation/bargaining via elected representatives are exist.

► 4. Concluding remarks

In Hungary, there is still a wide leeway for further clarification and development of the role of works councils and I&C mechanisms. Most of all, a clear vision would be needed about the expected role and future of this legal institution. Furthermore, the clarity, depth, enforcement and so forth of works councils' functions could and should be improved in Hungary.

Central and Eastern European perspectives of I & C revealed that – owing to several peculiar characteristics

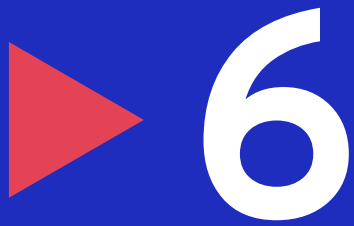
of the region – a cautious, tentative reinforcement of the role of elected representatives might be sensible in the region.

Overall, recent EU-laws and EU-policies, by hook or by crook, increasingly attempt to "mainstream" and boost a culture of I & C (even well beyond the classic labour law terrains of I & C).

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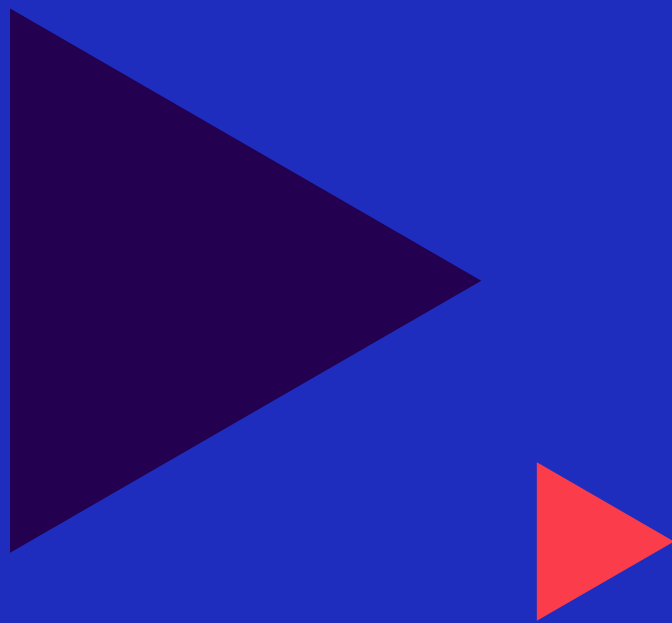
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The case of Lithuania

By Dr Daiva Petrylaitė, Professor of Collective Labour
Law, Law Faculty of Vilnius University



► 1. Evolution of the collective worker representation model in Lithuania

Collective industrial relations in the Republic of Lithuania are based on the international and constitutional principle of freedom of association. Lithuania has ratified all the main conventions of the International Labour Organization, which guarantee the right of participants in labour relations to organize to defend their interests.¹⁰⁶ The right to form associations is also guaranteed by the Constitution of the Republic of Lithuania; its article 35 establishes the right of citizens to form societies, political parties and associations. From the perspective of labour relations, this principle is detailed in article 50 of the Constitution, which declares the right of trade unions to be established freely and function independently, and in article 51 of the Constitution, which guarantees the right of workers to strike in defence of their social and economic interests.

Labour law is a codified branch of law in Lithuania. The main legal act regulating industrial relations is the Labour Code of the Republic of Lithuania. There are also a number of laws regulating specific areas of industrial relations.¹⁰⁷ After the restoration of the independence of the State of Lithuania on 11 March 1990, labour law has been reformed substantially three times:

(i) in 1990–2003, when individual laws were adopted rapidly to move from socialist regulation of labour relations to a legal regime of labour in line with the free market;

(ii) in 2003–2017, when the first Labour Code of independent Lithuania was adopted; the Code, *inter alia*, also transposed the provisions of the labour law of the European Union into national law (during this period, some areas of industrial relations were regulated by laws, which, together with the Labour Code, constituted a unified system of labour law);

(iii) after 2017, when the current Labour Code was adopted, one of the objectives sought by its adoption was to modernize the legal regulation of labour relations in the light of the changing labour market, economic globalization and the transformation of labour relations.

It should be noted that the legal framework for worker representation was at the epicentre of all the above-referred labour law reforms. After 1990, Lithuania urgently needed to create the legal regulation for free, independent trade unions and legal conditions for free and voluntary collective bargaining. The relevant laws were adopted immediately.¹⁰⁸ In the first decade, trade unions were the only representatives of workers in Lithuania – at the workplace, at both sectoral and national levels.¹⁰⁹

One of the major challenges for Lithuania in the context of the European integration process and the implementation of the *acquis communautaire* in labour law was the model of worker representation and the creation of a model for information and consultation procedures that would actually work. Trade union density had always been and remains a major issue (in recent years, trade union density in Lithuania has not exceeded 10 per cent and was around 7 per cent on average) (OECD 2021). This was why the first Labour Code (in force from 1 January 2003 to 1 July 2017) introduced an alternative workers representative – the works council. According to article 19 of the Labour Code,¹¹⁰ trade unions were in the position to represent and defend the rights and interests of workers or, if there was no trade union in the enterprise, workers could delegate their defence and representation functions to a sectoral trade union or could elect a works council. Thus, the preference in employee representation was given by the Labour Code to trade unions which operated in accordance with

106 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); Right of Association (Agriculture) Convention, 1921 (No. 11); Workers' Representatives Convention, 1971 (No. 135); Collective Bargaining Convention, 1981 (No. 154) all these conventions were ratified by Lithuania in 1994.

107 Law on Trade Unions, Law on Safety and Health at Work, Law on European Works Councils and so on.

108 Law on Trade Unions, 21 November 1991; Law on Collective Agreements, 4 April 1991; Law on the Regulation of Collective Disputes, 11 March 1992.

109 It should be noted that, after the restoration of independence, "representatives elected collectively by workers" were known for a short time only. As it is known, the number of workers who were members of trade unions reduced to a dangerously low level after the reinstatement of the independence. That was why the 1991 Law on Collective Agreements provided that, where there was no trade union in an enterprise or where there were several trade unions which had not agreed on joint representation, the collective agreement of the enterprise could be signed by the representatives elected collectively by workers. The Law did not specify how such representatives should be elected, but it was clear that the aim of such statutory provision was to enable workers who were not members of a trade union to sign a collective agreement. This statutory provision, however, did not last long. Trade unions gained a monopoly right to make collective agreements over time and the above-referred provision on the representatives elected collectively by workers was repealed when the Law on Collective Agreements Act was amended in 1994.

110 Labour Code of the Republic of Lithuania, Law No. IX-926, adopted on 4 June 2002 (valid until 30 June 2017).

the Law on Trade Unions. The other form of collective representation of workers – works councils – was a new organizational structure that had not existed in Lithuania until that time. Article 21 of the Labour Code stipulated that a works council had all the rights of collective representation entities; however, they could not perform the functions that were recognized by law as the prerogative of trade unions. In other words, works councils were able to participate in information and consultation procedures, initiate collective bargaining, sign collective agreements and even declare a strike in the event of an industrial conflict, that is, perform all collective labour law functions at the company level. The collective representation of workers at a level higher than the company was the exclusive right of trade unions.

It should be noted that although works councils were for the first time introduced in Lithuanian labour law in 2003 (when the then Labour Code came into force), in reality they started to operate only at the end of 2004 when the Law on Works Councils came into force.¹¹¹ The authors of the Labour Code did not initially intend to have a separate law on works councils – all related issues were to be regulated in the Labour Code. However, when the trade unions that were against the introduction of works councils started blocking the discussion of the draft Labour Code and delaying its adoption, it was decided to provide for only a general legal framework in the Labour Code and to regulate all the issues related to the election and operation of works councils in a special law. This allowed some more time for negotiations with trade unions on the model of works council that was being created.

To sum up, it appears that, when choosing a system for worker representation between 2003 and 2005, Lithuania opted not for a solidarity-based worker representation model enabling co-functioning of several types of worker representatives in parallel but rather for an alternative in which workers may be represented by one of the two representatives, that is, either by a trade union or by a works council.

It is difficult to assess the effectiveness of works councils between 2004 and 2017, as no official statistics were collected at the time, nor was there any relevant case law. It should be mentioned that several research studies were carried out between 2006 and 2009. A survey of employers and employees carried out during the research study (Institute for Labour and Social Research 2006) showed that 40 per cent of the respondent workers said the establishment of the works council had been initiated by the employer, and 22 per cent of the respondents reported voluntary assistance of the employer in electing the works council/workers' representative by the workers who had initiated such an election. A survey of relations between works councils

and employers revealed a highly positive nature of these relations: the majority of the respondents (71 per cent) said that the relations between the works councils and the employer were normal and constructive dialogue was in place; another 24 per cent of the respondents described the relations with the employer as "warm and friendly".

In order to assess trade unions' views on closer cooperation between works councils and trade unions, the survey included an opinion of high-ranking trade union officials, that is, the leaders of national, sectoral and territorial trade union organizations. Findings of the survey of trade union leaders showed that even 12 respondents out of 25 believed cooperation between works councils and trade unions would be useful for both parties, while 6 respondents were of the opinion that such cooperation was vital in the pursuit of common goals. Another six respondents expressed the opinion that cooperation between trade unions and works councils was hardly possible in Lithuania, and only one respondent said that trade unions would never cooperate with works councils in Lithuania (Institute for Labour and Social Research 2008).

Between 2009 and 2011, data on existing works councils were collected by the State Labour Inspectorate. It should be noted that this was not a purposeful and complete collection of data, but only the systematization of information found during inspections of enterprises. In 2011, the State Labour Inspectorate inspected 12,325 enterprises (15,935 and 12,411 in 2009 and 2010, respectively) and found out that 305 enterprises had trade unions registered (347 and 298 trade unions in 2009 and 2010, respectively); in 89 enterprises, the function of employee representation and protection was transferred to sectoral trade unions (as compared to 124 and 83 enterprises having the employee representation and protection function transferred to sectoral trade unions in 2009 and 2010, respectively), and 153 enterprises had works councils in place or their functions were implemented by employee representative (as compared to 207 and 166 enterprises with works councils or employee representatives performing the functions of the works councils in 2009 and 2010, respectively) (Ministry of Social Security and Labour 2012).

Practice has shown that, despite good intentions, there were no constructive cooperation relations developed between trade unions and works councils; works councils were not active even in information and consultation procedures; collective bargaining and collective agreements between works councils and employers were uncommon, often teetering on the edge of lawfulness and compliance with the Labour Code; and there was not a single strike called by a works council. Regardless, public presentation of practical examples

111 Law on Works Councils, 26 October 2004, No. IX-2500 (in force until 1 July 2017).

and publications in mass media suggested that the divide between trade unions and works councils did not narrow in Lithuania. On the contrary, the alternative provided for the Labour Code became very popular – instead of setting up trade unions or works councils in enterprises

to transfer the representation function to a sectoral or regional trade union which then established its units in the particular enterprise. This made the work of works councils more nominal than real, and the information and consultation model largely failed in practice.

► 2. The current model of works councils

The third reform of Lithuanian labour law, with the entry into force of the Labour Code in 2017 as its main highlight, removed the universal representation mandate held by works councils and aimed to change the system of employee representation, *inter alia*, to create the system of collective industrial relations more favourable for trade unions and to strengthen the employee rights to information and consultation (Davulis 2017).

The regulations on the legal status of works councils in the Labour Code (2017) have undergone significant changes:

(1) mandatory requirement for employers with 20 or more employees on average to have a works council (article 169 (1) and (4));

(2) requirement for employers to form a works council on their own initiative (article 169 (1)) and to be actively involved in the election process, that is, to set up an election commission to carry out the election of the works council (article 171 (2)), to create conditions for employees to participate in the election and pay them their average remuneration for this time (article 171 (6)), to provide the material and technical provisions for the works council election (article 171 (13)) and so forth;

(3) direct involvement of the State Labour Inspectorate in the process of forming of works councils, that is, the chairperson of the works council must inform the State Labour Inspectorate in writing about the formation of the works council, its management bodies and the

name of the enterprise where the works council has been formed (article 173 (6)); the employer must inform the Inspectorate in writing about the termination of activities of the works council if a new works council is not formed within six months (article 176 (3));

(4) imperative provision that the competence of works councils is limited only to their right to participate in information and consultation procedures at the employer level (article 165 (4)), that is, the rights of the works council as a collective representative of workers have been considerably narrowed.

Furthermore, the Labour Code states that where there is a trade union in an enterprise and it represents more than one-third of the employees of the enterprise, the works council shall not be elected and the trade union shall carry out information and consultation procedures (article 169(4)). The Code also provides that, in small enterprises with up to 20 employees, an employee trustee may be elected, who shall be equivalent to a works council and perform similar information and consultation functions (article 177). It should be noted that the election of an employee trustee is not compulsory and depends only on the initiative of employees. If an employee trustee is not elected, information and consultation procedures in small enterprises take place directly between the employer and the collective of employees.

2.1. Election of the works council

After the Labour Code entered into force, there was a transition period of six months: employers with 20 or more employees on average on the date of entry into force of the Labour Code (1 July 2017) had 6 months to form an election commission of the works council to organize the works council election. Until the works council was elected and started operating, the information and consultation functions provided for in the Labour Code were carried out by the trade unions operating in the enterprise. As a result of such legal

regulation of the transitional period, the second half of 2017 saw the so-called boom of elections of works council in Lithuania, as all enterprises with 20 or more employees had to elect their works councils by 1 January 2018 at the latest.

The Labour Code (Article 170) defines the compulsory number of members of the works council, which depends on the number of employees working in a company:

- (1) up to 100 employees – 3 members of the works council;
- (2) from 100 to 300 employees – 5 members of the works council;
- (3) from 300 to 500 employees – 7 members of the works council;
- (4) from 500 to 700 employees – 9 members of the works council;
- (5) more than 701 – 11 members of the works council.

All employees who are at least 18 years of age and who have worked in the enterprise for at least 6 months may be elected as members of the works council. The employer and its representatives (persons in the management of the enterprise) may not be elected to the works council. The works council is elected for a term of three years (article 169(3) of the Labour Code). If there are one or more trade unions in an enterprise, one seat on the works council is reserved for the candidates nominated by them in the elections.

The procedure for the election of the works council is governed by article 171 of the Labour Code. As already mentioned, the election of the works council shall be organized and carried out by the election commission set up by the employer. The election commission shall be composed of at least three and at most seven members; the employer's representatives may constitute no more than one-third of the members of the commission. The election commission shall meet for its first meeting and start organizing the election of the works council no later than seven days after its formation. At the first meeting, the election commission shall elect a chairperson from among its members and shall set the date of the works council election, which may not be later than two months after the date of the formation of the election commission. Employees appointed to the election commission may not be dismissed from work on the initiative of the employer during the mandate of the election commission. They shall be paid average remuneration for the time spent organizing and holding the works council election. The mandate of the election commission shall expire at the first meeting of the works council.

Candidates for the works council may be nominated by employees entitled to vote. Only employees who have the right to vote may be nominated as candidates, with the exception of the members of the election commission. Each employee may nominate one candidate by writing to the election commission and submitting the candidate's written consent to be elected to the works council. Employer-level trade unions shall be entitled to

nominate at least three employees who have the right to vote as candidates for the works council, and the candidate who receives the most employee votes shall be deemed elected.

The works council shall be elected by secret ballot in direct elections, on the basis of universal and equal suffrage. All employees who have had an employment relationship with the employer for at least three uninterrupted months may participate in works council elections and have the right to vote. The employer must create conditions for employees to participate in the election and pay them their average remuneration for this time. In practice, works council elections often are conducted by remote voting, provided that the employer and the election commission guarantee the secrecy of such voting. Material/technical provisions for works council elections shall be provided by the employer.

It shall be deemed that the works council election has taken place if more than half of the employees who have the right to vote participated in the election. If a works council election is deemed null and void due to insufficient employee participation, a repeat election must be held within the next seven days. Such a repeat election shall be considered to have taken place if one-fourth of the employees entitled to vote participated. The candidates who received the majority of votes shall be deemed to be elected members of the works council. If several candidates receive an equal number of votes, the candidate with the longer length of employment at the enterprise, institution or organization shall be deemed elected. Persons on the reserve list of members of the works council may, in consecutive order, become works council members in the event of a vacancy on the works council.

2.2 Statistics on works councils

Since July 2017, the State Labour Inspectorate (SLI) has been collecting information on the works councils formed in Lithuania,¹¹²

Table 1. Works councils in Lithuania 2017–2022

	2017 (from July)	2018	2019	2020	2021	2022
Number of works councils elected	1,094	2,920	407	315	1,045	218
Total number of members in works councils	3,870	11,021	1,536	1,142	4,239	902

The statistics show a real trend in the formation of works councils. As mentioned above, works councils could be elected (under the provisions of the 2017 Labour Code) for a three-year term until 2018. It is, therefore, likely that the term of office of many of the works councils elected during this period ended near the beginning of 2021. However, due to Covid-19 pandemic constraints applicable at the time, works councils were not re-elected, and old works councils continued to function or ceased to function at all in a large number of enterprises.

The State Labour Inspectorate notes that, according to the data of 2022, employees were represented by works

councils and trade unions in 39.64 per cent of enterprises, of which: works councils operated in 12.11 per cent of enterprises; a single-person trustee of employees (in enterprises with up to 20 employees) – in 25.51 per cent; enterprise trade unions in 3.13 per cent and sectoral trade unions – in 0.33 per cent of enterprises. These are not representative statistical indicators, but data collected by the SLI during inspections of enterprises. Nevertheless, these data suggest that employees are collectively represented in around 40 per cent of companies in Lithuania.

2.3. Legal status and activities of works councils

As already mentioned, in Lithuania, works councils are involved in information and consultation procedures with the employer. That is the only function entitling the works council (article 174 of the Labour Code):

- (1) to participate in information, consultation and other participatory procedures by which the employees and their representatives are included in the employer's decision-making process;
- (2) to receive the information necessary for the performance of their functions from the employer and from state and municipal institutions and establishments;
- (3) to submit proposals to the employer on economic, social and labour issues, decisions of the employer that are of relevance to the employees, and the implementation of labour law provisions;
- (4) to initiate a collective labour dispute on rights if the employer fails to fulfil the requirements of labour law provisions;
- (5) to discuss, where necessary, economic, social and labour issues of importance to the employer's employees and convene a general meeting (conference) of the

employees of the employer or of the workplace, upon coordinating the date, time and place of the meeting/conference with the employer.

In carrying out its functions, the works council must take the rights and interests of all of the employer's employees into account and not discriminate against individual employees, groups of employees or employees from different workplaces; inform employees about its activities on a yearly basis by publicly providing employees of the enterprise, institution or organization with an annual report on works council activities or by another method established in the regulation on works council activities; inform the employer and the employer-level trade union in writing about its authorized members.

If an enterprise has one or more trade unions, the Labour Code (Article 174) obliges the works council to cooperate with them in good faith, to share information provided by the employer and to jointly resolve issues of concern to employees.

The employer and the works council may enter into a written arrangement to discuss the exercise of the works council's competence, the organization and

¹¹² The chairperson of a newly elected works council must communicate this information to the SLI in writing not later than within one month. Data from: State Labour Inspectorate. Monitoring of the Labour Code. Accessed via: https://www.vdi.lt/Forms/Tekstas1.aspx?Tekstai_ID=17

funding of its activities, the establishment of additional guarantees for works council members for the duration of their activities and other related key issues that promote cooperation between the works council and the employer. Employees' terms of employment, remuneration, working and rest time and other matters that are regulated by the collective agreement applicable to the employer's employees may not be negotiated in an agreement between the works council and the employer. An agreement between the works council

and the employer shall be concluded for a fixed term. The duration of its validity may not be longer than one year after the end of the term of office of the works council that concluded it. Either party may terminate the employer-works council arrangement by notifying the other party thereof in writing at least three months in advance. This provision shall also apply in the case when a new works council is elected and the agreement between the employer and the previous works council is still in effect.

2.4. Guarantees for the performance and non discrimination of works council members

The employer provides the premises free of charge and allows the use of available working facilities (office equipment, internet and so forth) for the performance of functions of the works council (article 167 of the Labour Code).

Members of works councils normally carry out their duties during working hours. For these duties, each member of the works council shall be given a minimum of 60 hours of work per year (for which time they shall be exempt from the performance of their direct job functions) for which the employee's average remuneration shall be paid. The employer must also create conditions for the education and professional development of works council members in the area of employee representation. For this purpose, each member of the works council shall be granted at least five working days per year, of which at least two working days shall be paid at the average remuneration (article 168 of the Labour Code).

During the term of office and six months after the end of the term of office of members of the works council, the employer may not:

- (1) dismiss employee representatives on the initiative or at the will of the employer;
- (2) worsen, on its own initiative, the indispensable employment contract terms compared to the employment terms of the employees of the same category.

If the employer has to take one of these decisions in respect of a works council member, it must obtain the consent from the SLI. Consent shall be granted if: (i) a change or termination of the employment contract is planned due to objective work organization or related reasons; and (ii) the employer proves that its intention is not due to the employee's membership of the works council.

Table 2. Data of the State Labour Inspectorate on employers' requests for termination of employment contracts with employee representatives, 2017-2022¹¹³

	2017 (from July)	2018	2019	2020	2021	2022
Requests received from employers	15	44	56	44	54	65
Requests granted	11	37	53	38	50	57

In deciding whether or not to give a consent for termination of the employment contract with a member of the works council (article 168 (3) of the Labour Code), the State Labour Inspectorate considers the termination of the employment contract only from the perspective whether the termination of the employment contract

is not potentially related to the representation of the employees or to the activities of the employee as a person exercising the representation of employees. It does not, however, assess the justification of the dismissal and employment or other issues related to the lawfulness of the dismissal.

113 A similar guarantee applies to members of works councils, trade unions and OSH committees operating in enterprises. The table shows just general figures.

► 3. Representation of employees in OSH committees, participation in employer's decision-making

As mentioned above, in Lithuania, works councils have one function – to represent workers in information and consultation procedures. This function is detailed in the Law on Safety and Health at Work by granting the right to the works council (trustee of employees) to represent the interests of employees in the creation of safe and healthy working conditions (article 10). Article 13 of the Law states that at least one OSH representative shall be elected in each workplace. The election of this representative shall be organized by the works council at a meeting of the enterprise staff.

In accordance with articles 210-211 of the Labour Code and article 10 of the Law on State and Municipal Enterprises of the Republic of Lithuania, the works council shall nominate its representatives to the board (that is, the collegial management body of the enterprise) of the state or municipal enterprise. It should be noted that the board, as the management body of an enterprise, shall

be formed in the cases provided for by the articles of association of a particular enterprise. Thus, it is allowed to not form any board in the above enterprises; however, where they are set up, they must include employee representatives. The members appointed by employee representatives have the same rights and obligations as the other board members.

In other enterprises, collective agreements also may provide for the possibility of employee representatives to observe or attend meetings of the employer's collective management or supervisory bodies in an advisory capacity – when the meetings discuss matters relating to the working conditions of the employees of the enterprise. In such a case, employee representatives have the right to express their opinions on the issues of employee working conditions discussed at the meetings (article 212 of the Labour Code).

► 4. Works councils and non-standard forms of employment

According to the provisions of the Labour Code, works councils represent employees, that is, individuals who work under an employment contract. It should be noted that it is irrelevant in this case what type of employment contract (for example, fixed-term, temporary, seasonal and so on) the employees have. Lithuanian labour law, however, does not treat self-employed persons and persons working on digital platforms as employees. As a result, these persons may not elect and be represented by works councils.

Lithuania also has a specific situation with regard to works councils in the civil service. Civil service relations, as well as the legal status and social guarantees of civil servants, are established by the Law on the Civil Service of the Republic of Lithuania,¹¹⁴ which provides for the subsidiary application of labour laws, that is, the Labour Code and other labour laws are applicable to civil servants to the extent their status and social guarantees are not regulated by the Law on the Civil Service. The approach to the application of the provisions of the

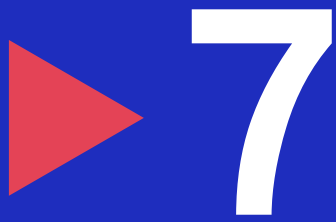
Labour Code regulating the legal status of works councils in the civil service is not uniform. The Law on the Civil Service does not regulate the procedure for the election of works councils; however, it does state that members of works councils may participate as observers in the selection commission to the position of civil servants, as well as in the performance assessment of civil servants. Such legal regulation is viewed differently. There is no consensus in the academic literature whether the election of works councils in the civil service is possible and whether such election should be subject to the provisions of the Labour Code, or whether special rules nevertheless should be laid down directly in the Law on the Civil Service (Krasauskas 2022). The case law, on the other hand, is categorical and states that the provisions of the Labour Code establishing the legal status of works councils are not applicable for the regulation of legal relations in the civil service and that, in general, works councils may not be formed in public authorities employing civil servants.¹¹⁵

114 Law on Civil Service, 8 July 1999, No. VIII-1316.

115 Rulings of 20 February 2019 and 4 November 2020 of the Supreme Administrative Court of Lithuania.

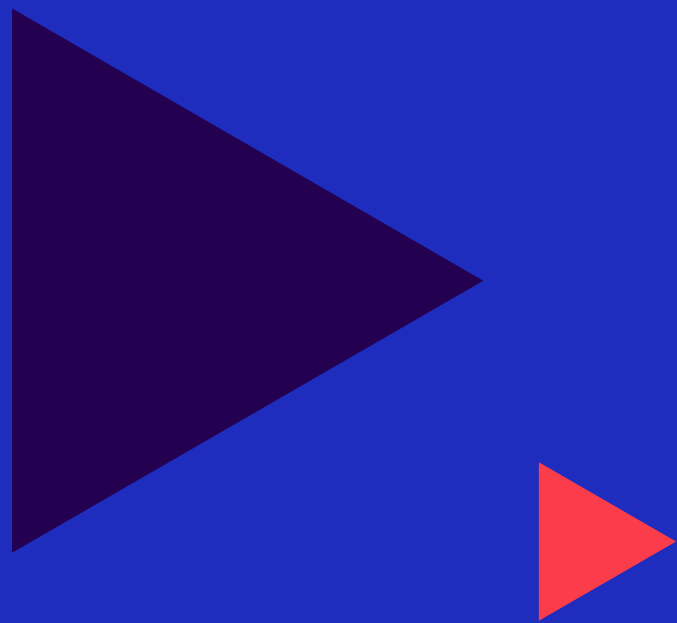
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The case of Moldova

By Valeriu Berlinschi



▶ Introduction

The Republic of Moldova recently has recorded a downward trend in its unionization rate and trust in trade unions, phenomena which have led to the need to identify new ways to represent employees in the negotiation of collective agreements and settlement of collective labour disputes. The Moldovan legislature has responded to by enshrining the legal institution of the

elected employees' representatives as an alternative to unions. This report, in this case, invokes the provisions of article 21, paragraph 2 of the Republic of Moldova's Labour Code¹¹⁶ (hereinafter, LC) (No. 159-162, 29 July 2003), according to which in those entities where trade unions have not been set up, employees' interests can be defended by their elected representatives.

▶ 1. Participation of elected workers' representatives in workplace cooperation

According to article 20 of the LC, the interests of employees of the entities within the framework of social dialogue¹¹⁷ – during collective bargaining, when concluding, amending and supplementing collective labour contracts, when carrying out control over its fulfilment, as well as when realizing the right to participate in the administration of the entity – are represented by a trade union body from the enterprise, and in its absence by other representatives elected by the enterprise's employees.

Article 42 of the LC provides that the participation of employees and their representatives in the administration of the entity can be achieved by:

- ▶ participation in the drafting of normative acts at entity level in the social-economic field,
- ▶ participation in the approval of normative acts at entity level in the cases provided by LC and other legislative or normative acts,
- ▶ informing and consulting employees regarding the following issues:
 - ▶ recent evolution and probable evolution of activities and economic situation of the entity,
 - ▶ situation, structure and likely evolution of employment within the entity, as well as any anticipatory measures expected, especially regarding job security,
 - ▶ decisions that may generate important changes in the organization of work or in contractual relations, including those related to collective dismissals or a change of ownership,

- ▶ occupational health and safety at the unit, as well as any measures likely to affect their assurance, including planning and introduction of new technologies, choice of work and protective equipment, training of employees in matters of occupational health and safety, and so on,
- ▶ average remuneration per category of employees or positions.

The information is provided by sending, in written form, a relevant, complete and truthful data on the listed subjects, in a timely manner, to the employee representatives which would allow them to prepare a consultation, if necessary.

If certain measures are expected regarding the employees, the information will be submitted at least 30 days before the implementation of the appropriate measures.

In case of liquidation of the entity or reduction of the staff or staffing levels, employees will be informed at least 30 calendar days before beginning the procedures provided by the legislation.

If there is neither a union nor elected representative within the entity, the relevant information is brought to the attention of employees through a public announcement placed on a public information board in the unit's headquarters (including each of its branches

116 Available online: https://www.legis.md/cautare/getResults?doc_id=135052&lang=ro#.

117 LC of the Republic of Moldova uses the term "social partnership".

or representative offices), as well as, as the case may be, through its web page or electronic messages.

The consultation of employee representatives takes place as follows:

- a) during meetings with representatives of the employer at the relevant level in relation to the subject discussed,
- b) based on the information sent by the employer and the opinion that the employees' representatives are entitled to formulate in this context,
- c) in order to obtain a consensus regarding the subjects which are related to the employer's competences.

At the entity level, the LC provides for the establishment of **"employer-employee" social dialogue commissions**.

The Model Regulation on the Organization and Functioning of the Commission for Social Dialogue between Employer and Employees has been approved by the National Commission for Consultations and Collective Bargaining (No. 9, 18 May 2007¹¹⁸) and provides that the Commission is formed on parity principles from the representatives of the employer and the trade union body in the unit or *employees' elected representatives*.

The commission has the following duties:

- harmonizes the interests of both employees and employer in the process of establishing concrete mutual obligations about work and social issues;
- carries out collective bargaining, develops and promotes the collective labour contract, contributes to its conclusion and monitors the process of its realization;

- analyses, prevents and mitigates conflict between employees and employer;
- elaborates proposals regarding the improvement of working conditions in the unit and grants employees additional guarantees and compensations than those provided by the legislation in force.

The commission also can perform other duties within the limits of its competence and under the conditions of the law.

In order to carry out its duties, the Commission has the right:

- a) to adopt recommendatory decisions in matters related to its competence, decisions about which the employer must examine and inform the Commission in writing,
- b) to request and receive from the employer the information necessary to fulfil its duties.

Based on these legal provisions, employees' elected representatives benefit from the same rights as trade union organizations at entity level within the "employer-employee" committee.

However, the provisions of the Moldovan legislation do not describe a situation whereby a trade union organization functions at the unit level, but there are also employees who are not union members but who would like to participate in the "employer-employee" commission. Thus, if there is a trade union, employees who are not union members have no alternative but to mandate the trade union to represent their rights.

► 2. Role of workers 'representatives in collective bargaining

In article 16, the LC establishes two conditions for participation in the social dialogue:

(1) At the entity level, employees and employers participate in the social dialogue, in the role of authorized representatives. The employee representatives are the trade unions or the elected representatives.

(2) At the national, branch and territorial levels, trade unions, employers and the respective public authorities participate in social dialogue, in the person of representatives empowered in the manner established by the LC. In these situations, the employees' elected

representatives are excluded from participating; this exclusive right belongs to trade union organizations.

The right to participate in collective bargaining and the right to sign collective agreements on behalf of employees at the national, branch or territorial levels belongs to the corresponding trade unions (or trade union association). If there are several trade union bodies at the national, branch, territorial or entity levels, then a single representative body is created for the conduct of collective bargaining, drafting of the collective agreement and its conclusion. The establishment of the representative body is carried out based on the principle of proportional representation of trade union bodies, depending on the number of trade union members. In

118 Available online: <http://cncnc.gov.md/aboutdialog>.

the absence of an agreement regarding the creation of the single representative body for the organization of collective bargaining, the right to conduct them will go to the trade union (trade union association) that gathers the largest number of members. Current legal provisions do not provide for elected representatives of the employees to participate at these levels of social dialogue.

Regarding the participation in collective bargaining in units where there is a trade union organization but some of the employees are not union members, the LC provides, according to article 21, paragraph 1, that they have the right to empower the trade union body to represent their interests at bargaining. It is clear from this provision that a trade union organization and elected representatives of employees who are not members of the union cannot coexist in a unit. The interests of the employees are expressed, according to article 21, paragraph 2, by the elected representatives of the employees only in units where unions are not present.

The basic principle provided by the LC in the framework of collective bargaining is that the participants in collective bargaining are free to choose the issues that will constitute the regulatory object of collective labour contracts and collective agreements and are to be negotiated.

Also, a conclusion that can be drawn from this legal text is the following: the existence of employees' elected representatives is not mandatory; labour law provides a possibility but not an obligation for employees to elect their representatives.

Considering the provisions of article 21 of the LC, employees' representatives are elected within a general assembly of employees, with the vote of at least half of the total number of the entity employees (or their delegates). The empowerment of employees' elected representatives, manner of their performance, as well as the duration and limits of their mandate, is established by the general assembly of employees in a normative act at the entity level.

The syntagm "in a normative act at entity level" conveys an imperfect character to this legal provision, giving grounds for different interpretations. Why does the legislature consider that the empowerment of the employees' elected representatives, manner of their performance and other important aspects are to be established in a local normative act? This legal provision is difficult to unravel, especially if we consider the provisions of article 10, paragraph 1, point (e) of the LC based on which the issuance of normative acts at the

entity level lies with the exclusive competence of the employer.

Therefore, the analysis of the provisions of article 21, paragraph 5 and article 10, paragraph 1, point (e) of the LC shows that the employer is the one who ultimately drafts the mandate of employees' elected representatives, establishes the manner of their performance and decides on other important aspects pertaining to the legal status of the other social partner.

Interpreting the aforementioned legal provisions, we conclude that the term "employees' elected representatives" refers to employees elected within the general assembly of employees in the entities where trade unions have not been set up for promoting and defending employees' rights (*Jurnalul de Studii Juridice* 2014).

Regarding the organization of the elected employees' representatives, their number is determined by the same general assembly of employees, considering the number of staff in the entity. Furthermore, according to the article 21, paragraph 5 of the LC, the mandate of the elected employees' representatives, manner of their performance, as well as the duration and limits of their mandate, shall be established by the general assembly of employees in a normative act at entity level.

Regarding **the right to strike**, the legislation allows (wildcat) strikes in an entity where there are no trade unions.

Thus, a strike can also be organized by the elected representatives of the employees, but, as in the case of collective bargaining, only at the entity level. Employee representatives express the interests of employees on strike in relation to the employer, employers, central and local public authorities, as well as the courts, in the case of civil and criminal proceedings.

Before starting a strike in the unit, the union organization or the elected representatives of the employees must comply with the conciliation procedure, which is mandatory.

As mentioned earlier, the right to declare and organize a strike at the territorial level belongs to the territorial, branch or national trade union body.

In such a situation, the claims of the strike participants are examined by the National Commission for Consultations and Collective Bargaining, the commissions at the branch level or the territorial commissions, depending on the level of participation in the strike, at the request of the interested social partner.

► 3. Worker or employee representatives

As mentioned earlier, in units where some employees are not union members, they have the right to authorize the union body to represent their interests in bargaining.

Since the legislation does not provide for the coexistence of a trade union organization and the elected representatives of the trade unions within the same unit, the relations between them are not regulated either.

Analysing the instruments of the ILO, in particular the Collection Agreements Recommendation, 1951 (No. 91), it may be concluded here that the ILO gives preference to trade unions as part of collective bargaining and refers to non-union workers' representatives only in the absence of such organizations. Consequently, the Trade Union Freedom Committee of the International Labour Office Board noted that: "In such circumstances, a direct negotiation between the management of the company and its staff aimed to ignore the representative organizations may, in some cases, contradict the principle according to which collective bargaining between employers and unions should be encouraged and promoted."

This situation is different in developed European countries, where more opportunities for democratic representation of employees are enshrined in legislation, for example, works councils, group of works councils or staff delegates.

Thus, at the European level, the right to establish European Works Councils was regulated by Directive 94/45/EC "On the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees" of 22 September 1994 (*Official Journal of the EU*, No. 254 of 30 September 1994) for undertakings or groups of undertakings with at least 1,000 employees within the Member States of the European Union and other countries of the European Economic Area, with at least 150 employees in at least two Member States.

Showing little interest in the experience of Western countries to create more possibilities for employee representation, the Moldovan legislature instead emphasizes the representation and defence of employees' rights and interests through unions, giving

them duties that are fulfilled by other structures that represent employees in other countries.

In this context, the Republic of Moldova has a difficult task ahead to adjust its labour legislation on social dialogue to meet the EU's *acquis* requirements, a step that has its foundation in article 37 of the Association Agreement between the EU and Moldova.

Unlike union leaders, the elected employees' representatives do not benefit from legal guarantees established in articles 387–388 in the LC. With regard to the matter of collective bargaining, the provisions of article 29, paragraph 3 of the LC will be applied to them, according to which employees' representatives who participate in collective bargaining, during the negotiations, cannot be subject to disciplinary sanctions, transferred to another work or dismissed without prior consent of the body which empowered them, with the exception of dismissal cases stipulated by the LC for disciplinary breaches.

Importantly, trade unions remain legal persons under private law, representing a collective subject of law, with all the rights and obligations that the legislation of the Republic of Moldova provides for these subjects of law. In contrast, employees' elected representatives do not enjoy status as a legal person and, therefore, cannot own patrimony, properties, cannot conclude various contracts or agreements with other natural or legal persons (with the exception, of course, of the possibility to negotiate and conclude collective agreements) and cannot act as a plaintiff or defendant in courts of law.

Regarding the duties of the elected employees' representatives, they target not only the issue of collective bargaining but have a rather general nature. The elected employees' representatives may initiate and also participate in the resolution of collective labour disputes.

Such a conclusion is based on the provisions of article 358, paragraph 1 and article 359, paragraphs 2 and 4 of the LC, in which the legislation refers to the generic term "employees' representatives" (*Jurnalul de Studii Juridice* 2014).

Collective bargaining in the Republic of Moldova take place within the tripartite commissions for consultations and collective bargaining at the national, branch and territorial level, based on the provisions of Law No. 245/2006,¹¹⁹ and at the entity level within the "employer-employee" commission, mentioned earlier. In 2018, Law 245/2006 was amended, and it was established that in the branches where there are no representatives of a social partner, the branch commissions are constituted as bipartite bodies.

Thus, the existing legislation gives the exclusive right to be part of these tripartite or bipartite commissions only to trade union organizations, with the exception of the entity-level commission where elected representatives can be members.

The establishment of work councils according to European practice is not currently provided in Moldova's legislation.

► 4. Impact of recent changes in law and practice

The institution of elected employee representatives was established in the Republic of Moldova upon the adoption of the Labour Code in 2003. Since then, no substantial changes have been made regarding the status, role or rights of elected employee representatives.

► 5. Workers' representatives as a collective voice on digital platforms?

In the Republic of Moldova, there are currently no associations of employees or trade union structures active on digital platforms. The Labour Code only provides for the election of employee representatives at the entity level, and the situation of workers on digital platforms is not regulated in any way.

► Conclusions

In sum, Moldova's legal system enshrines the monopoly of primary trade union organizations in collective bargaining and the conclusion of collective agreements, as well as in the initiation and resolution of collective labour disputes. However, if there is no primary trade union organization within the entity, the collective rights (the right to entity administration, the right to collective bargaining and the like) may be exercised by the employees' elected representatives.

Thus, the Moldovan legislature has made an important step towards the generalization of social partnership (dialogue) by harmonizing the national legislation with the principles and norms of international labour law, but it can be developed to offer more rights to employees.

Regarding the protection and facilities to afforded to workers' representatives, according to Article 3 of the ILO Workers' Representatives Convention, 1971 (No. 135),

workers' representatives are the persons, recognized as such under national law or practice, whether they are:

(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or

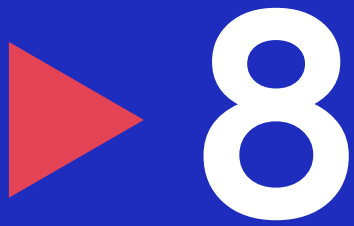
(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned.

In 2022, the Republic of Moldova became a candidate country for accession to the European Union and accession negotiations will soon start, whereby the Republic of Moldova must implement the *acquis communautaire* and, respectively, changes will be made regarding the elected representatives of employees to comply with European Union legislation.

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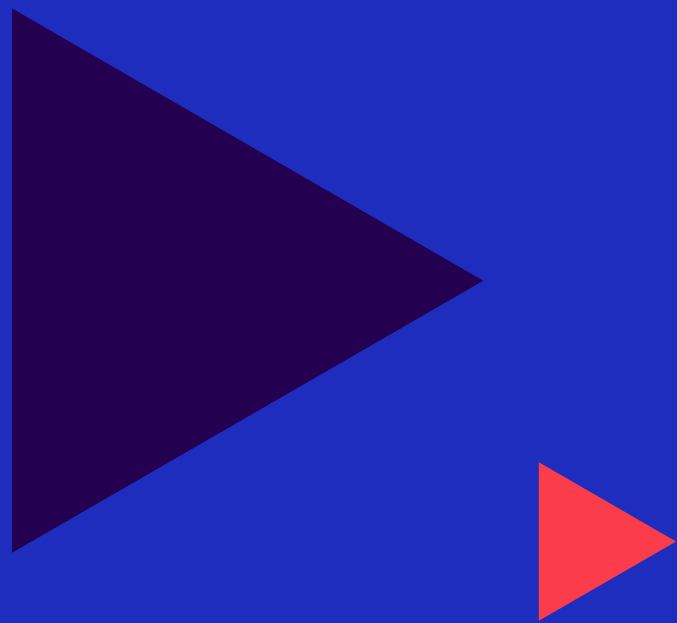
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The case of Montenegro

By Vesna Simović-Zvicer



► Introduction

The basis for trade unions and other means of association is established in the Constitution of Montenegro, which in article 53 guarantees the freedom of political, trade union and other association and action, without approval, by registration with the competent authority.¹²⁰ Joining a trade union organization is voluntary. The Labour Law does not define the conditions for joining a trade union but rather defines the conditions under which someone can become a member of a trade union or an association of employers as provided by the internal acts of those associations (usually by statute). The Labour Law does not envisage a minimum number of members for the establishment of these organizations, but this issue is also regulated by their internal acts. However, there are limitations regarding the affiliations of persons who can hold office in trade union bodies because the positions in trade union bodies are incompatible with positions and membership in political organizations and government bodies. Thus, the Law on Trade Union Representativeness (*Official Gazette*, No. 12/2018) in article 9, as one of the general conditions for trade union representativeness (regardless of the level at which the trade union is organized), provides for independence from state bodies and political parties. In addition, it was specified that the precondition of independence will be unfulfilled if the trade union representative is a member of a political party or on the electoral list as a candidate of a political party.

In accordance with the provision of article 53 of the Constitution of Montenegro, which provides for

protection against forced membership of an association, the Labour Law in article 189 further guarantees protection against unfavourable treatment either due to membership or non-participation in trade union activities.

In addition, article 13 of the Labour Law specifically prohibits discrimination in terms of the trade union right to organize, which in practice would mean that an employee, as a trade union member, cannot be disadvantaged in terms of membership or exercise of rights as a trade union member on any grounds of discrimination listed in article 7 of the Labour Law. This provision is related to the right to trade union organization, which in its positive meaning implies the freedom of an employee to choose whether to be a member of a trade union or not and of which trade union. Trade unions also cannot put their members at a disadvantage in relation to any personal characteristic, either in terms of access to the organization or in terms of the benefits it provides for its members.

In Montenegro, there is no special law on the organization of workers and employers, but their organization and operation are regulated within the Labour Law. It follows from the above that the work of employers' and employees' organizations cannot be banned, nor can these organizations be dissolved by a decision of an administrative body, because that would be contrary to the essence of their freedom of organization guaranteed by the Constitution of Montenegro.

► 1. Participation of elected workers' representatives

The obligation of the employer to provide employees with the free exercise of trade union rights, as well as to provide conditions for efficient performance of trade union activities that protect the interests and rights of employees, includes the creation of material and technical conditions and the obligation to inform and consult trade unions.

Article 192 of the Labour Law stipulates the obligations of the employer related to informing and notifying the trade union, that is, shop stewards (in the case a trade union is not organized with an employer), specifying in which cases the employer informs the shop steward and in which cases the employer has an obligation to notify them. The difference between these two employer

obligations is that information is shared at least once a year and notifying is done as needed (if a new act is adopted, changes in health and safety at work measures or new work technologies, changes in the exercise of employees' rights and so forth). Thus, an employer is obliged to inform a trade union at least once a year on a wide range of issues: business development plans and results, their impact and any changes in salary policy; the list of employees, their status, working hours for which employment contracts have been concluded and the qualification structure; total gross and net salaries, including contributions for compulsory social insurance and the amount of average salaries and overtime; recorded work injuries and improvements in working conditions; and any other issues important

¹²⁰ Montenegro has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), as well as the Right to Organise and to Collective Bargain Convention, 1949 (No. 98).

for the financial and social security of employees. An employer also notifies the trade union about its general acts; health and safety measures; introduction of new technology and organizational changes; working hours, night work and overtime; measures to address any redundancies and the time and manner of payment of salaries. The obligation to inform a trade union also exists in the event of a change in ownership as stipulated in article 110 of the Labour Law. Here, the aim is to mitigate the consequences of a change of ownership. In such a case, the employer must inform and consult their employees (Kovačević 2017, 63–91). The current employer is obliged to inform either a trade union no later than 30 days before a change in ownership (any trade union organized within an employer, regardless of whether it is representative) or shop stewards (if no trade union is organized at the employer). The information is provided in writing and should contain the date of the change in ownership; the reasons for and legal, economic and social consequences of a change in ownership for employees; and envisaged measures for employees whose employment contracts are to be transferred to the new entity.

The obligation to consult, provided in paragraph 2 of this article, should be distinguished from the obligation to inform, which should not have the expected consequence of submitting opinions or proposals of trade unions (shop stewards). Both the old and new owners have an obligation to consult with trade unions organized within that employer. However, this obligation only applies if they have new measures in relation to their employees. They are obliged to consult with a trade union (shop stewards) about these measures in a timely manner. So, in this case, the role of a trade union (shop stewards) is more active in relation to the previous case – which refers to sharing information. The aim of the consultation is to reach an agreement to mitigate the socioeconomic consequences for employees. This means that a trade union or shop stewards submit their proposals and opinions. Although reaching an agreement is not imperative, an employer's relationship with a trade union (shop stewards) cannot be reduced only to "submitting proposals and opinions" but also can entail a discussion to be conducted in good faith – with the aim of reaching an agreement (see also Simović-Zvicer 2002, 282).

In addition, a trade union may submit initiatives and proposals to an employer as they relate to the relevant issues on the agenda as well as any occupational health and safety matters. This avenue is restricted to a trade union and does not extend to shop stewards. Here, an employer is obliged to inform the trade union in writing about the meeting at which its initiatives or proposals will be discussed and to submit the appropriate materials.

The Labour Law also regulates consultation in the following ways:

- consulting on all important issues concerning the professional and economic interests of employees such as measures to mitigate socioeconomic consequences from a change of ownership;
- informing and consulting a trade union in a case of collective redundancies or if an employer intends to carry out redundancies for at least 20 employees within a period of 90 days;
- consulting on drafts of the act on systematization: in this case an exception is made in relation to other general acts of an employer, on the occasion of which an employer has only an obligation to inform a trade union. With the adoption of an amendment to the Act on Systematization, an employer has an obligation to request and consider the nonbinding opinion of a relevant trade union regarding the plans ahead. However, non-compliance with the obligation to consult a trade union results in liability for the misdemeanor, in accordance with article 209 of the Labour Law.

In all these cases, there is an obligation by an employer to notify a trade union in a timely manner, and no later than five days before the meeting at which its proposals and recommendations will be considered. The relevant materials and agenda also must be submitted before a meeting.

Additionally, a trade union may be involved in the process of determining the disciplinary responsibility of employees. Specifically, article 147 of the Labour Law stipulates that a trade union member may be supported by their union during a disciplinary hearing. Article 193, paragraph 3 of the Labour Law also provides for a solution that empowers a trade union to initiate proceedings to protect the rights of its members. This refers to the submission of an initiative for the protection of rights to the Labour Inspectorate, an initiation of proceedings for the peaceful settlement of labour disputes (before the Agency for Peaceful Settlement of Labour Disputes or the Centre for Alternative Dispute Resolution) and the initiation of proceedings for the protection of rights before the courts.

The role of trade union representatives in the consultation process regarding collective redundancies is important. Namely, the Labour Law foresees the employer's obligation to inform and consult the union, that is, employees or representatives of employees,

in a collective redundancy procedure.¹²¹ Consultation with employees' representatives is provided only in the event that an employer does not have a union. The law does not regulate the method to elect employees' representatives in situations where the employer does not have an organized union, so it is up to employees themselves to decide how to go about it. Moreover, if the employer has no organized trade union, the obligation to inform and consult applies to one, and not several, employee representatives.

In this case, the employer's obligation applies equally to each trade union (organized within that employer) that is registered in the national trade union register, regardless of whether it is representative or not. Informing and consulting the trade union, or the employee representatives in case no trade union is organized at the employer, are two separate processes, which (together with other legal aspects) are a condition for the legality of the procedure. The difference between these two processes is in the periods of their implementation. Namely, in accordance with article 167, paragraph 1 of the Labour Law, an employer must first inform a trade union about planned dismissals and publicize it with the necessary information internally before making a decision, while observing exhaustive criteria as listed in the Law, including the total number of employees, criteria applied for redundancy, workplace systematization data on job numbers, descriptions and functions, severance pay calculation, opportunities for professional retraining or reassignment in accordance with contractual terms or collective agreement, assignment to another job or

another employer), in which case the employer may terminate their employment contract without obligation to pay severance.

After submitting the above information, a consultation with trade union or employee representatives follows. Notably, this is done at the initiative of an employer, who is obliged to seek the opinion of a trade union no later than 90 days before the planned redundancies, while the consultation phase cannot be shorter than 30 days (within the aforementioned 90-day period, at least 30 days must be committed to the consultation procedure). During the consultation phase, the active role of trade unions, that is, employees and employee representatives, is understood through dialogue with an employer, which aims to prevent layoffs or mitigate the consequences. For this purpose, a trade union or employee representative submits opinions and proposals during the consultation, either verbally in meetings with an employer¹²² or in writing. An employer is obliged to answer with a written explanation in relation to each proposal (regardless of whether the proposal is accepted or not). This obligation applies only to proposals aimed at preventing or mitigating the consequences of layoffs. The aim of the consultation process is to reach an agreement between employer and trade union or employee representatives. However, reaching an agreement is not imperative: if no agreement is reached, the employer has fulfilled its legal obligation to conduct a consultation, so the absence of an agreement cannot affect the legality of cancellation of employment in such a case.

► 2. Role of workers' representatives in collective bargaining

Union representatives have a vital role in the collective bargaining process. Collective agreements are the second most relevant source of labour law in Montenegro. According to the Labour Law, collective agreements can be concluded at three levels: general (national); sectoral (sector, group or subgroup of business activity) or employer (organization). Collective agreements concluded at a certain level apply to all workers at that level of organising, regardless of whether they are members of representative organizations that have entered into such agreements. In addition, the

matters regulated by collective agreements are the same, irrespective of the level of collective bargaining.

The conclusion of collective agreements in Montenegro is basically voluntary, but according to the Labour Law, social partners are obliged to negotiate collectively. This is confirmed in article 185, paragraph 1. This obligation of collective bargaining does not always have to result in a conclusion but remains useful because it contributes to an improvement in social dialogue. To be legally binding, a collective agreement must be signed by all parties to the collective bargaining. In case there are several representative trade unions, each must be a signatory to

¹²¹ The European Court of Justice also points out the obligation to consult employees, that is, employee representatives if a trade union is not organized with the employer. *The Judgment of the Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-383/92 of 2 March 1994 (ECLI:EU:C:1994:78) regarding the transposition of EU rules on collective redundancies, the court stated that the duty to inform and consult would be deprived of its full effect if Member States would allow only recognized representatives of employees to be informed and consulted, leaving employees without an organized trade union without the right to information and consultation.

¹²² If consultations are held at meetings, it is necessary to keep minutes, in which the opinions and proposals of trade unions, or employees and employee representatives may be entered in detail.

the collective agreement.¹²³ The conditions for acquiring the status of a representative trade union (general and special), as well as the procedure for determining the representativeness of a trade union are defined by the Law on the Representativeness of Trade Unions (*Official Gazette of Montenegro*, No. 12/2018). The general conditions are to be registered in the Register kept by the Ministry of Labour and Social Welfare; to be independent of state bodies, employers and political parties; and to be financed from membership fees and other sources, while special conditions depend on the level at which representativeness is determined.

Special conditions for determining representativeness refer to the percentage of employees who are members of a trade union, and it is determined differently, depending on the level of trade union organization. Thus, representativeness requires that a trade union gather at least 20 per cent of the employees at the employer. That percentage is 15 per cent at the level of branch of activity, group or subgroup, and 10 per cent at the state level, but with the caveat that at least five representative branch-level trade unions are members of that union. These thresholds were provided for in the previous Law on the Representativeness of Trade Unions (*Official Gazette* Nos. 26/10, 36/13 and 55/16), and the new Law adopted in 2018 specifies the condition of political neutrality. Thus, article 9 of this Law states that if a trade union representative is a member of a body of political parties or on the electoral list as a candidate of a political party, then independence is not fulfilled. It also specifies how general conditions are assessed, namely: confirmation of entry in the Register; a statement by the trade union representative that they are not a member of the body of political parties and that they are not on the electoral list as a candidate of a political party; the statute or the rules of the trade union organization; and a trade union statement on the method of financing.

The professionalization (or formalization) of the position of shop steward is covered by article 195 of the Labour

Law. Thereby, professionalization can only refer to a shop steward of a representative trade union (because only a representative trade union can appear as a signatory to a collective agreement). The Labour Law leaves space for a collective agreement to define the details about a trade union position, for example, a steward's rights and obligations on the shop floor, how much time they devote to the union, how much of their salary is paid from trade union funds and their corresponding term.

In case their rights and obligations are suspended, a shop steward has the right to return to "their" former job after the termination of a trade union position or – if in the meantime that job is terminated – to be assigned to a new job corresponding to their level of education or professional qualification. A steward is entitled to paid leave to attend branch and/or national trade union meetings of which they are members), seminars, courses, congresses and conferences in the country and abroad. Thereby, there is no limit to the number of hours or days that a shop steward may be absent from work, and they are entitled to salary compensation for the entire period of absence due to the aforementioned trade union activities. In addition, a part-time shop steward is entitled to an additional 20 hours of absence from work per month to perform other trade union activities (also with salary compensation). In both cases, an employer may not prevent the absence of a shop steward so long as they inform their employer at least three days in advance.

Shop stewards are protected in multiple ways from an employer's punitive action for performing trade union activities during and up to six months after their term. They can be neither made redundant, reassigned, redeployed nor discriminated against for performing trade union activities. In addition, the employer cannot put the shop steward at a disadvantage due to their trade union activities, so long as they fulfil their work obligations.

► 3. Workers' representatives

The Labour Law provides for representation of employees only through trade unions. In case there is no trade union in the enterprise, employees may elect one or more representatives for representing them in occupational

safety and health related matters. A previously valid law¹²⁴ provided for the establishment of works councils, but in practice they did not play a significant role in the protection of employees' rights because their powers

¹²³ Such a solution also derives from Article 6 of the Law on Trade Union Representativeness, which, as one of the rights of a representative trade union, provides for the right to collective bargaining and the conclusion of collective agreements.

¹²⁴ The Labour Law of 2003 (*Official Gazette of the Republic of Montenegro*, No. 043/03) provided for the right of employees to establish a Works Council with an employer with more than 20 employees. The Works Council gave opinions on: significant decisions and acts of the bodies of the employer that affect the position of employees, in accordance with the collective agreement; improving professional rehabilitation; working conditions of older employees and any redundancy program. In addition, the employer was obliged to seek the opinion of the Works Council if at the same time at least ten employees or at least 10 per cent of the total number of employees applied to it for protection of rights from work and on the basis of work.

overlapped with those of trade unions. Currently, there is no provision for the establishment of works councils, therefore the implementation of EU Directive 2009/38/EC on the role of European Works Councils informing and advising employees is not possible.

The role of elected employees' representatives is foreseen only in terms of occupational safety and health. Occupational safety and health are regulated by the Law on Safety and Health at Work which does not provide for an obligation to establish a special body that would play an active role in protecting the rights of employees; however, it does contain provisions relating to elected employees' representatives. An elected employees' representative is a person appointed by employees to represent them in safety and health matters at work. The employer is obliged to inform the shop steward in writing regarding:

- risk, prevention, measures and activities in relation to each type of workplace and/or job;
- the manner of organizing and providing first aid, fire protection, evacuation procedures in the event of serious and imminent danger and assigning persons in charge of implementing these measures.

In addition to the obligation to inform the shop steward, the employer has an obligation to provide them with

access to decisions on occupational safety and health measures that must be honoured as well as the means and equipment for personal protection; records and reports on injuries at work, as well as data arising from the measures and actions of inspection and other bodies responsible for occupational safety and health. An employer is obliged to enable a shop steward and a trade union to submit their remarks regarding safety and health at work to a competent inspector during inspection procedures.

The Law on Safety and Health at Work specifies that an employer must provide a shop steward with appropriate forms of training. In addition, the employer is obliged to provide at least one shop steward with adequate paid leave from work of at least five working hours per month and to provide them with all the necessary means to perform work related to safety and health at work. Bearing in mind that shop stewards prominent role in relation to safety and health at work, they cannot be put at a disadvantage due to the performance of tasks that contribute to controlling occupational safety and health.

Employees have the right to elect one or more shop stewards. The selection procedure, the manner of work and the number of employee representatives with the employer, as well as their relationship with the trade union are regulated by a collective agreement.

► 4. Recent changes concerning trade union' representatives on the national industrial relation system

The manner of electing an authorized trade union representative (shop steward) is regulated by a trade union's own internal rules. A trade union may have one or more representatives at an employer. A few comments are worth making in this regard:

- an authorized shop steward, in accordance with article 5, paragraph 1, item 4 of the Labour Law, can only be an employee;
- the name of the authorized shop steward is entered in the Register of Trade Union Organizations maintained by the relevant ministry;
- the trade union is obliged to inform the employer about the appointment of an authorized shop steward within 15 days from the day of entry of that fact in the Register of Trade Union Organizations.

An employer must allow an authorized shop steward to perform trade union activities without any hindrance according to article 191 of the Labour Law. An employer is also prohibited from obstructing a shop steward from performing their function. Similarly, a shop steward is expected to perform trade union activities in a manner that does not affect workplace efficiency (for example, by modifying the timing and dynamics of their activities or coordinating with their employer so as not interrupt work).

In Montenegro, no statutory advisory bodies currently exist for representatives of branch-level trade unions and employers' associations. Nevertheless, the possibility to establish these bodies is provided for in branch-level collective agreements, and their role is to provide opinions and interpretations regarding the application of branch-level collective agreements. Thus, the Branch-level Collective Agreement for Education (*Official Gazette of Montenegro*, Nos. 10/2016 and 76/2019), signed by the representative trade union for education in Montenegro and the Government of

Montenegro, stipulates that the Contracting Parties establish a commission for implementation, monitoring, implementation and interpretation of this Agreement, on a parity basis, composed of three representatives of each Contracting Party. This commission makes decisions and gives its opinions regarding the application of this Agreement, provided that its decisions are binding on the Contracting Parties and the employer. The manner of work and decision-making of the commission is regulated by the rules of procedure. Similar provisions are contained in the Branch-level Collective Agreement for Health Care (*Official Gazette*, Nos. 30/2016 and 9/2020), as well as in the Branch-level Collective Agreement for Culture (*Official Gazette*, No. 64/2016), the Branch-level Collective Agreement for Energy sector (*Official Gazette*, No. 69/2016), the Branch-level Collective Agreement for Telecommunications (*Official Gazette*, Nos. 55/2015 and 61/2018), as in other branch collective agreements, except that, instead of a commission, a committee for monitoring, application and interpretation of this collective agreement is envisaged.

Representatives of representative trade unions and employers' associations have their representatives in the management boards of public institutions, which have competencies in the field of labour relations and exercising rights based on work. These are the following institutions: the Agency for the Peaceful Settlement of Labour Disputes, the Labour Fund, the Health Fund, the Pension and Disability Insurance Fund and the Employment Agency. The competencies of these bodies, in addition to the election of the director of the institution, also refer to the adoption of decisions and acts of a general nature, development plans and programs and so forth. In each of the management boards of these institutions, the members include one representative of the representative association of employers and one representative of the representative trade union at the state level. Two representative umbrella associations of employees currently operate in Montenegro, and their

membership in these bodies is regulated by the principle of rotation. Namely, article 6 of the Law on Trade Union Representativeness stipulates that if tripartite bodies prescribe the participation of a smaller number of trade union representatives in relation to the number of representative trade unions at the appropriate level, the principle of rotation applies, in accordance with a special agreement.

In addition, representatives of representative trade unions have their representatives in the Committee for Determining the Representativeness of Trade Unions at the National and Branch Level (which makes a proposal for determining representativeness to the minister responsible for labour), as well as in the Committee for Monitoring, Implementing and Interpreting the General Collective Agreement.

Representatives of representative trade unions, according to the principle of rotation, have their representatives in advisory bodies at the state level. One of such bodies is the Council of the Vocational Rehabilitation Fund, which in accordance with article 40 of the Law on Vocational Rehabilitation and Employment of Persons with Disabilities (*Official Gazette*, Nos. 49/2008, 73/2010, 39/2011, 55/2016) monitors the implementation of measures aimed at improving vocational rehabilitation and employment of persons with disabilities as well as the use of the Vocational Rehabilitation Fund.

Representatives of representative trade unions have an important role in the Council for Privatization and Capital Projects which performs management, control and enforcement of privatization and has executive powers determined by the Law on Privatization of Economy, and proposes and coordinates activities on the implementation of capital projects in Montenegro.

The work of the aforementioned bodies is regulated by their internal acts (rules of procedure). In practice, sessions are held live or electronically – via various platforms (e-mail, Zoom, Viber and so on).

► Conclusions

Trade unions keep the primary role in the information and consultation processes at the company, including regarding collective redundancies. In practice, the elected workers' representatives have only a marginal involvement if any. Moreover, there is no legal provision for the establishment of works councils, therefore the

implementation of EU Directive 2009/38/EC on the role of European Works Councils informing and advising employees is not possible. Besides, in Montenegro, no statutory advisory bodies currently exist for representatives of branch-level trade unions and employers' associations.

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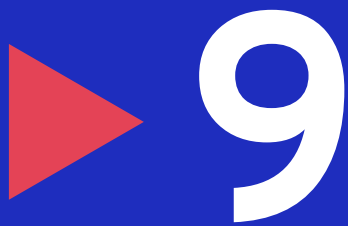
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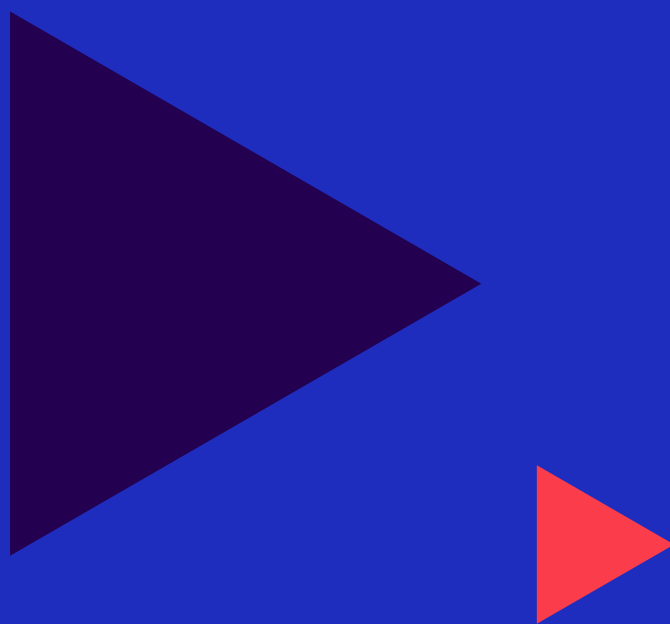
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The case of North Macedonia

By Aleksandar Ristovski



► Introduction

The establishment of a proper legal mechanism that enables the collective voice of workers to be heard and considered by their employers is one of the main prerequisites for the existence of industrial democracy in the workplace. This mechanism is usually called “involvement” or “participation” of workers in the decision-making process at the employer (that is, participatory management), an alternative to autocratic staff management (Servais 2017). In theory, there is no real difference between the meaning and use of the terms “involvement” and “participation” of workers. A certain nuance between these terms can be made depending on the regulatory context (see Njoya 2016). In the literature, the term “participation” is used generically, covering a wide range of rights, which consist of information, consultation, collective bargaining, co-decision and partaking in decision-making bodies of a company (Hanami 1982). Participation rights, according to their intensity, can start from the right to receive information and to be consulted and exchange opinions, through the right of workers’ representatives to veto and to decide jointly with management representatives, to the right to participate in decision-making within the management body of the company (Bruun 2011). The heterogeneity of different national industrial relations systems also is reflected in the legal sources regulating employee participation (in some countries, exclusively based on legislation; in others, on collective agreements; or a mixture of both) (Weiss 2004). Participation can be obtained by means of collective representation of workers through their representatives (so-called “indirect” or “representative” participation) or by means of “direct” and immediate involvement of individual or groups of workers in decision-making (Eurofound 2023), or other processes in the company (for example, profit-related pay or ownership sharing) (Barnard 2012). While direct participation is a subject of human resource management science and integral to companies’ human resource strategies (Blanapin 2013), labour law and industrial relations traditionally have dealt with indirect participation (obtained through workers’ representatives). Both ILO Workers’ Representatives Convention, 1971 (No. 135) and ILO Recommendation, 1971 (No.143) leave ILO member states free to choose the most appropriate form of dialogue between employers and workers. In that regard, these two international labour standards provide for two traditional formulas through which the representation of workers is obtained: either through trade union representatives (appointed or elected by the unions or their members), or through representatives freely elected by the undertaking’s workers (for example, works councils) (Servais 2017). The way in which these formulas are implemented in national legislation and practice are different. They

usually include “dual” (or multi-layered) or “single” participation channels, depending on whether the institutionalized representation of workers at the employer consists of the presence of two structures (works council/employee representative and trade union/trade union representative), or only one of them (works council/employee representative or trade union/trade union representative) (Eurofound 2009, 8). In countries with a tradition of “dual” (or multi-layered) channels of participation (for example, Germany), trade unions usually are authorized to participate in collective bargaining, while the other aspects of participation (information, consultation, co-decision) are carried out through works’ councils. In countries with a tradition of “single” channel participation (for example, the United Kingdom), the involvement and collective voice of workers historically took place only through trade unions, that is, their representatives in the company (Davies 2012, 218–219).

With the independence of the Republic of North Macedonia (then the Republic of Macedonia) from the former Socialist Federal Republic of Yugoslavia (SFRY) in 1991 and the introduction of political pluralism, a market economy, and the contractual nature of labour relations, industrial relations abandoned all elements and relics of the “workers’ self-management” system characterizing SFR Yugoslavia. From that point, trade unions, that is, their representatives within the undertaking (so-called trade union representatives), gained a central role in the collective representation of workers in industrial relations, including in decision-making within the undertaking. Collective bargaining is the most significant type of workers’ participation compared to other types. However, North Macedonia – like other former communist and socialist countries from Central and Eastern Europe – has witnessed a tremendous decline in trade union membership and density rates as a result of several significant factors, chief among them being: privatization of state-owned or socially-owned undertakings, restructuring of socialist-era enterprises, growth of the service sector, and others (Bagić 2010, 71). Currently, more than 30 years since the independence of the country, the trade union density rate in North Macedonia is estimated at just over 17 per cent, while the representativeness rate of trade unions in the private sector is only 6 per cent (Ristovski 2023, 142).

The institutionalization of other opportunities for the collective representation of workers besides trade unions, and other types of workers’ representatives apart from trade union representatives, gained significance since the rights to information and consultation were recognized in North Macedonia’s national labour legislation. In this regard, with the 2010

amendments to the Law on Labour Relations, both the general framework of informing and consulting (regulated by the Information and Consultation Directive 2002/14/EC) and some of the context-specific directives (namely, Collective Redundancies Directive 98/59/EC and Transfers of Undertakings Directive 2001/23/EC) became subject to statutory regulation. In 2007, the Law on Safety and Health at Work (LSHW) was adopted with the aim of complying with the Framework Directive for occupational safety and health 89/391/EEC, while in 2012, the European Works Council Directive 2009/28/EC (recast) was introduced into the Macedonian labour law system through the adoption of the Law on European Works Councils, although its application

is conditional upon the accession of North Macedonia to the European Union. The introduction of the said directives in Macedonian labour legislation was more a consequence of the duty to comply with the EU acquis rather than a result of the preferences or the initiative of the social partners to improve industrial democracy on the shopfloor or enterprise level. Regardless of the motives, Macedonian labour legislation has not yet established an in-depth and systematic approach for involving workers in decision-making at the employer – addressing both procedural and material aspects of the rights to information and consultation as well as the construction of an appropriate structure for collective representation of workers in the exercise of these rights.

► 1. Participation of elected workers' representatives at the workplace

The right to participation has been elevated to the rank of a constitutionally guaranteed right, provided for in article 58 of the Constitution of North Macedonia from 1991. The constitutional provision implicitly refers to two types of employee participation, namely: employee participation in the management of the company (board-level) and employee involvement related to work processes (work-related) (Kalamatiev and Ristovski 2012, 509–510). The right to participation of employees in the management of the company is provided by the Law on Trade Companies from 2004, which in article 342, paragraph 4, refers to regulating this right with a special law. However, there are some roadblocks: not only has a special law on employee participation in company management yet to be adopted, but the Law on Trade Companies itself contains contradictory provisions that prohibit the participation of employees in the companies' supervisory bodies. It is worth noting that certain special laws in the field of social insurance and social policy provide for the participation of trade union representatives in the management of certain state administration bodies.

The right to participation, that is, involvement of employees related to the work process, primarily is regulated by the Law on Labour Relations (LLR). In this regard, the LLR regulates the rights to information and consultation, both in the context of the general framework for information and consultation, and the special legal regimes in the event of collective redundancies and transfers of ownership. An essential issue on which the effective application of the rights to information and consultation depends regardless of the context in which they are applied, is the issue of specifying the representatives of the workers (workforce delegates, trade union delegates and so

on, if they appear as individual representatives) or the representative body (works council and so on in case of a collegiate form of representation), through which these rights may be exercised. Considering the fact that the right to participation is a fundamental right regulated by articles 21, 22 and 29 of the revised European Social Charter (ratified by North Macedonia) and by article 27 of the Charter of Fundamental Rights of the EU, it is not the same whether, in ensuring its effective realization, a member state has arranged the issue of determining a representative structure through which this right will be exercised or not. It is considered that the effective realization of the rights to information and consultation (usually regarded as a continuum – information followed by consultation) must be supported by some kind of collective workers' representation (Ales 2015, 524). This is of particular importance for North Macedonia as a candidate country for EU membership, and for the sake of proper and expedient harmonization with the European directives on information and consultation. Yet, Macedonian legislation provides for a literal translation of the relevant provisions of the directives in relation to the definition of the term "employees' representatives". Thus, according to the LLR, "employees' representatives" means employees' representatives provided for by law and by the laws of the member states of the European Union. This provision does not prescribe any legal ground for the effective exercise of the right to information and consultation. The vaguely defined concept 'employees' representatives', in addition to the general framework for information and consultation, is also used in the context-specific framework of collective redundancies. On the other hand, the Law on Labour Relations sets out the right to information and consultation with trade union organizations, that is, their representatives, in the

event of transfers of undertakings (that is, change of employer). The LLR also stipulates an obligation for the employer to consult with the representative trade union at the employer, and if there is none, with the employees' representative, on certain issues related to night work, such as: the time that is considered night work, the forms of organizing night shifts, measures for protection at work, as well as measures for social protection.

In the context of the general framework for information and consultation, the LLR provides for several minimum provisions in an attempt to comply with Directive 2002/14/EC. In article 94 (a) entitled "informing and consulting the workers", provisions, which to a greater or lesser extent are literally translated from the Directive, are those concerning: the definition of the terms "information and consultation" (article 2, paragraph 1 (f) and (g) from the Directive); the content of the information and consultation (article 4, paragraph 2 of the Directive); the scope of application of the right to information and consultation (article 3, paragraph 1) and the manner of implementation of the information and consultation (article 4, paragraphs 3 and 4 of the Directive). Provisions of the Directive which have not been taken fully into account throughout harmonizing are those referring to the objectives and principles of the Directive (article 1), the possibility of regulating the practical arrangements of information and consultation by means of an agreement (article 5), the protection of employees' representatives (article 7), the protection of rights (article 8). The legal framework neither specifies more closely nor refer to the negotiation of the practical arrangements related to the time and manner of implementation of the information and consultation; it also does not operationalize and systematize the issues (content) that can be the subject of information sharing and/or consultation with employees like economic, financial, or production processes; staff management (working time arrangement, protection of the right to privacy, access to training and so on); collective matters affecting staff (issues that may be subject to regulation by general acts of the employer) and matters affecting individual workers (dismissals, deployments and so on).

Collective agreements go "one step beyond" the law. Regarding the time, a range of agreements stipulate that it must take place at least annually, as needed or regularly and in due time. Similarly at the discretion of the respective agreement, the manner may be regulated, whether written or verbal, newsletter, bulletin or meeting. Regarding the content, collective agreements may cover annual and multi-year development plans, organizational changes, decisions governing employees' employment rights, annual business results, other issues of common interest, drafts, i.e. proposals of acts that regulate certain issues in the field of labour relations, wages, annual reports on the use of funds from donations, sponsorships and funds received from own

revenues, measures and regulations for protection at work and of the working environment etc.

The Law on Labour Relations envisages compliance with the context-specific Directives on information and consultation in relation to collective redundancies (Collective Redundancies Directive 98/59/EC) and transfers of undertakings (Transfers of Undertakings Directive 2001/23/EC). Article 95 on collective redundancies is an example of a near perfect transposition of the Directive's language (article 2) into local legislation. On the other hand, the right to information and consultation in the event of transfer of an undertaking (i.e. change of employer) regulated by articles 68 (b), 68 (c) and 68 (d) of the LLR, is harmonized with the corresponding provisions of the Transfers of Undertakings Directive 2001/23/EC (for example articles 7 and 9 of the Directive).

Macedonian legislation also provides for information sharing and consultation with employees on issues related to their occupational safety and health (OSH). The Framework Directive on Safety and Health at Work 89/391/EEC draws a distinction between two types of workers' representatives (workers' general representatives and workers' representatives for safety and health) and delimits the issues that are subject to their consultation and participation (Bercusson 1996, 514). Macedonia's Law on Safety and Health at Work, however, narrowly defines only "workers' representatives for safety and health at work". These representative can be elected by employees from among their ranks at a trade union meeting of the majority union or at an employee general meeting. The Law prescribes their minimum amount that hinges on the number of employees employed with an employer, regulates their competences and obliges employers to enable the adequate performance of their functions, including a guarantee of their special protection as enjoyed by trade union representative at an employer. An employer, by an act, determines the number of workers' representatives for safety and health at work, the manner of their training, as well as the manner and form of their functioning. In practice, the number of employers who thoroughly carry out their duties to inform and consult workers' representatives for health and safety seems to be insignificant. Frequently, workers' representatives are present formally at an employer but ineffective.

Workers' representatives have a certain role in the procedure for attainment, that is, protection of workers' rights (for instance, grievance procedures). In the Macedonian labour law system, attainment is conducted in two phases: before the employer (primary or internal protection) and before the competent court (external protection). The LLR explicitly provides for the involvement of a trade union representative when representing an employee before their employer in a grievance procedure. However, this only applies in cases of the termination of employment by dismissal (with or

without a notice period) or temporary suspension of an employee. According to the collective agreements, trade union representation for an employee before a company tribunal applies to all cases of violation of a right defined by law, collective agreement or employment contract. Neither the LLR nor collective agreements oblige an employer to inform and/or consult an employees' representative (including a trade union representative) prior to an individual decision on dismissal, deployment and so on. The legal framework also enables an employee to be represented in labour dispute proceedings by a law graduate employed by their trade union or in an affiliated trade union federation or confederation. Certain trade unions at a higher level (national, branch or section) also provide free representation in labour dispute proceedings for their members.

The LLR also provides for two cases of "vetoing" or "co-deciding" the dismissal of special categories of workers. Workers in cases of pregnancy, maternity and parenthood are protected from dismissal – unless the employee commits a severe breach of the contractual duties or violation of working order and discipline which is sanctioned by dismissal without a notice period. In such a case, the LLR requires consent from the trade union about the case, or if no trade union is established or the employee is not a member of a trade union, consent of the competent labour inspector. In the event that a trade union, that is, the competent labour inspector, does not give consent for termination of the employment contract, the employer may, within a period of 15 days, initiate a procedure for its re-consideration by a court decision or arbitration award. The second case refers to the protection of trade union representatives. The employer is prohibited from any form of salary reduction or contract termination of a union representative due to trade union activities. The protection prior to dismissal shall last during the whole period of the union's representative term of office, and at least two years after its expiry. Any termination of the employment contract includes a mandatory request for prior consent from the trade union. The union has eight days in which to state whether to grant or deny consent on the termination. If the union does not state its opinion on granting or denying a consent, it shall be deemed to have agreed with the employer's decision. If the union does not grant consent, the consent may be compensated by a

court decision. In practice, the request for prior consent by the trade union before the dismissal of a trade union representative and the procedure following a lawsuit filed by an employer for compensation, which is, repealing of the denied consent, causes multiple dilemmas and ambiguities. The LLR neither specifies the moment (phase) of the union's involvement in co-deciding on the termination of an employment contract of a union representative (either before or after the adoption, but before the finality of the decision on termination), nor does it oblige a union that denied the request for consent to justify its decision, nor does it stipulate a time limit in which a court of first instance should decide on an employer's claim for compensation for a denial of consent from a trade union. It is also unclear whether the proceedings for compensating, that is, repealing a union's denial before the competent court, should be reduced to a genuine preliminary proceedings – in which the court will expeditiously determine whether there is a well-founded reason for dismissal and a lawful procedure for dismissing a union representative, or the proceedings should take place as any regular proceedings in the event of a dismissal by an employer. It is important to mention that the legal protection for the trade union representative does not apply to employees' representatives (for information and consultation).

Macedonian legislation recognizes certain forms of involvement of an employees' representative in exercising the right to protection against harassment at the workplace. Pursuant to the Law on Protection against Harassment at the Workplace (LPAHW), employees' representatives can submit written requests for protection against harassment at the workplace to the employer, with the prior written consent of the employee who considers themselves exposed to harassment at the workplace. They can also participate in the mediation procedure, at the request of the parties. LPAHW, similarly to the LLR (in the part of the general framework for information and consultation and the special framework for information and consultation in the event of collective redundancies), neither defines nor determines the manner of electing the employees' representative for protection against harassment in the workplace, nor does it provide for an obligation on the part of the employer to inform and consult employees' representatives about how complaints are handled.

► 2. Role of workers' representatives in collective bargaining

Collective bargaining in North Macedonia takes place at three levels: the level of the Republic (i.e. at national level) the branch or section level according to the National Classification of Activities (NCA) and at the employer level. The highest level of collective bargaining (i.e. national level) is conducted to conclude General Collective Agreements. A General Collective Agreement can be concluded either in the private or public sector. Branch or section level collective bargaining, in accordance with the National Classification of Activities, is conducted for concluding Specific Collective Agreements. The employer level is covered by Individual Collective Agreements. Of note, an individual collective agreement is concluded at the level of an entire company/employer (regardless of whether the company has one or more branches/subsidiaries located in different municipalities across the country) (Ristovski 2022, 33).

Regardless of the level, the right to collective bargaining is an exclusive trade union competence; only a trade union can be the sole, organic holder of this right on the behalf of workers. Argumentum a contrario, Macedonian labour legislation does not recognize and legitimize the right to collective bargaining of non-unionized workers. Pursuant to the LLR, a trade union is defined as an "autonomous, independent and democratic organization of the workers, which they join voluntarily for the purposes of representation, promotion and protection of their economic, social and other individual and collective interests". This definition creates some dilemmas in terms of the personal scope of the freedom of trade union association (and the right to collective bargaining), since the LLR formally attributes this right to "workers" which, according to current legislation include only "employees" in the narrowest sense (meaning only those persons who have entered into an employment relationship by signing a written employment contract. Given that the Law implicitly levels the terms "employment relationship" and "employment contract", while simultaneously requiring a written form as a prerequisite for valid contract, and in the absence of an adequate legal mechanism for combating disguised employment (such as presumption for determining the existence of an employment relationship), many categories of workers are formally deprived from exercising their right to trade union organization and collective bargaining. The "list" includes not only informal (undeclared) workers and workers in a disguised employment relationship (bogus self-employed) but also casual workers and genuine self-employed including freelancers. Macedonian labour

legislation neither sets out clear rules on the manner and levels of organizing trade unions nor differentiates much between "trade union" and "higher-level trade union". More problematic are amendments to the LLR from 2012 initiated by national trade unions (federations and confederations), which abolished the possibility to register and acquire legal personality at the employer-level. Their main reason for the amendments was budgetary due to the expense of registration. Of course, their prevailing motive was to strengthen the financial and organizational capacities of the trade unions at a higher level (primarily at the branch or section level), while the only way in which trade union organizations established at an employer-level were allowed to function was through and within the higher-level trade unions (Kalamatiev and Ristovski 2019, 12–13). From then on, the registration and functioning, and thus the very existence of the trade unions, at the level of an employer depends either joining a newly formed trade union or accession to an existing trade union at a higher level (for example, a branch trade union or federation, or a national confederation). Such limits seriously restrict workers' freedom of association and their right to organize (particularly at a company level) and as such are considered to be contrary to ILO Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) (and in particular to articles 2 and 7).

Only representative trade unions have the right to participate in collective bargaining. Determining the representativeness of trade unions for the first two levels of collective bargaining depends on the fulfilment of two cumulative conditions: (1) the union needs to be registered in the Ministry of Labour's register, and (2) it should include at least 20 per cent of the total number of employees in the public/private sector who pay membership fees, no matter whether branch or section. Considering that the LLR does not specify the direct and immediate registration of trade unions at the employer level in the Ministry of Labour's register, the only condition for representativeness is that at least 20 per cent of workers must be current fee-paying members of the union. The legal framework also provides for two other alternatives to gain representativeness in special circumstances, for example, when no single union (based on the level of collective bargaining) can meet the legally prescribed conditions for gaining representativeness. The first alternative assumes the recognition of the representativeness of the "majority" union in cases when the union has submitted a request

for representativeness but does not meet the threshold criterion. Here, the Law allows the trade union with the largest number of members to participate in collective bargaining until the threshold of representativeness is met. The second alternative for participation in collective bargaining includes an "association agreement" of two or more non-representative trade unions. Although the LLR does not explicitly qualify this way of gaining eligibility to participate in collective bargaining as a way of gaining representativeness, it deserves inclusion as a special way of achieving "collective" representativeness, only if none of the unions meet the requirements for representativeness. Keeping in mind the two alternative ways to gain representativeness and eligibility for participation in collective bargaining, the following dilemma appears as a theoretical possibility: which of these ways will have an advantage in terms of their application if, at the appropriate collective bargaining level, there are several non-representative trade unions; was the legislature's first option the "majority" union, or was it the "association agreement" for the purposes of collective bargaining? It seems that the "association agreement" will be applied for gaining eligibility for participation in collective bargaining if the sum of the individual percentages (thresholds) of the joined unions, is at least 20 per cent, which is the general minimum threshold to determine representativeness. If this is not the case, or if, at the collective bargaining level, only one trade union is established, then priority should be given to the majority trade union or employers' association (see Ristovski 2022, 33).

If more representative trade unions participate in a General or a Special Collective Agreement, a negotiation board is established, whose composition is determined by the representative trade unions. The LLR fails to provide for this possibility when concluding an Individual Collective Agreement, where there is a presence of several representative trade unions at the level of the employer. Neither the LLR nor the collective agreements regulate the composition of the negotiation board.

Concerning the procedure of collective bargaining, the LLR skims over the minimum requirements (formal preconditions) such as an obligation for the persons representing the parties in collective bargaining to have an authorization and to hold power of attorney, and the obligation to bargain collectively in good faith. On the side of the union, such persons, are called representatives of a trade union, in the broadest sense. In the Macedonian context, a distinction should be made between "representatives of a trade union" in the broadest sense and "trade union representatives". A "trade union representative" primarily is associated with the representation of a trade union at the employer. The authority of a trade union representative derives from a trade union's internal acts or statutes. The LLR neither specifies nor limits the number of trade union representatives entitled to represent union members at

a particular employer. Considering the special protection that trade union representatives enjoy against dismissal, in practice, the question of a closer account of these persons and their number at the employer is also important. Although employers' organizations advocate for specific identification of and limits to the number of trade union representatives, the persons with a status of trade union representatives usually are determined by an internal act of the trade union and by a collective agreement. Collective agreements provide an indicative framework for persons who may obtain the status of trade union representatives. Such persons are usually: presidents and members of executive bodies in basic organizations, and elected representatives in higher union bodies. Certain specific collective agreements expand the scope of trade union representatives (with, for example, vice-presidents of trade unions, members of the supervisory board and the statutory commission among others), while others narrow it down only to the president of the trade union organization with the employer. The method and term of appointment or election are determined by a union's internal acts. Trade union representatives can perform their function voluntarily or professionally. If the function is voluntary, they usually are entitled to paid leave provided for by a collective agreement. If the function is performed professionally and requires a temporary pause in work for the employer, the LLR provides for the right to return to work within five days.

Finally, the exclusive competence of the trade unions in North Macedonia also includes the right to organize a strike. The labour legislation currently in force determines that a trade union, that is, its associations at a higher level, as the sole holder of the right to strike. A strike, which is initiated by a group of workers who are not organized in a trade union, including "wildcat strikes" as a cessation of work by employees without consent of the trade union, shall be considered illegal. A distinction, though should be made between who is entitled to exercise the right to strike and who is capable of calling a strike (see, for example, Evju 2011, 213). In a Macedonian context, the legal nature of the right to strike can be described as a mixture between the "individualist" and the "organic" (collective) doctrine (see Kovacs 2005, 457). It means that the exercise of the right to strike is an individual right of workers from an employment relationship that is due to them as members of the trade union that organized the strike, members of another trade union or non-unionized employees, but at the same time, the right to organize and call a strike belongs exclusively to the trade union, that is, the trade union at a higher-level. International instruments governing the right to strike (for example, the Revised European Social Charter) and bodies responsible for monitoring the compliance of national laws and practices with such instruments (for example, the European Committee on Social Rights of the Council of Europe) provide a wide personal scope in the realization of this right, which

includes both the workers (as a group) and the trade union. The European Committee of Social Rights of the Council of Europe, in addition to ascribing the right to call a strike as the right of any ordinary group of workers without any legal status, also legitimizes the possibility of reserving the right to call a strike exclusively to a trade union, but only if workers may “easily, and without excessive requirements form a trade union for the purpose of a strike” (Birk 2007, 28–29), that is, under the condition of existence of “complete freedom to

form trade unions... in a ... process that is not subject to excessive formalities” (Birk 2004, 565). Given the limitations in Macedonian labour legislation and practice regarding the exercise of the right of workers to form a union of their choice (primarily with regard to forming a union at the employer level), it is debatable how much the exclusive union right to call a strike is aligned with the positions of the European Committee on Social Rights of the Council of Europe.

► 3. Workers' representatives and trade union(s)

Why does it matter what form of representation of workers will take in the context of the realization of participation rights in decision-making at an employer? The answer is at the heart of theoretical debates about the relationship between rights to information and consultation versus the right to collective bargaining, not to mention filling gaps in workers' representation caused by the decline of trade unions versus the risks of undermining the role of trade unions, their eventual substitution with alternative representative structures and the existence of a model of “cooperative” versus “conflictual” partnership between workers and employers (see Njoya 2016). There is an essential difference between rights of information and consultation and rights of collective bargaining: while the common goal of collective bargaining is the regulation of employment and working conditions of workers, the common goal of information and consultation is the regulation of organizational-supervisory aspects and control over the implementation of workers' rights within the enterprise (Kalamatiev and Ristovski 2012, 509–510). Collective bargaining is an expression of the fundamental values of freedom of association and voluntary organization of workers in trade unions that are independent of the employers' influence, while information and consultation traditionally are achieved through “institutionally compromised” representative structures of workers (for instance, works councils) whose competences include, inter alia, the resolution of companies' production and operational problems with the aim of increasing efficiency and economic performance. The relationship between trade unions and works councils also can be analysed from the aspect of the need to fill the void in the collective representation of workers in terms of the decline of union power. Taking into account the EU's approach in regulating the rights to information and consultation, as well as the normative and institutional shaping of the representation of workers in decision-making which leans towards the model of “dual” or “multi-channel” representation, it seems that a “free space” for the

representation of workers is more likely to be occupied by works' councils than trade unions. The mere existence of any consultative representative structure (including a works council) within the undertakings where there were no workers' representatives before, could in itself be a “steppingstone” for workers' unionization. The risk that works' councils may transform into company unions would call into question their independence and limit the possibility of the workforce establishing broader solidarities beyond company boundaries should not be underestimated (see Njoya 2016, 378). The form or model of representation of workers should be tailored to meet the essence and purpose of the participatory rights in question. Thus, the approach taken in the European directives governing workers' participation implies that its aim is to establish a cooperative partnership between labour and capital. Forms of workers' representation that may better fit such a cooperative aim are works' councils compared to unions that traditionally establish a so-called “conflictual” partnership with employers based on their adversarial interests related to income distribution. Hence, works' councils are considered as bodies intended to resolve companies' production problems in contrast to trade unions oriented towards resolving distribution problems (see Estreicher 2009, 255). By accommodating the model of cooperative partnership, the EU legal framework for workers' participation implicitly supports a model of “dual” or “multi-channel” representation of workers, requiring a mandatory presence of a certain consultative structure (regardless of whether individual or collegial) which will guarantee the effective application of the rights to information and consultation. However, this approach to the regulation of the forms of workers' representation faces serious challenges in countries where industrial relations are traditional or where a “single” channel of worker representation (through a trade union) prevails, frequently characterized by a conflictual partnership in the relations between labour and capital - a situation undoubtedly familiar to North Macedonia.

► Conclusion

The harmonization of Macedonian labour legislation with the EU directives on information and consultation, at least “on paper”, has opened the way for the establishment and coexistence of a “double channel” of collective representation for workers at the employer: through a trade union (union representative) and through “employees’ representatives”. The role and competences of a trade union remain unchanged: it continues to have exclusive competence to engage in bipartite social dialogue (that is, collective bargaining at the national level, at the level of the branch or section and at the level of an employer) and tripartite social dialogue (that is, participation in the Economic and Social Council), as well as in collective labour disputes, including the right to call strikes. Meanwhile, the role and competences of the so-called “employees’ representatives” are or should be reduced to information and consultation. In fact, Macedonian labour legislation neither adequately defines the term “employees’ representative” or other type of statutory body (for instance, works council) for information and consultation, nor provides for any procedure for their election, nor does it distinguish their competencies from those of trade union representatives. The embryonic development of the representation model for information and consultation rights is also mirrored in the system for the exercise of those rights – both in terms of their scope (production versus personnel management matters; collective matters affecting the entire staff versus individual matters affecting single workers), as well as of their intensity (information, consultation, co-decision). Hence, in practice, workers usually exercise their rights to information and consultation through a trade union, that is, trade union representative (where present), regardless of the framework and legal situations in which these rights are exercised. Confirmation of this can also be found in the collective agreements, where, almost without exception, elected or appointed union

representatives at the employer’s level are determined as employees’ representatives responsible for information and consultation for all purposes. Problems in the application of the rights to information and consultation primarily arise in workplaces where there are no trade union representatives present. In such circumstances, the trade unions highlight various negative practices in which employers exercise influence over the election, that is, appointment or activities and decisions of the employees’ representatives to the detriment of the interests of the employees in the enterprise. Such actions create a hostile perception by the unions towards “employees’ representatives” as a “Trojan horse” in Macedonian industrial relations. However, a reliance on trade unions to implement participatory rights of workers at an employer creates other dilemmas: What if the workers at the specific employer are not unionized? Is it reasonable and justified to expect trade unions to be the main and only legal channel through which the exercise of the rights to information and consultation of employees shall be carried out, given that trade union representativeness in the private sector is estimated at around six per cent of the total number of private sector employees in the country? Can it be expected from employer-level trade union organizations to appropriately represent the rights and interests of all employees within the undertaking when they primarily represent and act on the behalf of their members, as well as in situations where Macedonian labour legislation and practice questions the legal personality status of trade union organizations at the employer level? If Macedonia’s labour legislation and the “new” Law on Labour Relations (in drafting for over five years) really stand for a functional system of participation and involvement of workers in decision-making processes which should be substantively and not only superficially aligned to European directives, then they might consider the issues flagged in the course of this analysis.

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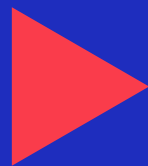
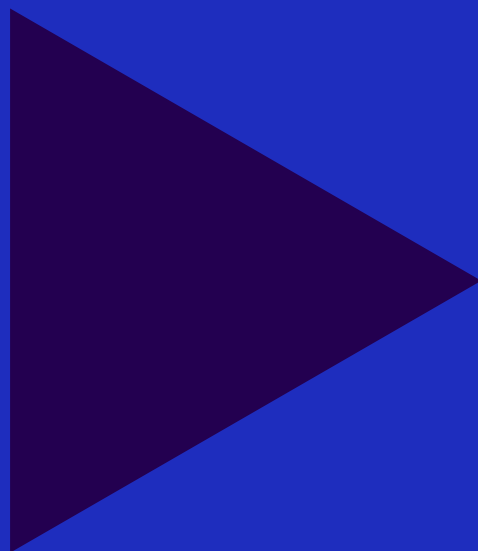
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 10

The case of Poland

By Agnieszka Zwolińska



► Introduction

The primary objective of this report is a theoretical and practical look at a possible extension of the right to collective bargaining to workers' representatives already recognized in the ILO Convention on Collective Bargaining, 1981 (No. 154). The first two parts of the report contain theoretical considerations and aim to

present the principles of collective bargaining. The third part analyses selected national examples of extending the right to collective bargaining to workers' representatives from the perspective of previously identified principles of collective bargaining.

► 1. The notion of collective bargaining

In order to understand the concept of extending collective bargaining rights to workers' representatives, there is a need to present a legal understanding of the notion of "collective bargaining".

The most relevant reference is the definition of "collective bargaining" given by the International Labour Organization (ILO). Pursuant to article 2 of the ILO Collective Bargaining Convention, 1981 (No. 154), (hereinafter C154), for the purposes of this Convention, the term "collective bargaining" extends to all negotiations that take place between an employer, a group of employers or one or several organizations of employers, on the one hand, and one or more organizations of workers, on the other, for the purpose of: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations. This definition should be read in conjunction with the preamble of C154. The preamble emphasizes the importance of international standards contained, inter alia, in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), (hereinafter C87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), (hereinafter C98), or Collective Bargaining Recommendation, 1951 (No. 91), (hereinafter R91), and identifies the general principles by reference to article 4 of C98 and paragraph 1 of R91. Both provisions provide key information for defining the concept of collective bargaining. Article 4 of C98 mentions a mechanism of voluntary negotiation between employers or employers' organizations and workers' organizations to regulate the terms and conditions of employment by means of collective agreements. In turn, paragraph 1 of R91 states that "machinery appropriate to the conditions existing in each country should be established by agreement or by laws or regulations that may be appropriate in national conditions, to negotiate, conclude, revise and renew collective agreements". "Collective agreement" as used in paragraph 1 of R91 refers to "all agreements in writing

regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other" (paragraph 2.1 of R91). It is expressly stated that nothing in this definition should be construed as implying recognition of any workers' association established, dominated or funded by employers or their representatives (para 2.2 of R91). It is worth emphasizing that, when defining a "collective agreement", the effects of concluding such an agreement are important. Recommendation No. 91 indicates: (-) the principle of binding both the signatories to the agreement and those on whose behalf the agreement is concluded with the provisions of the agreement; (-) the principle of the primacy of the collective agreement over the provisions of employment contracts, (-) the principle of invalidity of the provisions of employment contracts contrary to the provisions of the collective agreement, unless the provisions of employment contracts are more favourable to employees than the provisions of a collective agreement (paragraph 3, subparagraphs 1-3 of R91).

It follows that collective bargaining is a negotiation process that aims at concluding a collective agreement. A concept of negotiation has not been defined in the previously cited provisions. In the literature, negotiation is understood as a basic means of getting what one want from others; back-and-forth communications design to reach an agreement when one and the other side have some interests that are shared and others that are opposed (as well as some that may simply be different) (Fisher, Ury and Patton 2012). Similarly, the concept of negotiation is described by the Freedom of Association Committee of the Governing Body of the ILO. The Committee, explaining the principle of bargaining in good faith, indicates that "collective bargaining implies both a give-and-take process and a reasonable certainty

that negotiated commitments will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members. [...]" (ILO 2006, 2018).

To sum up, an analysis of the definition of "collective bargaining" contained in C154 leads to a conclusion that what distinguishes the collective bargaining from all other negotiations are: (-) parties to negotiations – as far as the workers' side is concerned, this party is always collective in nature and negotiations are conducted on its behalf by representation, which has an organized form (one or more workers' organizations); (-) subject of negotiations; (-) the purpose of the negotiations (in a view of conclude, revise or renew a collective agreement).

Assuming that collective bargaining is a negotiation process that stands out from other negotiations due to the parties and their representations, as well as the subject and purpose of negotiations, it seems clear that collective bargaining is not the same as the concept of social dialogue. As aptly indicated in the literature, social dialogue denotes all instances of relationships between management and labour; from simple exchange of views to joint working as well as (but not necessarily) negotiations and can be defined as the wider area in which industrial relations and, even narrower, collective bargaining might develop (Pietrogianni 2021, see also Santera 2018).

Both article 4 of C98 and the preamble of C154 emphasize that collective bargaining is a free and voluntary process. Bearing in mind, on the one hand, the structure of the workers' party (represented by one or more workers' organizations), and on the other, the purpose of the collective bargaining (conclusion of an agreement binding the workers for whom the negotiations were conducted), it is extremely important for the sake of maintaining the voluntary nature of negotiations to ensure that workers are free to decide who represents them in this process and their representation is independent from other parties (mainly an employer or employers' organizations) in decision-making throughout the process. For this purpose, traditionally, the right to collective bargaining is inseparably linked with the freedom of association. The relation between voluntary collective bargaining and the freedom of association is recognized by the Freedom of Association Committee: "the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association" (ILO 2006, 2018). However, if we were to analyse this relationship from the perspective of the principle of free and voluntary collective bargaining, freedom of association contributes

to the voluntary nature of collective bargaining through the legal guarantees of the freedom of association. According to article 1 of C87, each member of the ILO for which C87 is in force undertakes to give effect to the workers and employers the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. What is more, article 1 of C98 establishes the obligation to ensure adequate protection of workers against acts of anti-union discrimination in respect of their employment, and its article 2 sets out the obligation to ensure adequate protection of workers' and employers' organizations against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration. The independence of workers and employers' organizations participating in collective bargaining from each other, as well as from authorities, constitutes a precondition of a free and voluntary collective bargaining process, according to the Committee on Freedom of Association (ILO 2018). The above link between free and voluntary collective bargaining and the independence of workers' organization and employers' organizations has been recognized in Collective Bargaining Recommendation, 1981 (No. 163), (hereinafter R163). According to part II, paragraph 2 of R163, the free, independent and representative employers' and workers' organizations have been qualified as a means to promoting collective bargaining. It should be added that the obligation to respect, promote and realize the freedom of association and the effective recognition of the right to collective bargaining has been extended to all ILO members, even if they have not ratified the respective conventions, by classifying them as fundamental rights (ILO 1998, 2022).

Another principle of collective bargaining is the principle of good faith bargaining, making every effort to reach an agreement (ILO 2006). This principle is associated with such values of the negotiation process as its authenticity and constructiveness and the implementation of this principle is seen as a necessary element to establish and maintain a relationship of trust between the parties (ILO 2006, 2018).

In the light of the previous considerations, it is reasonable to assume that, first, the essence of collective bargaining is the voluntary nature of this process, and second, the condition for free and voluntary collective bargaining is the independence of workers' organizations, which in turn stems from the fundamental right to organize into trade unions. If so, the question arises by what means can free and voluntary collective bargaining be ensured when workers are represented by representatives other than a trade union (a workers' organization built on the concept of membership). An answer will be the aim of rest of the report.

► 2. Unorganized workers' representatives and collective bargaining

Comparing ILO conventions in chronological order, it is obvious that in the case of C98, adopted in 1949, collective bargaining is described as a voluntary negotiation between employers or employers' organizations and workers' organizations. Article 4 of C98 does not mention any other form of workers' representation than workers' organizations. In turn, C154, adopted in 1981, provides for the possibility of conducting collective bargaining on behalf of workers by elected representatives. In article 3, paragraph 1 of C154 it has been stated that, where national law or practice recognized the existence of workers' representatives as defined in article 3, subparagraph (b) of the Workers' Representatives Convention, 1971 (No. 135), (hereinafter C135), national law or practice may determine the extent to which the term collective bargaining shall also extend, for the purpose of C154, to negotiations with these representatives. Taking into account the linguistic interpretation of article 3, paragraph 1 of C154, it can be concluded that conducting collective bargaining on behalf of workers by their representatives (not by an workers' organization whose authority to act on behalf of workers is based on membership) does not constitute an international labour law standard. However, the possibility of collective bargaining through workers' representatives is recognized in international labour law provided that the conditions of article 3, subparagraph (b) of C135 are met.

Turning to an analysis of article 3, subparagraph (b) of C135, conditions for extending the concept of collective bargaining to negotiations with workers' representatives are: first, these representatives have been freely elected and authorized by the workers of the undertaking; second, these elections have been held in accordance with national laws or collective agreements; third, the right of elected representatives to participate in the collective bargaining on behalf of workers actualizes when there is no representative workers' organization. The analogous conditions can be derived from wording of R91. According to part II, paragraph 2 (1) of R91, collective agreements may be concluded between an employer, a group of employers or one or more employers' organizations, on the one hand, and the representatives of the workers duly elected and authorized by them in accordance with national laws and regulations, on the other (in the absence of a representative workers' organization). It follows from the above that in international labour law the principle is that workers in collective bargaining process are represented by one or more workers' organizations (see also article 2, paragraph 2, C154; part II, paragraph 4 of

the Workers' Representatives Recommendation, 1971 (No 143), (hereinafter R143)).

The representative role of workers' organizations in collective bargaining and its primacy over the representation powers of the elected workers' representatives has been repeatedly emphasized by the Committee on Freedom of Association (ILO 2006). Thus, from the perspective of ILO instruments, the promotion of collective bargaining cannot be carried out in a way that violates the principle of primacy workers' organizations over elected (unorganized) representatives. As a consequence, it seems doubtful that the recognition in national law of unorganized workers' representatives' right to bargain on behalf of workers contributes to the promotion of collective bargaining. Here arises a paradox that, on the one hand, the concept of collective bargaining is extended to negotiations conducted on behalf of workers by the elected representatives, and on the other hand, the obligation to promote collective bargaining focuses on the promotion of collective bargaining in which workers are represented by one or more workers' organizations (see part II, paragraph 2 of R163 where, as a means of promoting collective bargaining, measure have been mentioned to be taken to facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers organizations).

In order to understand the logic behind the principle of primacy of organized workers' representation over unorganized representation in collective bargaining, it is advisable to refer to the theory of representation in collective negotiation presented in the negotiation literature. It should be noted from the outset that the negotiation literature recognizes the fact that agency is a key part of the collective bargaining system, explaining accurately that workers' organizations function in reality, that they serve as a representative for workers, that they sought to enrol and at the same time speak for workers in dealing with management (McKersie 1999, 181). Thus, workers' interests are not the only legitimate interests represented in bargaining, as those who represent workers may have legitimate interests of their own that are different from the interests of those they represent (Cutcher-Gershenfeld and Watkins 1999, 24). Another difficulty in real-world negotiations recognized in the negotiation literature is that representatives rarely represent principals whose interests are fixed and static (Ibid.). Those interests are constructed in interactions between representatives and those they represent, interactions informed by the representatives' superior knowledge of external realities (Ibid.). What is more, in collective bargaining the

representatives act on behalf of the collective of workers, whose interests are not monolithic, but internally divided (Ibid., 32). Consequently, in collective bargaining workers' representation manoeuvres from representing interests of workers to representing interests of their own, from representing stated interests of workers to transforming these interests throughout a negotiation, from representing unified interest to representing divided internal interests (Ibid., 33–34). Referring to a behavioural theory of labour negotiations, the previous aspects of negotiations are analysed within the concept of intraorganizational bargaining, understood as the system of activities that happen during the course of negotiations between a union and an employer and is designed to achieve consensus within a union and within an employer and to bring the expectations of principals (a union and an employer) into alignment with those of the chief negotiator (Walton and McKersie, 1995, 5). Interestingly, it is recognized that a union negotiator is probably subject to more organizational constraints than their employer's counterpart as a union is a political organization whose representatives are elected to office (Ibid., 6), thus accountable to an electorate.

Given this context, the main question is what structures will best serve to ensure the primacy of workers' interests over the interests of workers' representatives participating in negotiations with the employer and to implement the principles of collective bargaining – namely principles of free and voluntary negotiations, conducted in good faith to conclude, renew or amend a collective agreement. Here, the fact that authority to

act on behalf of workers is based on membership and its limits are set by bylaws of the association seems to matter. Healthy organizational structures (trade union structures) enable: back and forward communication between negotiators, joining the negotiating table and workers being represented in the negotiations. A smooth flow of information and ongoing consultations are a key factor in adapting workers' demands and the perception of their interests to the dynamics of negotiations, as well as in building a coalition within a workers' organization. In addition, trade union structures can help hold negotiators accountable for their behaviour during negotiations (the selected negotiator can be dismissed by the trade union at any time or not be re-elected). Thus, the organizational structures based on membership contributes to the realization of the primacy of workers' interests (at least the interests of trade union members) over the interests of negotiators acting on behalf of workers. After all, the legal protection against anti-union discrimination strengthens the independence of trade union officials who are the face of workers at the negotiating table, and consequently also the voluntary nature of the negotiation process.

Therefore, the challenge for a national legislature deciding to extend the right to collective bargaining to unorganized workers' representatives is to ensure that: (-) in negotiations the real and current interests of well-informed workers (collective interests) are represented, (-) workers' decision-making independence is respected, and (-) the negotiation process is voluntary.

► 3. Extending the right to collective bargaining to workers' representatives – examples from Central and Eastern Europe

In order to enrich the theoretical considerations with a practical aspect, interesting research material is provided by the examples from the countries of Central and Eastern Europe¹²⁵. Leaving aside the cultural, historical and social determinants of the formation of collective bargaining systems in these countries, the aim of further research is to assess the national regulations from the perspective of the principles described previously that determine the existence of collective bargaining. Therefore, the research focuses on two issues: (1) whether a given regulation ensures the representation of the interests of the collective of workers (or, to put

it differently perspective, does it reduce the risk of pursuing the workers' representative's own interests at the expense of the interests of the collective they represent), (2) whether the given regulation ensures a voluntary nature of collective bargaining.

At the outset, it should be noted that all the analysed cases of extending the right to collective bargaining to workers' representatives (Brcko District of Bosnia and Herzegovina, Hungary, Moldova, Poland, Romania and Ukraine)¹²⁶ are in line with the principle of the primacy of trade union representation over

¹²⁵ This part of the research is based mainly on information available at CEELEX database: <https://www.ilo.org/dyn/ceelex/en/?p=14100:1:0::NO::>

¹²⁶ The extension of collective bargaining to workers' representatives has not been adopted in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, North Macedonia, Montenegro, Slovakia – according to CEELEX database: <https://www.ilo.org/dyn/ceelex/en/?p=14100:1:1::NO::>

workers' representatives. Thus, the right of workers' representatives to bargain on behalf of workers is conditioned by the absence of a representative trade union that could bargain collectively with an employer.

Analysis of these regulations also allows one to clarify which rights are exclusive rights of trade unions, referring in this respect to the principle laid down in article 3, subparagraph (b) of C135. According to article 3, subparagraph (b) of C135, functions of elected workers' representatives do not include activities which are recognized as the exclusive prerogative of trade unions in the given country. An interesting example is the solution adopted in Hungary, which provides for the right of works councils to conclude an agreement with employers regulating the terms of employment, with the exception of wages and remuneration.¹²⁷ On the other hand, as far as Polish solutions are concerned, statutory regulations providing for the right of workers' representatives to conclude collective agreements with the employer, in the absence of trade unions, raise doubts as to their compliance with the Polish Constitution. According to article 59, section 2 of the Constitution, trade unions and employers and their organizations have the right to bargain collectively, in particular, to resolve collective disputes and to conclude collective labour agreements and other agreements. The Constitution does not provide the right to collective bargaining for workers' representatives other than trade unions. However, statutes (acts) – the sources of universally binding law located in the hierarchy of sources of laws below the Constitution – provide for the right of workers' representatives to conclude collective agreements.

For example, the Polish statutes provide for a possibility of concluding a collective agreement with workers' representatives (in the absence of a representative trade union): (-) on temporary suspension of the application of labour law provisions specifying the rights and obligations of parties to an employment relationship other than acts and regulations (for example, suspension of the application of remuneration regulation);¹²⁸ (-) resulting in the application of less favourable employment conditions for employees than those resulting from employment contracts concluded with these employees, to the extent and for the time agreed in the agreement;¹²⁹ (-) specifying the conditions for performing work during economic downtime or reduced working hours;¹³⁰ (-) on the introduction of an balanced

working time system, in which it is permissible to extend the daily working time, but not more than 12 hours in a calculation period not exceeding 12 months;¹³¹ (-) on the extension of the calculation period of working time or the application of a flexible working time schedule.¹³² It follows from the above that the participation of workers' representatives in collective bargaining is not guaranteed in the Polish Constitution (although it may well be argued that it is contrary to article 52 (2) of the Constitution (Santera 2018)), and is limited to situations and matters specified by the statutory legislature.

Moving on to the analysis of national regulations from the perspective of ensuring the representation of the collective interests of workers in negotiations and the voluntary nature of negotiations, the nature of non-union workers representation (*ad hoc* representation, that is, established for the purpose of concluding a specific collective agreement, or permanent representation) and the procedure for electing workers' representatives are significant circumstances. Hungary has opted for a model of workers' representation in the form of works councils (permanent workers' representation), the members of which are elected by employees in a secret ballot and popular vote and the election is valid if at least 50 per cent of those eligible to vote have voted.¹³³ In turn, in Poland, the legislature has chosen the model of *ad hoc* representation, which is "established in the manner adopted by the employer". Comparing these models of representation, a permanent workers' representation seems to be a better solution for many reasons. First, the structural and procedural framework related to the permanent functioning of works councils creates a framework within which mutual and continuous communication is possible between elected representatives and workers, on the one hand, and between elected representatives and the employer, on the other hand. As a consequence, it may contribute to the exchange of information enabling workers' representatives to assess both the negotiated proposals and the effects of the negotiated agreement. Moreover, the prospect of mutual relations between the members of the works council and the employer in the future, during the period for which the members of the works council were elected, may have a positive impact on the decisions of both the workers' representatives and the employer taken within the given negotiation process, motivating them to act in good faith. In addition, the legal framework for establishing and operating

127 Available online: https://www.ilo.org/dyn/ceelex/en/f?p=LEGPOL:1100:10754438049803:::P1100_THEME_ID:234530.

128 Article 91 of the Act of 26 June 1974 the Labour Code (consolidated text in Journal of Laws of 2022, item 1510) – hereinafter Polish Labour Code.

129 Article 231a of the Polish Labour Code and Article 15zf of the Act of 2 March 2020 on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (consolidated text, *Journal of Laws of 2021*, item 2095).

130 Article 4(2) of the Act of 11 October 2013 on Special Solutions Related to the Protection of Jobs (consolidated text, *Journal of Laws of 2019*, item 669), and Articles 15g, 15gb of the Act of 2 March 2020 on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them.

131 Article 15zf of Act of 2 March 2020 on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them.

132 Article 150, § 2, point 2 of the Polish Labour Code.

133 Available online: https://www.ilo.org/dyn/ceelex/en/f?p=LEGPOL:1100:10754438049803:::P1100_THEME_ID:228923.

works council may enable workers to exert pressure on workers' representatives, and consequently increase the chances that the collective interest of workers will be represented in negotiations instead of the particular interests of members of the works council. Therefore, it should not come as a surprise why some representatives of the Polish doctrine of labour law (Szmit 2010, 19–21) postulate that workers' representatives "established in the manner adopted by the employer" should be understood as employees' councils elected in accordance with the Act of 7 April 2006 on Informing and Consulting Employees.¹³⁴ This Act transposes into Polish law Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community¹³⁵ with a later amendment¹³⁶.

As regards the procedure for selecting workers' representatives, both article 2 of C135 as well as part II, 2 subparagraph (b) of R143 clearly state that these workers' representatives should be freely elected by workers in accordance with national laws, regulations or collective bargaining provisions. Taking into account the analysed national solutions in the Central and Eastern Europe, the method of selecting workers' representatives through elections is a standard (Hungary¹³⁷, Moldova¹³⁸ and Ukraine¹³⁹). An additional safeguard that elected representatives will represent the collective interests of workers is the requirement of quorum and a majority of votes (Hungary, Moldova).

The situation is unusual in Poland due to the lack of statutory regulations clearly indicating an election as a procedure for selecting workers' representatives. The legislature uses the vague expression "in the manner adopted by the employer", without specifying that workers' representatives are to be elected by workers and, therefore, what the rules and procedures of the election should be. In addition, the law does not impose an obligation on the employer to agree to this. Such a method of regulating the selection of workers' representatives for the purpose of negotiating a legal binding agreement with the employer is negatively assessed by the doctrine (Stelina 2003, 81–83; Latos-Miłkowska 2010, 19–21; Szmit 2010, 110–111; Raczkowski and Ducki 2020, 19–20). The legal interpretation

supporting the need to organize the elections of workers' representatives is widely accepted, and one of the main arguments for such an interpretation is Poland's ratification of C135 (Latos-Miłkowska 2010, 19). Such an interpretation, however, does not solve the problem of ensuring the independence of workers' representatives from an employer and the voluntary nature of collective bargaining. The lack of statutory regulations on electoral procedures de facto deprives the authorities of the possibility to control whether the workers' representatives who signed an agreement with the employer were freely elected by the majority of workers covered by the agreement. In addition, it should be noted that the legislature's decisions to extend the right to collective bargaining to workers' representatives were motivated by the need to increase the flexibility of labour law in the interest of employers, in particular, struggling entrepreneurs. This circumstance, combined with the lack of regulations on electoral procedure, favours abuse by employers. Employers might be interested in concluding an agreement with a specific content (for example, a temporary suspension of a remuneration regulation¹⁴⁰ or temporary application of less favourable employment conditions¹⁴¹). For this purpose, they may unilaterally determine the procedure for selecting workers' representatives and indirectly lean on those candidates who support their agenda when concluding an agreement. Thus, the method of selecting workers' representatives affects the fundamental principles of collective bargaining – namely voluntary bargaining and acting in good faith. Such provisions enabling an employer to interfere in the selection of workers' representatives do not guarantee that the representatives will act in the interest of the collective of workers. Moreover, they also do not guarantee an equal position of workers' representatives and employer in negotiations, and thus the exercise of the right to collective bargaining (Stelina 2003, 82). Here, the Polish regulations are weakened by a lack of special legal protection of workers' representatives, constituting *ad hoc* representation against any act prejudicial to them based on their status or activities as workers' representatives. The legal concerns are confirmed in practice. The National Labour Inspectorate's activity reports have noted the problem of concluding collective

134 *Journal of Laws* 2006, No.79, item 550.

135 *Official Journal* L 80, 23 March 2002, p. 29.

136 Amended by Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers (Text with EEA relevance), *Official Journal* L 263, 8 October 2015, p. 1.

137 Available online: https://www.ilo.org/dyn/ceelex/en/f?p=LEGPOL:1100:9006950991569:::P1100_THEME_ID:228923.

138 Available online: https://www.ilo.org/dyn/ceelex/en/f?p=14100:1100:0::NO:1100:P1100_ISO_CODE3,P1100_SUBCODE_CODE,P1100_YEAR:MDA,,2021:NO.

139 Available online: https://www.ilo.org/dyn/ceelex/en/f?p=LEGPOL:1100:9006950991569:::P1100_THEME_ID:234530.

140 Article 91 of the Act of 26 June 1974 of the Labour Code (consolidated text, *Journal of Laws* of 2022, item 1510) – hereinafter the Polish Labour Code.

141 Article 231a of the Polish Labour Code and Article 15zf of the Act of 2 March 2020 on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (consolidated text, *Journal of Laws* 2021, item 2095).

agreements with the wrong representatives. As stated by the Chief Labour Inspector in their activity report for 2021, the signatories to an agreement with an employer, concluded on the basis of the Act of 2 March 2020 on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them, were most often trusted persons – that is, employees of human resources units or chief accountants – and other employees had no knowledge of such an agreement. In addition, inspections revealed only a few cases when a procedure for electing workers representatives was established formally.¹⁴² For the sake of clarification, articles 15g, 15gb and 15zf of the Act of 2 March 2020 on Special Solutions

Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them, provide for the possibility of concluding collective agreements resulting in the application of less favourable employment conditions for employees than those resulting from employment contracts, to the extent and for the time agreed in the agreement (article 15zf), or specifying the conditions for performing work during economic downtime or reduced working hours (15g and 15gb). Those collective agreements may be concluded with workers' representatives selected in the manner adopted by the employer, in the absence of trade unions.

► Conclusions

The decision of the national legislature to extend the right to collective bargaining to workers' representatives should be accompanied by guarantees of independence and freedom for workers to decide who will represent them in negotiations. Such a guarantee is the indication of workers' representatives in free elections conducted according to a predetermined procedure (adopted by the legislature or agreed to by an employer with their workers). The lack of such a guarantee results in a risk that negotiations will be conducted by persons who do not represent collective interests (the case of Poland), and therefore such negotiations will not be collective in nature, and the agreement concluded as a result will not be considered a collective agreement. In addition, an important guarantee is to ensure effective protection of workers against unfavourable treatment related to their participation in elections for workers' representatives.

Moreover, ensuring a voluntary collective bargaining process requires, at a minimum, that workers' representatives are protected against unfavourable

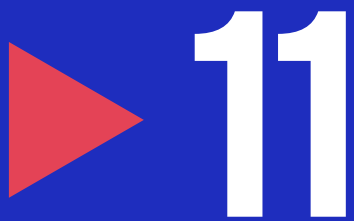
treatment because of their function and activities in relation to collective bargaining.

The representation of workers' collective interests is supported by a membership-based organizational structure. The existence of such a structure makes it possible to pressure workers' representatives who are involved in negotiations. This pressure, in turn, contributes to the implementation of the principle of the primacy of the interests of a workers' collective over the interests of their representatives. From this perspective, trade unions seem to be a better form of representing the collective interests of workers than elected representatives, which in turn justifies the principle of the primacy of trade union representation. Such a relationship should have been taken into account by the national legislature when deciding to extend the powers of workers' representatives, including powers that were traditionally the exclusive competence of trade unions (for example, the right to collective bargaining).

142 Available online: https://www.pip.gov.pl/pl/f/v/269141/Sprawozdanie_z_dzialalnosci_Panstwowej_Inspekcji_Pracy_-_2021.pdf#page=242.

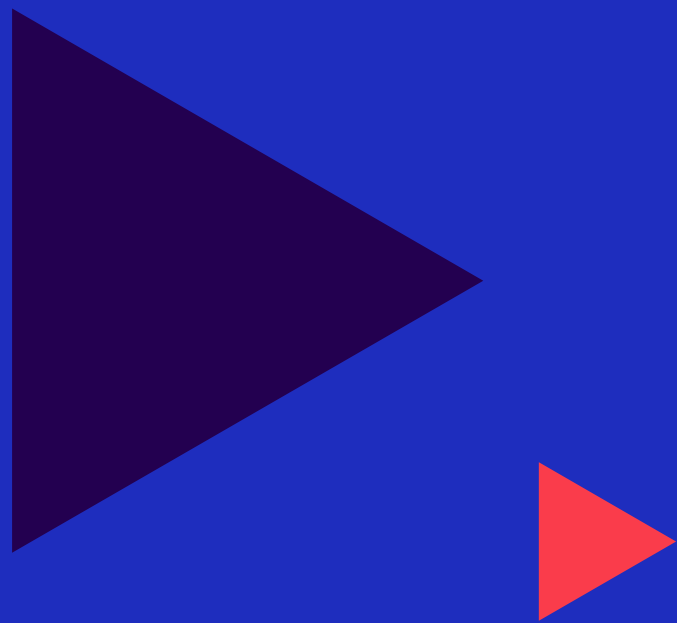
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The case of Romania

By Prof. PhD Raluca Dimitriu



► 1. Historical references

Since the first Romanian collective labour law regulations, the possibility of employees to be represented either by trade unions¹⁴³ or by other associative structures has been legally provided.

In 1929, when the Law on Labour Contract was adopted (essentially, the first Romanian Labour Code), workers could be represented at collective bargaining, by trade unions or alternatively other “employees’ groups”. The collective labour agreements could also be concluded by groups without legal personality (article 103) and, in this case, the individual signatures of each member of the group or of the mandataries of the group were needed.

The Second World War facilitated the appearance of a set of normative acts that gradually restricted the rights of employees, culminating with Law-Decree No. 3878/1940 that dismantled trade guilds which forbade any other form of unionized or non-unionized association of the workers.

During the postwar Communist period, the only means of representation for employees was the trade union, centralized and fully politicized. In fact, the employees were integrated automatically into the General Trade Union Association which had 7.8 million members in 1989 (the entire working age Romanian population). However, in the context of an undemocratic society, there could be no real social dialogue.

It was only after 1989, after the collapse of the communist regime, that laws were adopted successively to make social dialogue possible. Unlike in many other European legal systems, where legislation sought to

regulate pre-existing social dialogue, in Romania the role of legislation was to build it from scratch. Successive laws regulating employee representation in collective relations have mirrored the evolution of society itself. Sometimes trade union organization was encouraged by the legal rules, while at other times, on the contrary, it was discouraged. However, employees always have had the alternative to participate in collective bargaining and collective action through representatives elected directly from among their ranks.

Thus, the institution of workers’ representatives dates back to 1991,¹⁴⁴ and its role has varied over time. Initially, employees could only appoint their representatives in the absence of a trade union. The law favoured trade union organization, providing only the possibility of employees who were not members of the trade unions the alternative to designate their own representatives in their relations with an employer.

The Law on Social Dialogue 62/2011 enhanced the role of workers’ representatives, allowing them to participate in collective bargaining even if there were trade unions in the unit, so long as the latter were not representative. The change in the legislature’s approach was widely perceived as anti-unionist.

Currently, Law No. 367/2022 on social dialogue also regulates this form of employee representation but reverts to the original formula of appointing representatives only if employees have not first opted for trade union organization.

► 2. Current regulations on workers’ representatives

In Romania, even in establishments where there is no union, employees can be involved in collective labour relations: from negotiating the collective labour agreement to going on strike. To do this, employees must appoint their representatives by democratic vote. Workers’ representatives are the persons elected by employees and mandated to represent them, according to Law No. 367/2022 on social dialogue. This legislation

replaced the Law No. 62/2011 but partially maintained the legal status of workers’ representatives.

The new law brought with it two prominent changes:

- It has extended the possibility of appointing representatives. Whereas under the old law employees appointed their representatives only in companies with more than 20 employees, the Social Dialogue Law now stipulates that, in companies with as few as 10 employees, if there is no trade union, workers’ interests can be

¹⁴³ In an incipient form, trade unions go back to the nineteenth century, but the first law concerning them was passed in 1920.

¹⁴⁴ Law No. 15/1991 for solving collective labour conflicts expressly stipulated the possibility for employees to organize themselves in non-unionized forms. According to article 4: “employees shall be represented by trade unions in collective labour agreements. If the undertaking has no trade union or if not all employees are members of the trade union, in order to solve the collective labour conflict, the employees shall elect their representatives.”

promoted and defended by their representatives, elected and mandated specifically for this purpose;

- But it has diminished some of the rights of workers' representatives and reallocated them to trade union organizations. Thus, if there is no representative trade union in a company, the non-representative trade unions and workers' representatives will no longer participate together in collective bargaining and only the non-representative trade unions will be involved.

Representatives are appointed according to a procedure laid down by the law. The employees, acknowledging the non-existence of a trade union, set up an Initiative Group which draws up procedures or regulations for the election of workers' representatives. The Initiative Group:

- a. May seek advice from a trade union federation legally constituted in the sector concerned. If the trade union federation agrees to provide advice, its representative shall have access to the company's premises in order to conduct the process of electing employees' representatives, subject to compliance with the internal rules of the enterprise;
- b. Communicates to the employer the procedures or rules for the conduct of elections. The employer is obliged to inform all employees of the content of the procedures or rules of the election of workers' representatives within 10 days;
- c. Convenes a general meeting of employees, at which at least half plus one of the total number of employees will vote on:
 - the duties of workers' representatives,
 - how to fulfil them,
 - the duration and limits of their mandate. The mandate of employees' representatives may not exceed two years.
- d. These decisions shall be recorded in the minutes of the general meeting of employees recorded by the Initiative Group.

Organizes elections of the representatives. According to Article 57 (2), workers' representatives shall be elected with a vote of at least half plus one of the total number of employees in the establishment concerned.

Workers' representatives may be persons who have been hired on the basis of an employment contract

and have reached the age of 18. Persons holding positions representing the management in relations with employees or participating in the management's decision at the level of the undertaking cannot be elected as employees' representatives.

The number of elected workers' representatives is agreed with an employer, based on the total number of employees. The parties may determine by agreement any number of representatives. If no agreement is reached, the number of elected workers' representatives may not exceed:

- (a) 2 representatives in undertakings with less than 100 employees,
- (b) 3 representatives in undertakings employing between 101 and 500 employees,
- (c) 4 representatives in undertakings employing between 501 and 1,000 employees,
- (d) 5 representatives in undertakings employing between 1,001 and 2,000 employees,
- (e) 6 representatives in undertakings employing more than 2,000 employees.

Territorial labour inspectorates can check that the legal conditions for the election of workers' representatives are met.

Once elected, workers' representatives enjoy a number of special rights and protections. Thus, they have the right to devote part of their working time to the activities set out in the mandate. The number of hours allocated to fulfil the mandate is provided by the applicable collective agreement or by direct negotiation with management. However, unlike trade union leaders, who can suspend their employment contract to devote themselves entirely to trade union activity, workers' representatives do not have this possibility. They will carry out their representation activities in parallel with their normal work duties.

Throughout the mandate, an employer is prohibited from amending or terminating the employment contracts of workers' representatives on grounds related to the fulfilment of their mandate. Moreover, any interference by public authorities, employers and their organizations in the election of workers' representatives or in preventing such elections from taking place is prohibited. But an employer will, at the request of the employees, facilitate the procedures for the election of workers' representatives.

► 3. Workers' representatives in collective bargaining

The regulation of the duties of workers' representatives is not uniform; it is pieced together like a jigsaw puzzle from several pieces of legislation. Social Dialogue Law No 367/2022 provides that workers' representatives have the following main duties:

- a) to participate in the drafting of internal rules;
- b) to refer any non-compliance with the legal provisions and with the applicable collective labour agreement to the territorial labour inspectorate;
- c) to participate in collective bargaining, in accordance with the law. Collective bargaining is compulsory in establishments with at least 10 employees, so starting from this number employees appoint their representatives, who have the right to initiate and conduct these negotiations.

In the case of Community-scale undertakings¹⁴⁵, workers' representatives have a special set of duties, regulated by Law No 217/2005 on the establishment, organization and functioning of the European Works Council (*Official Gazette of Romania 2011*).

In addition, article 223 of the Labour Code remains in force, which states that representatives of employees have the following main attributions:

- to monitor compliance with employees' rights, under the legislation in force, with the applicable collective labour agreement, with employment contracts and internal regulations;
- to take part in the devising of the internal regulations;
- to promote the interests of the employees regarding wages, work conditions, working time and rest time, job stability and any other professional economic and social issues regarding work relations;
- to notify the Labour Inspectorate regarding the non-compliance with the legal provisions and with the applicable collective labour agreement;
- to negotiate a collective labour agreement, under the law.

Naturally, appointing representatives is a right and not an obligation for employees. However, some practical problems have arisen in cases where employees choose not to exercise this right. Initiating collective bargaining is compulsory in the Romanian system and the law provides for a considerable penalty for not initiating

collective bargaining.¹⁴⁶ But the employer may not have anyone to negotiate with if the employees have not designated their Initiative Group and organized a general meeting to vote their representatives. In addition, employers are forbidden from intervening in the election of workers' representatives, so they will not be able to organize these elections themselves.

According to Article 125 of Law No. 367/2022, in collective labour disputes at any level, employees shall be represented by the parties entitled to participate in the negotiation or, as the case may be, by the parties who took part in the collective bargaining and who represented them in the collective bargaining as mandated. Therefore, if they have participated in collective bargaining, workers' representatives will also be able to represent employees in collective disputes, for example, if the employer does not accept employees' demands.

In the event of a collective dispute, workers' representatives will also be able to participate in the settlement of the dispute through conciliation, mediation or arbitration. In addition, if the legal conditions are met, workers' representatives may trigger a strike.

In Romania, a non-union strike is legal only if the non-existence of a trade union would otherwise deprive employees of the possibility of exercising their constitutional right to strike. Moreover, the Romanian Constitution not only expressly provides for both the right to strike and the right to join a trade union but does so separately, implying no dependence between the exercise of these freedoms (articles 40 and 43). The right to strike is therefore not regulated as a consequence or accessory to freedom of association, but as a right by itself, granted to employees and not to trade unionists.

The legality of a non-union strike action is therefore acknowledged in order to give employees, in the absence of a trade union in the company, the possibility of using this effective instrument to pressure negotiations for a collective agreement. According to article 147 (3) of the Law on Social Dialogue, for workers in undertakings where no trade unions are organized, the decision to start a strike is taken by employees' representatives with the written consent of at least one quarter of company employees. Therefore, once conciliation of the collective dispute has been exhausted, the employees' representatives may not take the decision to trigger a strike without first consulting a general meeting of employees and putting this decision to vote. If there is

¹⁴⁵ A community-scale undertaking is 'any undertaking with at least 1,000 employees within the Member States and at least 150 employees in each of at least two Member States', as set out in the European Works Councils Directive (Article 2(1)a).

¹⁴⁶ The employer can be fined 15,000 lei to 20,000 lei (about 3,000 to 4,000 euros).

a representative trade union, however, it can take the decision to strike on its own.

Workers' representatives represent workers during a collective dispute and during the negotiation of a collective labour agreement, appoint an arbitrator in the collective dispute arbitration procedure, organize strikes and represent the strikers.

By contrast, a solidarity strike cannot be called by non-unionized employees. The current legislation provides

that the decision to start a solidarity strike may be taken by trade union organizations affiliated to the same federation or confederation as the organizing trade union, with the agreement of at least 35 per cent of the total number of workers in the enterprise. A solidarity strike is therefore viewed exclusively as a trade union tool; non-union solidarity strikes are prohibited by law.

Also, a new type of strike regulated by law, namely a strike against government social and economic policy, can only be organized by trade unions.

► 4. Rights to information and consultation

In order to carry out the above tasks, employees' representatives have the right to be informed about the respective company's economic development and performance (article 31 (1) of the Social Dialogue Law). During the exercise of the right to information and consultation, as well as during collective bargaining, workers' representatives may appoint third parties to assist. Trade union federations or confederations may delegate representatives or experts to assist workers' representatives or represent their interests in relations to their employers or their organizations.

Furthermore, the new law from 2022 stipulates that in undertakings where no trade union organizations are established, the employer is obliged, at least once a year, to allow the organization of a public information session on the individual and collective rights of workers, at the request of the trade union federations in the collective bargaining sector of the company in question. The employer will invite the representatives of these federations to take part in the information session. The place, date and time at which such information sessions are organized will be made public by displaying notice at all points of access to the undertaking or by communicating it by any other means of communication at least 15 days in advance.

Information and consultation of workers' representatives on decisions that may lead to significant changes in work organization, contractual relations or employment relationships, including transfer of undertakings, acquisitions, mergers, collective redundancies, closures of production units and so forth, will be carried out as follows:

a) Employers will initiate and complete the process of informing and consulting employees, prior to the implementation of decisions, to allow them to formulate proposals for the protection of employees' rights. Article 31 of Law No. 367/2022 outlines the initiation and completion of the process of information and consultation of employees *before the implementation of*

decisions. However, Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community provides that information and consultation should take place *before these decisions are made*. The directive has been transposed imperfectly, and the Romanian legislation places the process of informing and consulting employees in the post-decision-making phase, effectively limiting any practical mitigation of risks;

b) If employees consider that their jobs are threatened, the information and consultation process will start upon their written request, within 10 calendar days of the communication of the request;

c) In preparation for the consultation, employers are obliged to provide employees, on request, with the information necessary to enable the matter to be properly considered.

If there is no trade union, workers' representatives will participate in the information/consultation procedure in other cases as well:

- if the employer intends to carry out collective redundancies (article 69 (1) of the Labour Code);
- if a transfer of an undertaking is to take place (article 174 of the Labour Code and article 12 of Law No 67/2006 on the protection of employees' rights in the event of transfers of undertakings, businesses or parts thereof);
- in the development of occupational health and safety measures (article 178 (3) of the Labour Code);
- when an employee requests participation in a form of vocational training, with removal from activity (article 199 (1) of the Labour Code);
- in the case of a reduction in working hours from five days to four days a week, with a corresponding reduction in pay, until the

situation which caused the reduction in hours has been remedied (article 52 (3) of the Labour Code);

- for the cumulative granting of weekly rest days, after a period of continuous activity which may not exceed 14 calendar days (Article 137 (4) of the Labour Code);
- when setting productivity rates (article 132 of the Labour Code);
- for collective or individual scheduling of rest leave (article 148 (1) of the Labour Code) and so forth.

The range of information subject to information, consultation and sometimes even agreement of workers'

representatives is quite broad. However, some studies (Spătari and Guga 2017) show that, in practice, there are a number of difficulties in information procedures, which are perceived as formalistic:

- information is passed on after the management has taken the decision,
- time given to workers' representatives to analyse the information is too short,
- even if workers' representatives are subject to professional nondisclosure, confidentiality may be invoked by management to deny workers' representatives access to information and so forth.

► 5. Absence of works councils – consequences

There are no Works Councils in Romania set up in national companies, and no regulations on board-level representation. For the time-being, the only sector where works councils already have been set up is that of **Community-scale undertakings**, where their establishment has been imposed by EU directives.

Moreover, the issue of setting up Works Councils has never been on the public agenda¹⁴⁷; no draft laws have been written and labour law only stipulates that they are useful in other law systems. This may be surprising because in other areas, like labour conflict resolution, Romanian legislation followed a German model. But not the regulations for the Works Councils.

On the contrary, European Works Councils operate in Community-scale undertakings in Romania. The European Works Councils are structures to share information and consult with employees in transnational companies that operate in several EU Member States. Directive 2009/38/EC on the establishment of a European Works Council has been transposed in domestic legislation by Member States, but there is no shared legislative background for Works Councils of domestic companies (those not in Community-scale undertakings).

Thus, unlike Romania, domestic legal systems already familiar with national Works Councils (a prototype of European Works Councils) better accommodated European regulations on this form of representation into their respective legal systems. In Romania, this institution was set artificially. In the absence of any such council or of the practice to inform and consult

employees through this structure, the national law on the European Works Councils is unique to Romania's legislative system (Dimitriu 2014).

The legal literature sometimes deplores the absence of works councils in companies that are not community-scale undertakings. Works councils are particularly useful to countries where they are operational. Moreover, they are an effective means of representing atypical employees, for whom trade union membership may be an obstacle. Indeed, in European countries where the law encourages them, the best result of social dialogue – measured on the basis of employees' ability to negotiate and conclude a collective agreement – can be found (Nicolau 2022).

Sadly, works councils may well be a "lost train" for Romania. Social dialogue and employee representation have been available to Romania's workers for more than three decades now in a dual formula – trade unions and workers' representatives. These channels, although they have undergone certain variations as laws on collective relations have changed, can already be considered traditional in Romania.

However, this does not mean that employee representation has not suffered in the absence of works councils. The presence of works councils helps to create an organizational culture of negotiation. The absence of local works councils set up in national companies also has partly contributed to the absence of any mechanisms for workers' participation in the management bodies of companies.

¹⁴⁷ At least not during democracy. During communism, so-called "councils of the workers" were communist organizations in which the workers had the role of "producers, owners and beneficiaries" of the means of production. The council of workers was a collective management body of an enterprise or a unit and operated according to the principle of collective management and workers' self-management.

► 6. The relationship between workers' representatives and trade unions

Freedom of association includes the right *not* to be a member of a trade union. Moreover, Article 20 (2) of the Universal Declaration of Human Rights also expressly proclaims the right not to associate.

The Romanian Constitution does not expressly provide for the freedom not to be a member of a trade union; however, article 3 (4) of Social Dialogue Law No. 367/2022 does: "No person may be compelled to belong or not to belong, to join or not to join, or to withdraw or not to withdraw from a trade union organisation set up at the level of the establishment or in another establishment." In Romanian law, trade union freedom is protected both in its positive and negative aspects, *inter alia* by prohibiting the conditioning of employment or retention in employment on the basis of trade union membership. Any clause contained in the collective labour agreement which compels employees to join a particular trade union is null and void. For example, a clause in a collective agreement that might include sequence employee termination on the basis of membership status would be a violation of trade union freedom in its negative sense.

In a way, the institution of workers' representatives is an expression of this negative freedom to not organize. Not only can employees not be forced to organize against their will, but moreover, if they choose not to organize, they would not be deprived of the right to collective bargaining or collective action.

Employees retain the right to collective bargaining and, in the event of failure, the right to strike, whether they are unionized or not. However, there is a set of rights which are quintessentially trade union and which cannot be exercised in the absence of such an organization. Moreover, Law No. 367/2022 expressly states that workers' representatives may not carry out activities which are recognized by law exclusively to trade unions. For example, trade union organizations have the right to take legal action on behalf of their members on the basis of a written authorization from their members. The action may not be brought or continued by the trade union if the person concerned expressly opposes or discontinues the legal proceedings. Similarly, workers' representatives may not trigger a collective dispute over an employer's refusal to adhere to the sectoral collective agreement. This particular type of collective dispute remains the exclusive preserve of trade union organizations. Similarly, employees' representatives

cannot trigger a solidarity strike or strike against government social and economic policy.

Article 119 of the Social Dialogue Law provides for a special agreement between trade unions and employers, whereby, in addition to collective labour agreements, any trade union may conclude with an employer or an employers' organization any other type of agreement, convention or understanding, in written form, which represents the law of the parties. Such special agreements would be applicable only to the members of the signatory organizations. They may not contain the same clauses as those negotiated by the collective agreement, the clauses of which are applicable *erga omnes*. Workers' representatives cannot conclude agreements under article 119; they cannot address an employer with demands applicable only to some employees and not to all.

The core competences of employee representation therefore overlap, but as far as some subsidiary collective rights are concerned, trade union representation of employees is more comprehensive than non-union forms of representation.

Against this legislative background, one question may arise: what are the relations in industrial practice between trade unions and workers' representatives?

The legislation has undergone changes over time, at times allowing the appointment of representatives even in establishments where trade union organizations existed, at times imposing a monopoly on trade union representation in companies where such organizations were established. Thus, for example, Social Dialogue Law No. 62/2011¹⁴⁸ increased the role and rights of workers' representatives as an alternative to trade union organization, no matter that, in practice, the institution of workers' representatives had not been used to any great extent, as they rarely demonstrated the vigour of trade union demands. At the end of the day, facilitating non-union forms of trade union representation can only be to the detriment of union representation.

In the period preceding the adoption of the new Law on Social Dialogue no. 367/2022, some conflicts emerged between workers' representatives and trade union organizations when they had to coexist at the same company. In the legal literature, this phenomenon has been assessed as a form of "cannibalisation" of employee representation in a company (Nicolau 2022, 253).

This does not mean, however, that employees did not make creative use of the two forms of representation permitted by law or that trade unions did not collaborate with workers' representatives. In some cases, they were even obliged to do so. In enterprises where there were trade unions, non-representative but affiliated to a representative federation, they could only participate in collective bargaining alongside representatives directly appointed by the employees. In other cases, employees voluntarily opted for such cooperation. The law stipulated that if there were only non-representative trade unions in the enterprise which were not affiliated to representative federations, then they could not take part in collective bargaining at all; thus only the employees' representatives were entitled to negotiate. Under these rules, in many companies the workers' representatives were chosen from among the trade union itself which, until becoming representative, could not take part in bargaining.

These problems are likely to be overcome to some extent under the current social dialogue law, which gives priority to trade union participation in collective bargaining over non-union participation, even in the case of non-representative unions. Today, employees can only elect their representatives if there are no trade unions in the unit.

Here, another question may arise. According to the current law, the formation of a trade union no longer requires the association of at least 15 employees from the same enterprise, as was the case under the previous law. On the contrary, article 3 (3) of the Social Dialogue Law stipulates that the formation of a trade union requires at least 10 employees from the same enterprise or at least 20 employees from different enterprises in the same collective bargaining sector. In other words, a company could have only one union member, belonging to a union made up of workers from different enterprises. In this scenario, who will collective bargaining take place with? Employees will not be able to appoint their representatives, because technically there is a union in the company, and the employer will have to negotiate with this single union member, even though she/he does not represent the other colleagues, who have not elected her/him. This is a practical problem to which the legislature could have paid more attention.

On the one hand, collaboration continues under the current social dialogue law. For example, trade union federations are empowered to advise workers' representatives on request. Thus, according to article 57 (7), for the initiation and conduct of elections of workers' representatives, the Initiative Group may request advice

from a trade union federation legally established in the sector concerned. If the trade union federation agrees to provide advice, its representative will have access to the establishment for the purpose of conducting the process of electing workers' representatives. Also, according to article 33 (1), sectoral trade union federations may request employers without trade unions to organize a public information session on the individual and collective rights of workers, on which occasion they will collaborate with employees' representatives in the companies.

The new law stipulates that an employer must invite (in the absence of a representative trade union) a representative designated by the trade union organizations together with other workers to participate in the meetings of the board of directors (or similar body), to discuss issues of professional and social interest affecting workers. Current legislation provides that this is an obligation, and not just an option for an employer. But the wording contained in article 30 (2) is flawed and leads to the conclusion that employees can appoint a representative if there is a trade union in the enterprise (although the representative will not necessarily be a member) but, strangely, not if there is no union in the enterprise.

On the other hand, the appointment of representatives is rarely a prelude to trade union organization; on the contrary, most often, if employees have followed the procedure outlined above for appointing representatives, they probably do not intend to follow the procedure for trade union organization, which involves acquiring legal personality in court.

Membership in a trade union entails an obligation to pay a membership fee. The way in which dues are set and collected is one of the compulsory elements of a trade union's statute, according to the law. However, if employees are content to appoint their representatives directly, the rules proposed by the Initiative Group may not include a financial obligation. Although trade union organization would allow a greater degree of activism and participation in industrial relations, employees might consider the issue of membership fees, and then embrace a simpler form of participation and negotiation.

This might explain why trade union federations, instead of seeing future activists among the elected workers' representatives or developing a "nursery" of future trade unionists, may regard them as potential competitors, given a certain inertia on the part of employees, often maintained by the legislation itself.

► 7. Are workers' representatives a viable alternative to trade union organization?

A pillar of the "union struggle," workers traditionally have been taught to sacrifice their individual interests for those of the majority, thus submitting to a union democracy that usually does not preserve the identity of sub-groups of interests and does not protect minority options. Over time, this divergent relationship between union and individual interests has undermined some unions' strengths, and it has led to frustration among members, who feel that their personal interests (often more important to each individual than group interests) are under-represented or ignored.

This has led to a certain "focus towards the individual", sometimes reflected in legislation as well, where what some authors call "procedural individualism" (Adam 2005, 98) has developed in the relationship between members and the union, marked by organizing around the protection of employees' interests – not around the union but around the employee.

The agenda of Romania's trade unions centres around pay and redundancy issues; they focus less on issues equally important to employees, such as protection of personal data, protection against harassment in the workplace, rights of disabled or ethnic minority employees and rights of workers with atypical contracts. In fact, trade unions show a casual lack of concern for individual rights, for the uniqueness of each employee's interests. The trade union agenda unequivocally has diverged from that of its members.

This is very apparent for atypical workers. As noted, platform workers and home workers in Romania are currently invisible to the legislature, labour inspectorates and unions, enjoying no specific protection (Roşioru 2021, 155–175). And, indeed, digitalization is accelerating individualism, making workers perform their activity virtually alone, in an individual relationship with the beneficiary of their work.

In the case of digital workers, the proximity of colleagues – the usual precondition of solidarity – is almost always absent. Telework, work from home, hybrid work and a rethink of workplaces has removed digital workers from one another and diminished the collective dimension of their work. This remains the *appanage* of traditional workers who carry out their activity within the enterprise. In addition, the duration of digital workers' contracts is often limited, as they are employed by project or even micro-task, so that creating solidarity is difficult, not only in terms of *where* but also of *when*. To these obstacles others can be added, arising from cultural and linguistic differences among digital workers (Aloisi 2019), as well as from the managerial policies aimed at exacerbating

the competitive relations among them, to the detriment of solidarity (Dimitriu and Panainte 2020).

The basis of trade union organization, which is profoundly voluntary, is solidarity. Employees cannot be forced to join a trade union; they choose to do so with their own free will. But the past's solidarity among workers seems to be diminishing. Some authors have begun to wonder whether employees should seek post-union methods of organization. *Online* solidarity, (sometimes anonymous) discussion forums and social networking groups currently are seen as more appropriate tools for pooling individual energies and ideas.

In this context, employee representation through an alternative channel of representatives is seen as a solution. After all, unionization is not an end in itself; collective rights could be equally exercised by non-unionised employees.

In addition, the larger the trade union organizations, the greater the degree of formalism, bureaucracy and inertia. The institution of workers' representatives seems to be a flexible and supple solution, suited to the speed needed in industrial relations today. Indeed, appointing workers' representatives is easier and quicker than the process of organizing a trade union, obtaining legal personality and then becoming representative. The election of representatives does not require the same degree of solidarity, the same proximity to workers or the same level of activism and involvement.

But perhaps that is precisely the problem. A number of studies (Guga and Constantin 2017, 56) attest to the purely formal nature of the role played by workers' representatives during the 12 years that the previous Law on Social Dialogue was in force. If most collective agreements were concluded by workers' representatives (Guga and Constantin 2017, 55), this was due to legislation that actively discouraged unionization and imposed excessive standards for representativeness; the solution of negotiating collective agreements through representatives was perceived as a last resort, when legally many trade union organizations could no longer meet the conditions required by law to participate in negotiations themselves. Thus, Social Dialogue Law No 62/2011 required that, in order to obtain representativeness at unit level, the union must bring together at least 50+1% of the employees in the company. Failure to meet this condition automatically attracted the competence of worker's representatives to participate in collective bargaining.

Romania's experience so far shows that the representation of employees by directly elected representatives is fragile and not so functional. It is fragile because the employer has greater opportunities to influence – often unintentionally – their decisions and the conduct of collective bargaining. In extreme cases, organizing employees in non-union ways may even be encouraged by employers as a tactic to avoid organizing in the company (Donaghey et al. 2011). And it is not very functional because, far from being based on traditional trade union construction, it is a quick way of accommodating legal provisions rather than a true expression of workers' activism. Workers' representatives do not usually collect dues, so the support needed to carry out their work most likely will come from the employer. Their contacts with workers' representatives from other companies in the same sector are minimal. Workers' representatives are exclusively the voice of the workers in a particular company; they are not part of a system.

But the fact that unions are more vocal and confrontational than worker's representatives may have yet another reason. As a general rule, employees organize in trade unions especially when they are dissatisfied, so the purpose of trade union organization from the outset is to provide a platform for the expression of these grievances. Conversely, non-union forms of organization are more likely to be embraced

during peacetime. In other words, the difference is not so much in the channel used to express dissatisfaction with management, but in the extent of this dissatisfaction.

In any case, buttressing the role of workers' representatives, which was the aim of Social Dialogue Law No 62/2011, was achieved to the detriment of trade unions. At the time, the legislature's choice in 2011 was based theoretically on lowering the union density rate; it aimed to give employees a "voice" outside trade union bodies which they had partly left. Predictably, however, this led, in a vicious circle, to an even greater decline in unionization.¹⁴⁹ The role of the institution of workers' representatives contributed to the effects and causes of this decline.

The new Law on Social Dialogue from 2022 has removed the possibility of trade unions coexisting with workers' representatives. In addition, even if they have not achieved representativeness, trade unions can participate in collective bargaining. This creates the conditions for a clearer choice of one or other form of representation. In addition, the new law encourages cooperation between workers' representatives and the sectoral representative trade union federations, allowing the latter to support the work of representatives with their own expertise. It will be some time before the practical effects of these recent legislative changes can be identified.

► 8. Conclusions

The institution of workers' representatives has been consistently included in the various versions of collective labour dispute regulation in Romania over the last three decades. Workers' representatives always have been able to represent employees in collective bargaining, collective action or information and consultation procedures.

However, the Romanian legislature has clumsily and contradictorily managed the problem of non-union organization of employees. For a long time, the Labour Code and the earlier law on social dialogue contained different provisions concerning workers' representatives; the latter's role would be activated sometimes when there was no trade union and other times when there were no representative trade unions. In addition, the creditor of the employers' information and consultation obligations was not always clearly defined.

The current law on social dialogue rectified some of these omissions and contradictions but did not do so on the

basis of an impact assessment. The question remains: what should the legislature's position be, especially in this region of Europe where social dialogue is a relatively new concept? Some possible options might include:

- Encourage trade union organization by giving trade unions a monopoly on the exercise of collective rights in a company;
- Encourage non-union or post-union forms of organization as flexible formulas that could address some of the disadvantages of traditional trade unions;
- Leave open the possibilities for employees to organize either in union or non-union paths, taking a neutral stance towards these options.

The current Law on Social Dialogue No. 367/2022 embraces this third option with its advantages and obstacles.

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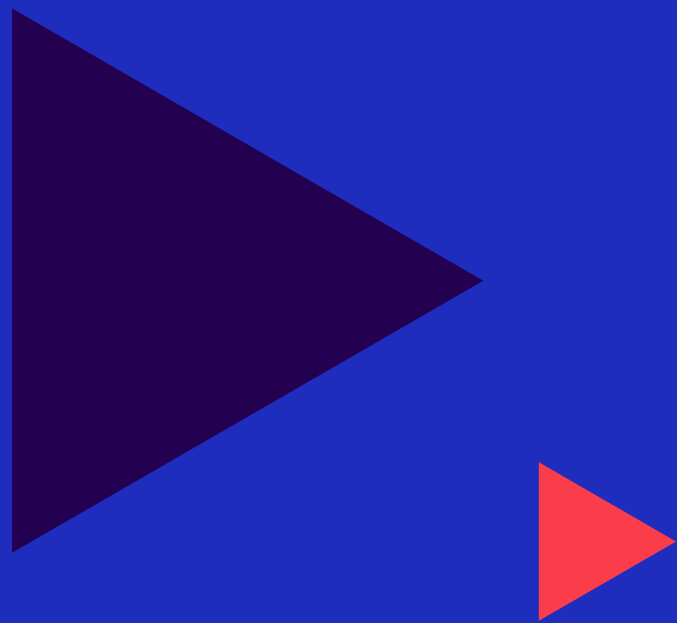
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The case of Serbia

By Senad Jašarević



► Introduction

The role of workers' representatives in Serbia generally is regarded as small, especially if employee representatives who act within trade unions are excluded. The provisions on this in Serbia's legislation are rudimentary, and so is the practice.

In Serbian legislation and practice the following types of workers' representatives are recognized: in companies (in works councils or in committees on occupational safety and health (OSH), as union representatives or in social, economic and other councils outside the company (at municipal, provincial or republic level). Serbia's trade unions perceive every other form of employee participation as competition and a means of reducing their power. They oppose all forms of worker representation in companies outside the trade union, especially works councils.¹⁵⁰

The role of representatives of employees in Serbia manifests directly or indirectly within the framework of the following mechanisms: social dialogue outside the company (through works councils) (Mihailović and Stojiljković 2006, 3; Jovanović 2007, 19), workers' participation in companies (participation of employees in information and consultation), collective bargaining (employee representatives in negotiations), participation of employee representatives in dispute resolution (strikes and arbitration) (Jovanović 1998, 33).

To learn more, this report delves into the overall state of industrial relations in the country, its socio-economic environment, the development of the trade union movement and the history of workers' participation in Serbia. At present, the conditions are unfavourable for the creation of an extra layer of worker representation: a prolonged economic crisis, an underdeveloped private sector and market economy, little belief in tolerance and economic democracy, an overly formalized social dialogue, divided trade unions unaccustomed to the conditions of action in a market economy.

Today's concept of workers' representatives is heavily influenced by Serbia's past.

Before the Second World War in the former Yugoslavia (in which Serbia configured as a constituent part, until its dissolution),¹⁵¹ a system of workers' representatives – so-called workers' trustees – was introduced by

the Workers' Protection Act of 14 June 1922. The law regulated all important issues related to the functioning of this institution (selection procedure, functioning, competence, dismissal, protection) (chapter 5, articles 108–119). Employees had the right to choose "workers' trustees" in all enterprises. Their tasks were numerous: to protect the economic, social and cultural interests of workers; to maintain good relations between workers and employers; to prepare collective agreements; to ensure that both employers and employees adhere to collective agreements and work contracts; to mediate disputes between workers and employers; to mediate in determining "tariffs" (wage levels); to strive to apply the prescribed working conditions (on working hours, vacations and so on), as well as standards of safety at work; to give workers advice in case of disputes and dismissals; and to make suggestions to employers for improving working conditions (article 109). Workers' trustees enjoyed protection in connection with the performance of their functions. It was stipulated that the employer must not dismiss or persecute a worker's trustee for the lawful exercise of their function (article 119).

The system of workers' trustees overlapped with the first years of socialism after 1945. However, with the abolition of private enterprises, that is, the nationalization of the economy, their role lost its meaning and they disappeared from Serbian legislation (Radelić 1989, 129–157).¹⁵² Instead, workers' representatives were recruited from the ranks of trade unions and whose role was reduced to an "extended arm" of the Socialist Party. As a result, trust in workers' representatives among employees in Serbia declined over time and continues to do so today.

During socialism Yugoslavia conducted an experiment in this area that became known globally as "workers' self-management" (Singh and Bartkiw 2007, 280–297). In this scheme, workers allegedly managed the factories and the entire society through their representatives, but the general assessment of social dialogue between employees and employers has been negative. Workers' participation was reduced to a mere formality, gradually diminishing over time. Self-management in Yugoslav (Serbian) firms increased the alienation from work and

¹⁵⁰ Marinković, for example, mentions the union's extremely repulsive attitude towards works councils. In the text from a conference on co-determination that was held in Belgrade, it is stated that the union leaders in Serbia believe that the works councils, the formation of which is provided for by the current legal solutions in Serbia, should in no way be opposed to the unions, that is, they should never be allowed and they serve to divide workers and obstruct the work of trade unions in companies (Marinković 2015; see also Vlaović 2012).

¹⁵¹ The Republic of Serbia became an independent state after the dissolution of the state union called "Serbia and Montenegro" (SM) in 2006. That union, considered to be the legal successor to the Federal Republic of Yugoslavia (FRY) was formed in 1992 after the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY).

¹⁵² Radelić goes on to write: "That is why the workers' trustees were passive due to party and trade union inactivity and performed only those tasks that could be in the function of increasing productivity and production, which, after all, was also the task of the trade union. In such circumstances, nationalization was carried out and thus the basic reason for their existence was abolished. After that, it was no longer possible to defend the institution of commissioners, who did not justify their existence anyway" (1989, 156).

caused disappointment in the idea of participation (Ravlić 2000, 94). The rejection of ideas to refresh workers' participation in today's companies in Serbia can be attributed to the breakdown of workers' self-management.

With the collapse of socialism, workers' participation became very unpopular in Serbia. However, since 2000, Serbia has focused on joining the European Union,¹⁵³ such that its various regulations have begun to promote social dialogue modelled after the EU. This phase began

in 2004 with the enactment of the Act on Social and Economic Councils (*Official Herald of the Republic of Serbia*, No. 125/2004), whereby socioeconomic councils were introduced in Serbia at various territorial levels. This has increased slightly the role of workers' representatives outside the company, but realistically the role of socioeconomic councils is tiny (except for the National Socioeconomic Council). It is apparent that the social dialogue outside the company is only formally more developed than within enterprises.

► 1. Participation of elected workers' representatives

One important channel through which workers ensure their influence is worker participation. According to Arrigo and Casale (2005), workers' participation consists of: "A principle as well as informal and formal processes, established in an enterprise, whereby workers or their representatives participate with management, on a cooperative basis, in resolving issues of common concern. Workers' participation can take various forms, for example, informal discussion between managers and workers; information sharing; consultation; collective bargaining; joint decision making in workplace committees, works councils or similar bodies; worker/trade union membership in management bodies; self-managed work groups; and financial participation" (Arrigo and Casale 2005, 264; see also Witt, Andrews and Kacmar 2000, 341–358; Poutsma, Hendrickx and Huijgen 2003, 45–76; ETUI 2023). Similar processes exist today outside the enterprise, with workers' representatives participating in various bodies at the local, regional, national and supranational levels, and thus having the opportunity to express their opinions on important issues concerning employees (so-called economic democracy).

How do these processes take place in Serbia? The basis for legal regulation of this field is article 82 of the Constitution of Serbia of 2006 (*Official Herald*, Nos. 98/2006 and 15/2021). It anticipates that the impact of the market economy on the social and economic position of employees shall be shaped through social dialogue between unions and employers. In addition, Serbia has ratified the amended European Social Charter of the Council of Europe of 1996, in which three articles provide for introduction of workers' participation (article 21 – the right to information and consultation, article 22 – the right to take part in the determination and improvement of the working conditions and working environment, article 29 – the right to information and consultation in collective redundancy procedures) (*Official Herald* [International Agreements], No. 42/2000). Serbia has

thus formally undertaken as its obligation to regulate and to introduce these issues.

Workers' participation through workers' representatives in companies is regulated by the Labour Act of 2005 (LA) (*Official Herald*, Nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017, 95/2018). According to article 13, one of the rights of employees is the right to consultation, information and expressing views on important issues – either directly or through their representatives. According to the same article, an employee, that is, an employee representative, cannot be punished for such activities, nor put in a disadvantageous position in terms of working conditions, if they act in accordance with the law and the collective agreement.

Article 205 of the Labour Act stipulates that workers employed by the employer with more than 50 employees may establish a *works council*. The jurisdiction of these bodies is only roughly regulated, and other more important issues are not regulated (for example, the election of council members). According to article 205 of the Labour Act, the works council provides opinions, participates in decision-making on economic and social rights of the employees in accordance with the law or "general rules of the company" (such as collective agreements or work rules brought by the employer) (see also article 8). The law does not contain details referring to the election or position of the council members among employees. It only provides for their protection, along with other representatives of the employees in the company.

Article 183 of the Labour Act provides that a valid reason for termination of an employment contract shall not be considered, *inter alia*, "activity in the capacity of representative of employees, pursuant to this law". Also, according to article 188 of the Labour Act, the employer is not entitled to dismiss or in any other way disadvantage any employee representative during the exercise of their functions. It is proscribed: "The employer can neither

¹⁵³ Serbia signed a Stabilization and Association Agreement with the EU in 2008 and in March 2012 acquired the status of an EU membership candidate.

cancel the employment contract, nor in any other way put the employee in a disadvantageous position because of his status or activity as an employee representative, trade union member, or because of his participation in trade union activities." This protection exactly applies for: (1) members of works council and employee representatives in administrative and supervisory boards of the employer, (2) the president of the union and other appointed or elected trade union representatives in the company, (3) trade union members at the company (or institution).

Before its amendment in 2014, the Labour Act from 2005 provided that an employer can dismiss employee representatives only with the approval of the Ministry of Labour, if they deny any right to be offered in order to resolve their status (article 188, paragraph 4). This solution was deleted in 2014, which we consider a step backwards. Now, in addition to the principled protection of the above representatives, it is provided that: "The burden of proving that the termination of the employment contract or put the employee in a disadvantageous position is not a consequence of the status or activities referred to in paragraph 1 of this article is on the employer." This is a useful solution in the event of litigation yet a weaker form of protection for workers' representatives than what existed in the original – the earlier solution made it possible to both avoid dismissal of workers' representative and be placed in an unfavourable position.

In addition, in several situations, the Labour Act provides for consultation of workers' representatives – that is, representatives of representative trade unions. According to article 16 of the Act (duties of employers), any employer shall: "Ask for advice of trade union in cases stipulated under the law; in case the trade union has not been set up with that employer, of a representative designated by employees."

Trade union representatives who operate in the company are elected in accordance with the rules (statutes) of those organizations. According to the *Rulebook* on registration of trade union organizations in the register, in order for a trade union to register, it must have its own statute (or general act) and a person authorized to represent (the president) (article 6 in *Official Herald*, Nos 50/2005 and 10/2010; see also Savić 2006).

There are other forms of participation in companies, in the form of *informing* or *consulting* workers' (trade union) representatives.

Article 111, paragraph 4 of the Labour Act, which regulates the "minimum wage", provides for the obligation to inform employee representatives in the following way: "After the expiration of six months from the date

of decision on introduction of minimum wage, the employer shall be obliged to inform the representative trade union on the reasons for the continued payment of the minimum wage."

The obligation to inform employees, through a representative trade union, is also provided in the case of transfer of undertaking (article 151). In that case:

(1) The preceding employer and succeeding employer shall, 15 days before the change of employer at the latest, notify the representative trade union of the employer about: 1) date or proposed date of change of employer; 2) reasons for such change of employer; 3) legal, economic and social consequences of change of employer and measures to mitigate them. (2) The preceding employer and succeeding employer shall, 15 days before the change of employer at the latest, undertake measures for mitigation of social and economic consequences on the position of the employees, in collaboration with the representative trade union. (3) Should there be no representative trade union with the employer, the employees have the right to be directly informed about the circumstances referred to in para. 1 of this Article.

When determining "redundant employees", there is an obligation to consult employee representatives. According to article 154 of the LC, an employer, before enacting widespread redundancies, should prepare or train those affected employees for new employment in collaboration with the representative trade union at the said employer and relevant national employment agency. Also, it is foreseen that an employer will submit the redundancy proposal to the representative trade union and the national agency for employment eight days after the redundancy proposal has been set at the latest, inviting their opinion (within 15 days) (article 155, paragraph 2). An employer will consider and take into account proposals of the national employment agency and trade union and inform them about its position within eight days (article 156, paragraph 3).

According to article 44 of the Act on Protection of Health and Safety at Work from 2005 (*Official Herald of the RS*, Nos. 101/2005, 91/2015, 113/2017), employees are entitled to elect one or more representatives for safety and health at work. A minimum of three members may form a Committee for Safety and Health at Work. The committee has an advisory role in protecting the health and safety of employees. An employer with 50 or more employees has an obligation to appoint at least one representative to the committee so that employer representatives are not in the majority. The election and operation of these bodies, as well as their relationship with the union, should be regulated by collective agreement.¹⁵⁴

154 The new Law on Health and Safety at Work will probably be adopted by Parliament by the time this report is published. Like the previous law, the new law foresees the existence of employee representatives and the Committee for Safety and Health at Work (article 56). The mandatory content of information, consultation with employees, employee representatives and the Committee for Safety and Health at Work by the employer is also regulated in articles 57–59. Available online at: http://www.parlament.gov.rs/upload/archive/files/cir/pdf/pred-lozi_zakona/13_saziv/295-23.pdf

In addition, based on the remnants of an old practice from the 1990s (on the basis of the Act on Enterprises on 1996, valid at that time) (*Official Herald of the FRJ*, Nos. 29/1996, 33/1996, 29/1997, 59/1998, 74/1999, 9/2001, 36/2002), employees are represented in management and supervisory boards of companies. Also, the laws governing the operation of public enterprises and public institutions established by the state (utilities, water supply, power utility, schools, hospitals and medical facilities and so forth) provide for the participation of employees (one person) in the supervisory or management boards of these companies or institutions. According to article 17 of the Act on Public Enterprises: "The president and members of the supervisory board of a public company founded by the Republic of Serbia shall be appointed by the Government, for a period of four years, one of whom is a member of the supervisory board from among the employees" (*Official Herald*, Nos. 15/2016 and 88/2019). According to article 22, paragraph 2 of the Act on Public Services: "Members from among the employees of the institution shall also be appointed to the management board." And: "Members from among the employees of the institution shall also be appointed to the supervisory board" (*Official Herald*, Nos. 42/1991, 71/1994, 79/2005 and 83/2014).

Also, today, according to Serbian legislation, there is an opportunity for workers to participate in social dialogue outside the company through their representatives. Employees participation through their representatives outside the company is generally reserved for "representative unions".¹⁵⁵ Social dialogue outside the company (exclusive of collective bargaining) is regulated by the Act on Social and Economic Council from 2004, which provides for a tripartite social and economic councils at local, provincial and state-wide levels.

The National Social and Economic Council consists of six representatives of the Government, six union representatives and six representatives of the employers, established for the territory of the Republic of Serbia (article 5. 2 of the Act). Local and Provincial Councils have the same structure. The National Social and Economic Council discusses issues such as: development and promotion of collective bargaining, the impact of economic policy on social development and stability, employment policy, wages and price policies, competition and productivity, privatization and other issues related to structural adjustment of the economy, labour environment protection, education and vocational training, health and social protection and

social security, demographic trends and other issues (article 9 of the Act).¹⁵⁶

The Social and Economic Council of the Republic of Serbia was first established in August 2001 under the Agreement on the Establishment and Scope and Mode of Operation of the Social and Economic Council of the Republic of Serbia, concluded among the Serbian Government, the Confederation of Autonomous Trade Unions of Serbia, Trade Union Confederation "Nezavisnost", the Association of Free and Independent Trade Unions and the Serbian Association of Employers. The Agreement on the Promotion of Operation of the Social and Economic Council was signed as soon as in April 2002. The Council operates today and it can be said that it is in practice the most important body of this type in Serbia (*Official Herald of the RS*, Nos. 36/2009, 88/2010, 38/2015, 113/2017, 113/2017, 49/2021).

According to article 28 of the Act on Employment and Unemployment Insurance of 2009, there is a possibility of establishing "employment councils" at three levels - national, provincial and local (*Official Herald of the RS*, Nos. 36/2009, 88/2010, 38/2015, 113/2017, 113/2017, 49/2021). These councils provide opinions and recommendations to the Government, provincial or municipal authorities on important issues related to employment (programs, regulations, measures of active employment policy, among others). Unlike the aforementioned socioeconomic councils, these bodies have a complex composition, and they include employee representatives. For example, the National Employment Council consists of representatives of the founders (the state), the representative trade unions and employers' associations, the National Employment Agency (employee representatives) and private employment agencies, relevant associations and experts (article 30 of the Act).

In addition to this, there are other possibilities for employee representatives to appear in a certain role in situations that affect employees. This is the situation during a strike when a "strike committee" composed of representatives of employees (or trade union) is formed, in accordance with the Strike Act of 1996 (*Official Herald of the FRJ*, No. 29/96; *Official Herald of the RS*, Nos. 101/2005, 103/2012). According to its article 6., the strike committee and the representatives of the bodies to which the strike was announced are obliged, from the day of the announcement of the strike and during the strike, to try to resolve the dispute by mutual agreement.

¹⁵⁵ According to articles 218–220 of the Labour Act, the union is considered to be representative if: (1) it was founded and operates on the principle of freedom of trade union organization and activity, and (2) it is independent from government authorities and employers, and (3) is funded mainly through membership fees and other own sources, (4) if it gathers sufficient number of members (15 per cent of the employees of the employer and 10 per cent when the union organized outside the company), and (5) if it is entered in the register in accordance with the law and other regulations.

¹⁵⁶ Other social and economic councils have similar competences, at the levels at which they operate.

At the invitation of the parties to the dispute, trade union representatives may be involved in a negotiated settlement of the dispute if the union is not the organizer of the strike.

Also, in accordance with the Act on Peaceful Settlement of Labour Disputes of 2004, workers' representatives participate in the peaceful settlement of labour disputes before the Agency for Peaceful Settlement of Labour

Disputes (*Official Herald of the RS*, Nos. 125/2004, 104/2009, 50/2018). According to article 2, paragraph 2, a party to a collective dispute are considered to be an employer, trade union, authorized employee representative, employee or strike committee. They, together with the conciliator, participate in the mediation process within the conciliation committee (article 155, paragraph 2).

► 2. Workers' representatives in collective bargaining

Workers' representatives also participate in collective bargaining, as a rule within representative trade unions. In order to present this process, we will briefly present the essential rules from the Labour Act on collective bargaining, from the point of view of the role of workers' representatives.

The LA specifies the following types of collective agreements: (1) general, (2) special, (3) concluded with the employer. A general collective agreement is concluded for the entire territory of the country. A special collective agreement is concluded for a certain branch, group, subgroup or activity, and can be concluded for the territory of the whole of Serbia, as well as for the territory of a unit of territorial autonomy (province) or local self-government (municipality) (articles 241–250). A collective agreement can also be concluded with the employer.

The participants in the negotiations and formation of a collective agreement are a representative association of employers and a representative trade union of employees. The LA also governs the situation when no association can be considered representative. Then the unions or the employers' associations can conclude an association agreement, in order to satisfy the condition of representativeness (article 249).

Also, the Labor Act contains an interesting solution when an employer fails to conclude a collective agreement. According to article 250, if a trade union has not been established in a company, the wages, salaries and other employee benefits may be regulated by an "agreement" (on wages). Such an agreement is deemed to be

concluded if signed by the managing director, that is, the employer, and the representative of works council or the employee empowered to do so by at least 50 per cent of the total number of company employees. This was probably meant to encourage other forms of social dialogue in companies, other than those existing between the union and the employer. The agreement ceases to be valid on the day the collective agreement enters into force.

The representatives participating in the negotiations must have the authorization of their bodies (article 253). Ideally, representatives must respect the interest of their "base" in the negotiations and not to negotiate in their own name and interest (which did happen in practice in order to obtain certain privileges).

The participants in the formation of a collective agreement have a duty to negotiate but have no obligation to reach an agreement. If no agreement can be reached, they can initiate arbitration within 45 days in order to resolve contentious issues (article 254). The next step is mediation before the Agency for Peaceful Settlement of Labour Disputes.

The collective agreement is binding to all employees, including those who are not members of the union which signed the collective agreement (article 262). The Government may extend the effect of a collective agreement by prescribing that the collective agreement as a whole or its individual provisions also applies to employers who are not members of the association that signed the agreement. The legislature prescribed this procedure in detail in articles 257 and 258.

► 3. Trade union(s), workers' representatives and works councils

Despite rules set by aforementioned legislation, the role of workers' representatives in Serbia is modest. The only exception is the somewhat larger role of union representatives. The number of work councils in companies across the country probably does not exceed the figure of five (Bosis 2023). Also, there are no known cases where a works council, empowered by the aforementioned Labour Act, concluded an "agreement on wages" as the replacement for collective agreement. The socioeconomic councils do not have much influence in practice, except to some extent the Republic's Socioeconomic Council. Also, the impact of employees in the decision-making bodies in companies and institutions is diminishing.

As previously mentioned, Serbia's trade unions see works councils as rivals who would undermine their own role in companies and openly oppose their establishment. They consider them as direct competitors, calling the works councils "yellow unions".¹⁵⁷ Moreover, even open conflicts between unions and works councils have been recorded (Kurir 2011). Works councils are seen as an instrument of the "manipulative participation" that aims to create an illusion that employees participate in corporate governance (Mojić 2008, 242).

In the author's view, there is a general feeling among employees that the social dialogue in companies is nothing but a pseudo "economic democracy", but, in fact, the employers make decisions unilaterally.

Participation of employees in companies is far from favoured by Serbia's employers who traditionally lack a democratic predisposition and management skills. The idea of works councils and participation of employees in the company is more likely to be accepted in companies owned by foreign employers.

The state shows no interest in this form of social dialogue at the company level. However, the state occasionally

encourages social dialogue at other levels (municipality, province and state), especially in times of intense social tensions.

The social dialogue outside the company is formally more developed. Socioeconomic councils and employment councils were established at all levels (local, provincial, national). However, their work generally is evaluated as poor, with almost no impact on the rights of employees and their working conditions

One of the biggest obstacles to any development in this area is the competitive relationship between trade unions and works councils, leaving policymakers asking how to make unions and works councils allies not competitors (Marinković 2013). One popular suggestion is to define their responsibilities clearly and precisely (Vlaović 2013). Also, it would be sound to define by law that the members of works councils primarily may be elected to this body as the representative of trade union. Regardless, to observe fully democratic principles, a proportional number of non-organized employees must participate in works council as well. Employee representatives to be elected for the works councils on the referendum in the company are to be elected exclusively by secret ballot. In companies where a trade union is not established, it should be mandatory that work councils are established (Jašarević 2011, 379–375).

In addition, the state should strongly support social dialogue outside the enterprise. *Inter alia*, it should be specified that legislation or measures that have an effect on the social status of the employees cannot be adopted without the opinion of relevant social and economic councils (local, regional, republic). The state should encourage social dialogue not only through mere norms but practical measures such as tax incentives or rewarding employers with successful works councils programs with quick access to loans.

¹⁵⁷ In the opinion of the former president of the Association of Free and Independent Trade Unions of Serbia (the third-largest trade union in the country): "The concept of the council is designed to take employees away from the union as the authentic representatives of the workers in the struggle for workers' rights. Councils are bodies that are controlled by the management and the management of the foundation of which has a major impact, so councils can never be a substitute for unions, that can not possibly be effective in protecting the rights of an employee." Zeljko Veselinovic, president of United Trade Unions of Serbia "Unity", said that Serbia was not mature enough for the introduction of works councils in companies, and that even at this moment, these councils would have retrograde role and would serve as a tool to fight union organizing (see Vlaović 2013).

► 4. Elected workers' representatives and digital platforms

The status and protection of digital workers is high on the agenda of international labour law. These include persons working together with the help of digital technology and through platforms (platform workers) (Biagi et al. 2018, 52). In order to adequately protect these workers, the possibility of their organization (trade union and others) is considered, that is, effective and adequate representation of collective interests of this category.

However, this group of heterogenous workers tends not to work in one location but frequently is scattered around the world. "Digital labour platforms typically rely on a workforce of independent contractors whose conditions of employment, representation and social protection are at best unclear, at worst clearly unfavourable" (Biagi et al. 2018, 5). People who work through platforms or digitally usually do not enjoy any employment protection and are without the status of employees. Platforms try to avoid declaring themselves as employers, although in most cases they are. Persons who work are registered as freelancers, self-employed or conclude modified (non-standard) civil law contracts are almost never treated as employees.

Although platforms avoid presenting themselves as employers, they, in fact, do control and subordinate their workforce – which is the basic prerogative of the employer. There is a "covert subordination", which is sometimes more intense than the subordination performed by regular employers (see Engels 2014, 361–384; OECD 2020).

Digital, that is, platform workers, are difficult to systematize, but it is considered that these are the following forms of work: casual work, dependent self-employment, informal work, piecework, work from home and crowd work. The type of work can be: digital or manual, in-house or outsourced; high-skilled or low-skilled, on-site or off-site, large or small scale, permanent or temporary (Biagi et al. 2018, 3).

Around the world, the number of these workers is constantly increasing. In Serbia, it is estimated that there are between 74,000 and 100,000 digital and platform workers (O21 2017; Lj. Radonjić 2020). Furthermore,

Serbia has one of the highest percentages of workers working through international platforms (programming, translation, language classes, dispatch).¹⁵⁸ At the moment, local platforms are more dominant in Serbia, and they are mostly engaged in food delivery, while transport and other services also developing.

To more effectively protect digital and platform workers, in addition to being awarded the status of employment or its equivalent, unions also started to think about representing and organizing this group of workers. This would be a major step towards their organized protection and recognition.

Since the state is not responding to this problem, digital and platform workers have begun to organize themselves. Also, trade unions, whose influence due to the "digitalization of labour" and "platformization of labour" is declining, have begun to include these groups of workers in their ranks. Despite legal barriers, there is almost no union in the EU that has not opened its doors to freelancers and the self-employed (digital workers). There are four forms of organization – (1) specialist unions, (2) special unions of invisible non-standard workers, (3) special organizations of self-employed and (4) large unions – that have opened up their membership to self-employed workers, platform workers and the like.

Vanadeale mentions that in some countries these workers are organized into platform cooperatives (for example, Britain and the Netherlands) (2021, 218, 222). The goal is to provide platform workers with some rights and to be permanently employed in the future.¹⁵⁹ He also states that the first forms of organized collective actions of these workers are taking place. The first strikes and protests of platform workers (for example, Denmark, England, Italy and Spain) were recorded (Kučinac 2019; Eurofound 2021). Regional unions of platform workers also are being formed, advocating a "community of resistance" to achieve a breakthrough. For example, Germany has both the Free Workers Union and the Independent Workers Union, while Great Britain has the International Workers of the World. These unions also litigate and have the support of a transnational network for the revitalization of trade unions (Vanadeale 2021,

158 In the analysis of the World Bank (Kuek et al. 2015), Ukraine, Romania and Serbia were for the first time identified as key suppliers of labour on global digital platforms, per capita. (See also Lj. Radonjić 2020.)

159 "Platform cooperatives are designed and owned by their members, who usually pay a small contribution from their earnings towards the maintenance and development of the platform... There are currently various platform cooperatives operating in a number of sectors, from taxi (such as Green Taxi Cooperative and ATX co-op Taxi, in the United States and Eva in Canada) and delivery (such as Coopcycle2) services, to house-cleaning (such as Up&Go, New York City) and e-commerce (such as Fairmondo, Germany)" (ILO 2021, 88).

223). They also enjoy the support of “activist groups” – Alter summit i ReAct.

Activist groups of digital workers are considered to be in the pre-phase of trade union organization.¹⁶⁰ In fact, in the absence of funding and infrastructure, activist groups are turning to Serbia’s main unions for aid.

Also, the first works councils of platform and digital workers are being constitutionalized (for example, in Cologne – Foodora 2017, Deliveroo and in many other cities of Germany).

By 2019, eight formal collective agreements between platforms and platform workers were identified (for example, in Denmark and Sweden),¹⁶¹ with more pending (Kilhoffer et al. 2020, 10). Somewhere they were helped by trade unions, and somewhere workers were independently organized – into joint cooperatives or collectives.

In 2019 academics, policymakers and trade unions jointly defined the Fairwork Framework – five principles for fair platform work: (1) fair pay, (2) fair conditions, (3) fair contracts, (4) fair management and (5) fair representation (Graham et al. 2019). “Fair representation requires that workers have a voice on the platform. Workers should have the right to be heard by a platform representative and there should be a clear process by which workers can lodge complaints, receive a response and access a dispute resolution process. The platform observes the ILO right to free association, not linked to worker status but as a universal right. Similarly, the platform accepts collective representation of workers and collective bargaining” (ILO 2016, 316).

And lawmakers are gradually starting to recognize representatives of digital and non-standard workers. Kilhoffer states that Irish¹⁶² and French¹⁶³ legislation allows collective bargaining for some self-employed workers, including certain platform workers (Kilhoffer et al. 2020, 119). Collective agreements mostly were found for on-location platform workers, and specifically for food delivery couriers.

Several countries established committees or panels on platform work. Governments (Czechia, Germany,

Norway and so forth) and social partners commissioned research or organized conferences on the platform economy as well. For the time-being, social dialogue for digital workers has been given far less attention (Lenaerts et al. 2017).

All these examples provide the basis for a clear general conclusion – that it is necessary to allow all workers in non-standard forms of work to form trade union organizations and to elect representatives to represent them in all relevant processes. The representatives of this group of workers should exist from the level of individual companies or platforms to the highest state level (for example, to have representatives in state socioeconomic councils).

This also applies to Serbia. The problems related to platform work and other new forms of work in Serbia are similar worldwide, but trade unions and the state are almost completely unaware of the problems in this area. Unions have not tried to unionize workers in non-standard forms of work, and collective bargaining in this area is still far from reality.

Some initiatives have been taken by digital workers, for example, when a retroactive tax was applied to their wages (since 2017). After numerous protests organized by self-organized digital workers (who have since formed the Association of Internet Workers),¹⁶⁴ an agreement was reached on their taxation (*Digitalna zajednica* 2023). However, workers were again dissatisfied with the way the agreement was implemented and protested again in early 2023.¹⁶⁵

All this indicates that organizing online workers is necessary. Certain steps in this direction could and should be taken by trade unions, including representatives of non-standard workers in their ranks, in addition to establishing special trade unions for digital and platform workers.

In order for this to happen, the state should remove the obstacle currently contained in the Labour Act.

According to article 55 of the Constitution of the Republic of Serbia: “(1) The freedom of political, trade union and any other association and the right to remain

160 Thus, for example, an activist group of Foodora couriers in Vienna turned into VIDA, the Austrian trade union that organizes transport and services, established in 2017. Thanks to this, bicycle couriers are for the first time in employment and are covered by a collective agreement – 2020. A similar example of organizing is also mentioned in Germany – where the organization FAU has grown in 2020 into the Food, Beverages and Catering Union - which should help workers get employee advice (Vanadeale 2021, 224).

161 In Denmark, a collective bargaining agreement between a trade union and a cleaning platform has allowed some platform workers to transition to employee status (ILO 2021, 26).

162 Irish Competition (Amendment) Act 2017 (act 12 of 2017), part 2B.

163 *Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels* [Law on work, modernising social dialogue and securing career paths] (2016-1088, 8.08.2016).

164 There is also a “Digital Community”. “The Digital Community is an independent umbrella organization of the Serbian digital ecosystem, which gathers individuals, entrepreneurs, startup founders, companies, organizations, enthusiasts and activists... The reason for establishing the Digital Community is the fight for people’s rights in the digital sector in order to create a stimulating atmosphere for everyone who wants to engage in IT activities.” Available online: <https://www.digitalnazajednica.org/o-nama/>

165 At a protest organized by the Association of Internet Workers, digital workers demanded a reduction in their tax obligations, the introduction of compensation for leave during pregnancy and maternity leave. One of their demands is that freelancers should not be charged tax for the period from 2017 to 2020, which the state wants to charge them retroactively (see: RTS 2021; RTS 2023; Radio Slobodna Evropa 2023).

outside any association are guaranteed." Thus, the right to union organization is not limited by the Constitution only to employees. Therefore, this right could be used by all workers working in non-standard forms of work.

However, the legislature limited this freedom in the Labour Law. Namely, under article 6, it follows that this is only the right of "employees". In accordance with this article: "A trade union, pursuant to this law, shall be an independent, democratic and self-supporting organization of *employees* that they join voluntarily for advocacy, representation, promotion and protection of their professional, labour, economic, social, cultural and other individual and collective interests." Something similar is foreseen in article 206 on employee trade

unions: "Freedom to organize trade unions and pursue trade union activity shall be granted to *employees*, with pertinent entry into a register."

Therefore, the Law foresees only union organization of employees and not other working persons. The Labour Act should be harmonized with the Constitution, so that both workers in non-standard forms of work and digital workers get the right to organize a trade union. This would allow them to obtain their legal representatives who will represent them in essential processes concerning their rights at work. Their representatives could also participate in social dialogue outside the enterprise, thus influencing regulations that would provide them with adequate rights and protection.

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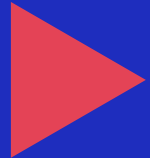
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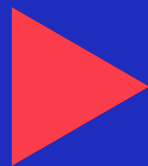
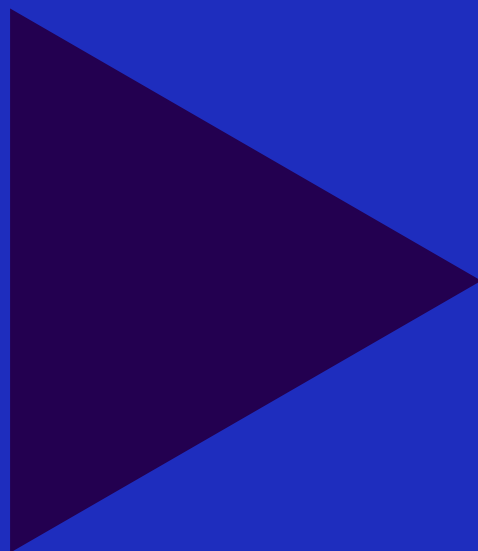
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13

The case of Slovakia

By Martin Bulla and Monika Martišková



► Introduction

Employees’ representativeness is regulated by Slovakia’s Labour Code (LC) and an assortment of domestic legislation like the Act on Health and Safety or the Commercial Code covering worker representation on supervisory boards. The Labour Code distinguishes four different types of workers’ representatives: trade union organization operating at the company level, works council (in companies above 50 employees), works trustee (in companies between 5 and 50 employees) and employee representatives for occupational health and safety as required by law. Special attention also is devoted to the European Works Councils, which are regulated in the Labour Code.

Public sector employees are entitled to information sharing and consultation through a “personal council” or “personal trustee” regulated by Act No. 312/2001 Coll., as

amended. These forms can be established only if there is no trade union organization in the state office. Only trade unions are permitted to join collective bargaining relevant to the public sector.

In this report, we devote attention to the relationship between the work councils and work trustees with trade union organizations in the private sector. First, we define and discuss the development of regulations concerning the mutual interaction between these two institutions. A section on the current state of the legislation focuses on specific cases of interaction of the employees’ representatives with the employer. Then examples of trade unions and works councils’ regulation at the workplace are provided along with a discussion of theory and practice.

► Workers’ representatives

The Slovak Labour Code distinguishes in article 11a four principal types of workers’ representatives: trade union, works council and a shop steward (literally staff trustee in Slovak), in addition to a special type of workers’ occupational safety and health (OSH) representative regulated by Act No. 124/2006 Coll. An employee’

OSH representative shall not be regarded as workers’ representatives for any issues outside this limited scope. If there is no trade union organization or works council (shop stewards) at the workplace, employee OSH representatives cannot assume a general role as worker representatives (Barancová et al. 2022, 285).

Table 1. Employee representatives

Employee representatives	Trade union organization (collective bargaining) (Regulated by the LC)
	Works council (Information sharing and consultation) (Regulated by the LC)
	Works trustee (Information sharing and consultation) (Regulated by the LC)
	Employees’ OSH representative (Information sharing and consultation on health and safety topics) (Separately regulated)
	European Works Council representative (Regulated by the LC)
	Members of the supervisory boards and representatives related to crossborder mergers (not regulated by the LC)

Source: author’s compilation.

The literature considers the types of workers’ representatives listed in article 11a of the LC to be non-exhaustive (Švec and Toman et al. 2019), which follows from the wording of the provision. However, article 11a

of the LC fails to mention members of the European Works Council (or representatives in an alternative mechanism), covered by part 10 of the Labour Code, nor is there any reference to employees’ representatives in

European companies (*Societas Europaea*)¹⁶⁶ or European cooperative societies.¹⁶⁷ They do, however, still benefit from protections afforded to workers' representatives by article 240 of the LC, such as leave for the fulfilment of their tasks as workers' representatives, the right to the provision of material equipment from the employer, or any termination of their employment unless consented by the applicable worker representative body (Barancová et al. 2022, 285). Mention of other forms of workers' representatives, such as those related to cross-border mergers (a special negotiating body, employees' committee)¹⁶⁸ or members of the supervisory board of a joint-stock company elected by employees,¹⁶⁹ is avoided in the article 11a of the Slovak LC.

Individual forms of employee representation are not mutually exclusive – they can operate simultaneously at any given workplace – and there is a possibility that just one form of employees representation is present or none at all (compare with Barancová et al. 2022, 285). According to article 229 of the LC, employees shall participate in decision-making by the employer concerning their economic and social interests, either directly or by means of a competent trade union body, works council or shop steward, while employees' representatives shall cooperate in parallel. Distinctly, the LC recognizes a trade union organization and a works council (or a shop steward) as the main forms of workers' representatives for the majority of purposes.

Shop stewards (staff trustee)

The difference between a shop steward and a works council is that a works council can be established only if the employer in question employs at least 50 employees. If the employer has less than 50 but at least 3 employees, the employees may decide to elect a shop steward. The LC stipulates that a shop steward has the exact same

rights and duties as a works council (article 233 (3)). A shop steward is elected directly by secret ballot, requiring an absolute majority of the employees participating in the ballot. The term of office of both the works council and the shop steward is four years.

Works council

A works council is a body which represents all the employees of an employer. Unlike a trade union, a works council is not membership-based but elected by the whole staff, and thus represents the entirety of the workforce working for a particular employer. The works council does not have a legal personality – unlike trade unions. As a result, the works council thus neither can enter into legal relations carry out legal acts, be found liable for damages ((Barancová et al. 2022, 1484–1485) nor have any legal standing before a court. This is quite problematic since works councils may carry out certain

co-decision competencies, for example, the right to give prior to consent on staff regulations, being otherwise invalid (article 84 of the LC) (see Olšovská 2017).

According to article 233 (4) of the LC, a works council or a shop steward shall have the right to co-determination in the form of an agreement or in the form of granting previous consent pursuant to the LC only if the working conditions or conditions of employment requiring co-determination are not governed by a collective agreement.

Trade union

A trade union organization is a civic association established according to Act No. 83/1990 Coll. on citizens' association. A trade union is constituted and acquires legal personality by registering with the Ministry of the Interior on the day after its petition for registration was delivered to the ministry.¹⁷⁰ The application for registration may be submitted by no less than three citizens, at least one of whom must be over 18 years of age; enclosed with the proposal shall be its statutes.

The key difference between a works council and a trade union is the fact that a trade union is an association, representing its members primarily, with full legal personality.

The table below summarizes the main difference between trade union organizations and work councils from the point of view of their competencies and legal person status.

166 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees; Act No. 562/2004 Coll. on European company.

167 Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees; Act No. 91/2007 Coll. on European Cooperative Society.

168 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (article 133); Act No. 513/1991 Coll. Commercial Code, as amended (§ 2181a – § 2181k).

169 Provided that a joint-stock company has more than 50 core employees at the time of the election, one third of the members of the supervisory board are elected by the employees. Act No. 513/1991 Coll. Commercial Code, as amended, § 200 (1).

170 Act No. 83/1990 Coll. on Citizens' Association, as amended, article 9a.

Table 2. Trade union organizations and work councils – competencies and legal person status in Slovakia

Category	Trade union	Works council
Concluding collective agreement	Yes, legally binding.	No. An employer has obligation to consult on redundancies or changes to work organization. No other obligation for an employer.
Enforcement	A collective agreement can be legally enforced by the trade union organization.	Work council can legally enforce consultation about the redundancies and/or work organization changes, but not more.
Rights to consultation, information and control of working conditions regulations	Yes.	Yes.
Impact on working conditions (wages and remuneration, working time, benefits...)	Yes, via collective bargaining.	No.
Membership	Associates workers of the employer based on their willingness to join the organization.	Does not require the membership of employees.
Member fees	Can collect member fees.	Does not collect member fees.
Financial resources	From member fees and employer.	No own financial resources (except <i>ad hoc</i> support from employer).
Relationships outside the company level	Trade union organizations can become a member of the sector-level trade union organization.	No cooperation outside the company level.
Legal and administrative support	Trade union organization can receive legal and administrative support from sector-level/regional-level professionals employed by the sector-level trade union organization.	No legal support outside the company, no administration support except from the employer.

Source: Author's compilation.

Participation of workers' representatives

The LC distinguishes in article 229 (4) four forms of workers' participation "in the creation of just and satisfactory working conditions":

Co-decision

Negotiation

Right to information

Inspections.

Co-decision

In addition to collective bargaining, which is regulated separately,¹⁷¹ is the right to joint decision-making, the strongest of participation rights awarded to workers' representatives. The LC, however, does not list all the specific areas in which worker's representatives need to be involved as co-decision-makers in one provision; they are instead scattered throughout the act. For instance, the employer may issue internal health and

safety rules only after reaching an agreement with worker's representatives (article 39, paragraph 2 of the LC),¹⁷² while flexible working hours (article 88 (1) of the LC), uneven distribution of working time for a period of 4–12 months (article 87 (2) of the LC) or working time account (article 87a of the LC) may be introduced only on the basis of a collective agreement or after reaching an agreement on the matter with workers'

171 Act No. 2/1991 Coll. on Collective Bargaining, as amended.

172 However, if an agreement is not reached within 15 days of the submission of a proposal, a decision shall be taken by the relevant labour inspectorate.

representatives; similarly, the start and finish of working time and the schedule of work shifts shall be determined by the employer only after agreement with employees' representatives (article 90 (4) of the LC), to name just a few examples in which the LC requires joint decision-making with workers' representatives. The right to joint decision-making is made stronger by article 17 (2) of the LC, which stipulates that a legal action for which the required consent of the employees' representatives was not granted or a legal act that was not negotiated

with the employees' representatives beforehand shall be deemed void, if so expressly stipulated by the LC or by special regulation. The LC does so, for example, in the case of staff regulations, which are invalid without prior to consent of workers' representatives (article 84 (1) of the LC) or notice of termination to a member of the relevant trade union body, a member of a works council or a shop steward, which is likewise invalid without the previous consent of workers' representatives.¹⁷³

Negotiation

The LC defines negotiation as an exchange of opinions and dialogue between the employees' representatives and the employer (article 237, paragraph 1 of the LC), which corresponds to the definition of consultation in Directive 2002/14/EC.¹⁷⁴ In article 237 (2), the LC contains a non-exhaustive enumeration of areas in which the employer is required to conduct prior consultation (negotiation) with workers' representatives:

- a. the state, structure and projected evolution of employment and the measures envisaged, in particular, where employment is at risk,
- b. fundamental issues of the employer's social policy, measures for the improvement of hygiene at work and the work environment,
- c. decisions that may lead to fundamental changes in the organization of work or in contractual conditions,
- d. organizational changes, such as the reduction or cessation of the activities of the employer or part of it, mergers, consolidations, divisions, changes in the legal form of the employer,
- e. occupational safety and health (OSH) measures.

Other situations necessitating negotiations with workers' representatives are mentioned in various provisions, for instance, employer's decision on even distribution of working time, which requires prior consultation with employees' representatives (article 86, paragraph 1 of the LC). Notice of termination or immediate termination of employment by the employer also requires prior consultation with the employees' representatives (article 74 of the LC), failure to do so results in the termination of employment being null and void.¹⁷⁵

There are also instances where the need to consult worker's representatives stems from EU law – Directive 98/59/EC on collective redundancies demands consultations in case of impending mass dismissals (article 73, paragraph 2 of the LC), Directive 2001/23/EC calls for consultations in the event of transfers of undertakings (article 29, paragraph 2 of the LC). Further cases where consultations are needed may be determined by collective agreement.

It should be noted that an employer is not obliged to respect the opinions of workers' representatives expressed during the consultation or the outcome of any ensuing discussions (Olšovská 2009, 274). But failure to conduct any consultation at all is regarded as a violation of labour law, for which the labour inspectorate may impose a penalty, but it only results in the nullity of the legal act concerned if the LC so explicitly provides.

Right to information

Information sharing is defined in article 238 of the LC as the provision of data by the employer to workers' representatives to acquaint them with the content, which roughly reflects the definition of information in Directive 2002/14/EC.

The default scope of the right to information is defined in article 238 (2) of the LC, which states that an employer shall inform workers' representatives about its economic

and financial situation and the development of its activities. An employer shall do so in a comprehensible manner and at an appropriate time. This is permanent in nature and not a one-off obligation (Barancová 2022, 1494). The frequency of the provision of information depends on the nature of the information concerned and ideally should be agreed upon in a collective agreement or in a deal with workers' representatives, together

¹⁷³ Art. 240 (9) and (10) of the Labour Code.

¹⁷⁴ Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community (article 2 (g)).

¹⁷⁵ The workers' representative shall conduct the consultation within seven working days from the date of receipt of a written request by the employer (two working days in case of immediate termination of employment). If the consultation does not take place within the stated period, the consultation shall be deemed to have taken place.

with other details, such as whether the information is provided upon request, periodically or in a different fashion (Švec and Toman et al. 2019).

Certain provisions of the LC stipulate the employer's obligation to provide specific information to workers' representatives (without prior request); for instance, workers' representative have the right to be informed about the employer's insolvency (article 22, paragraph 1 of the LC) in writing within ten days of its occurrence or about the transfer of an undertaking to another employer (article 29, paragraph 1 of the LC). The right to information is closely connected with other forms of participation: before engaging in negotiation (consultation) or co-decision, workers' representatives first will need to acquire the necessary information in order to be able to carry out those competencies

Inspections

According to article 239 of the LC, workers' representatives shall inspect compliance with labour laws, including wage regulations and collective agreement obligations. For this purpose, they are entitled to enter a workplace, request the necessary information and documents from management, table proposals for the improvement of working conditions, request that the employer rectify any shortcomings found as well as recommend that appropriate measures be taken against managers who are in breach of regulations. The material scope of inspection powers in article 239 of the LC is defined broadly – it covers labour laws in general, including wage regulations and collective agreements. It is presumed that the details, including the contents and forms of inspection activities, will be agreed upon in a collective agreement, a deal with workers' representatives or in internal company regulations.

Collective bargaining

Collective bargaining could be considered to constitute a special form of participation, but it is not the case in Slovakia's LC. Collective agreement is reserved exclusively for trade unions, and a special procedural

(Švec and Toman et al. 2019). Moreover, in connection with inspections, the LC provides that workers' representatives are entitled to request the information and documents necessary to carry out inspections as well as information on what measures have been taken to remedy any shortcomings identified during an inspection.

The LC does not only guarantee the right to information to the workers' representatives; it also provides this right directly to employees in article 229 (2), with the same material scope, which covers information about the economic and financial situation of the employer and its development. This provision expressly states that employees have the right to voice their comments and submit their suggestions on the information provided about internal decisions ahead.

Separate from general inspection privileges of workers' representatives in article 239 are occupational health and safety prerogatives that are reserved exclusively for trade unions. Under article 149 of the LC, a trade union is, in this regard, entitled to: examine how an employer fulfils its obligations to safeguard health and safety at work and whether it creates appropriate conditions for a safe and healthy workplace; regularly inspect an employer's premises, tools and personal protective equipment; verify that an employer thoroughly investigates workplace accidents and occupational diseases, and if not then lead the effort to stamp out health and safety violations; halt work in the event of imminent and serious threats to the health of employees or others; and alert the employer about overtime and night work that might endanger the health and safety of employees.

regulation applies – Act No. 2/1991 Coll. on collective bargaining, as amended.

Cohabitation of a trade union and a works council at the same workplace

Current regulation of workers' representatives in Slovakia builds on EU Directive 2002/14/EC, which demands each Member State ensure that employees can exert the right for information sharing and consultation regardless of their status. This generally was done by making exceptional arrangements for workers

without union representation, also the case in Slovakia (Workplace Participation 2014).

Cohabitation in Slovakia has swung between political extremes as successive governments in the period between 2002 and 2012 broadened or narrowed the opportunities for works councils and trade unions to function together. Since 2012, Slovakia has divided their functions such that the legislation gave trade unions

(besides the right to collective bargaining) co-decision rights, the right to information and the right to conduct inspections, while works councils (or shop stewards) were awarded the right to negotiation (consultation) and the right to information unless provided otherwise.

In 2002, Slovakia adopted legislation allowing works council and works trustee(s) to operate at the company level to ensure that information sharing and consultation is provided to employees but exclusively where the trade unions at the company level were not operating (Schronk 2017, 31). This introductory period was accompanied by an increased number of established work councils; employers understood their legal obligation to organize election work councils, even if only when employees demanded (Eurofound 2014).

Provided there is no trade union organization at a particular workplace, all four core participation competencies (co-decision, negotiation, information and inspections) can be carried out by a works council (or shop steward). A works council, however, cannot engage in collective bargaining, an exclusive right of trade unions (article 229, paragraph 6 of the LC). Likewise, if only a trade union is present and no works council was created, all the participation powers will be executed by the trade union.

The regulation of the cooperation and competencies between trade union organization and the works councils underwent several politically motivated changes, with main aim of undermining trade unions' exclusive power in collective bargaining. The parallel functioning of both a trade union and a works council at the same workplace was enabled by amendment No. 210/2003 Coll., and since then the regulation of the division of competencies between them (enshrined in article 229, paragraph 7 of the LC) has changed several times (see table 3) (Schronk 2017, 32-33).

Originally, in the case of "cohabitation", trade union bodies have been assigned the right to bargain collectively, the right to control (inspect) the fulfilment of obligations arising from a collective agreement and the right to information. The works council have been entrusted with co-decision, negotiation (consultation), as well as the right to information and the right to conduct inspections. Thus, initially, the bulk of participation rights was conferred to works councils, while trade unions were left with collective bargaining.

After a left-leaning government took power in 2006, the centre of gravity shifted towards trade unions since, based on amendment No. 348/2007 Coll., they took over the co-decision powers and the right to conduct inspections and kept the right to information. Works councils were left only with the negotiation (consultation) and information rights.

When right-wing parties briefly returned to power in 2010, amendment No. 257/2011 Coll. transferred the right

to co-decision and some inspection powers from trade union bodies back to works councils. The division of powers effectively returned to a default position, where trade unions have the right to collective bargaining, the right to information, the right to control (inspect) the compliance with a collective agreement and the right to conduct OSH inspections under article 149 of the LC. Works councils then benefited from the right to co-decision, negotiation (consultation) information, as well as the standard inspection rights.

As far as the relationship between trade unions and works councils is concerned, it is pertinent to mention that this was an interesting episode in the development of the Slovak legal framework. Although subsequent legislatures often introduced radical changes to Slovak labour law, they always respected that the right to bargain collectively belongs to trade unions. However, in 2011, amendment No. 257/2011 Coll. to the LC introduced a brand-new provision – article 233a – which established a very atypical legal institute, namely, an agreement between an employer and the works council or a shop steward. Such an agreement could only be concluded if there was no trade union organization at the workplace. This agreement could regulate working conditions, including remuneration and terms of employment, to the same extent as a collective labour agreement. Since neither the works council nor the shop steward is endowed with legal personality according to Slovak law, such an agreement was not legally enforceable. Therefore, any claims arising out of this agreement could be enforced only to the extent to which they were implemented in an individual contract of employment. When the following government adopted another major LC amendment (Act No. 361/2012) in January 2013, the whole of section 233a was repealed. The explanatory memorandum pointed out complications with the enforcement caused by the lack of legal personality of the works council or a shop steward.

National elections in 2012 brought back left-leaning representation, which enacted yet another reversal in the distribution of participation powers. Amendment No. 361/2012 Coll. gave trade unions (besides the right to collective bargaining) co-decision rights, the right to information and the right to conduct inspections. Works councils (or shop stewards) were awarded the right to negotiation (consultation) and the right to information unless provided otherwise. This amendment managed to stabilize the distribution of participation rights in the event of cohabitation of a trade union and a works council at the same workplace. This remains in place to date. None of the previous amendments concerning the division of participation right provided any reasoning for these changes in explanatory memoranda.

Finally, if no worker's representatives were established at the workplace, the general clause in article 12 of the LC will apply. It provides that if the consent of or agreement with workers' representatives is

required and no employees' representatives operate in the enterprise, the employer may, in principle, act autonomously – unless the Labour Code stipulates that an agreement with workers' representatives cannot be replaced by a decision of the employer. In such a case, the required agreement with workers' representatives cannot be replaced by an agreement with an employee

either. Where the Labour code requires negotiation (consultation) with workers' representatives, the employer may act autonomously.

In table 3, we provide a summary of the several amendments to works councils' rights.

Table 3. Regulation of the relationship between trade unions and works councils

Date	Regulation of the relationship between trade unions and works councils
Labour Code, Act No. 311/2001, valid since April 2002	Works councils and trustees introduced, possible only if trade union is not present at the workplace.
Amendment of the Labour Code No. 210/2003 (putting legislation in accordance with ILO Workers' Representatives Convention, 1971 (No. 135))	Workers' representatives and trade unions can function parallel in a workplace, and employer is obliged to communicate with both of them, only trade unions can conclude a collective agreement
Amendment of the Labour Code No.348/2007	Trade unions assigned co-decision powers and the right to conduct inspections and the right to information; works council have only negotiation and information rights.
Amendment of the Labour Code No. 257/2011, valid since September 2011	Introduced the possibility for the work council to conclude a collective agreement if there was no trade union organization present. At the same time, the amendment introduced representativity criteria for the trade union to be entitled to conclude a collective agreement. The trade union was required to represent at least 30 per cent of employees. Similarly, a works council could be created if only 30 per cent of employees support its creation, compared to the previous 50 per cent.
Amendment of Labour Code No. 361/2012, valid since 2013	The amendment cancelled paragraph 233a, allowing works councils to collective bargaining. Since then, trade unions are only entitled to collective bargaining, and this legislation applies until the time of writing this report.

Source: Author's compilation.

Cooperation between trade unions and works councils: theory and practice

Although it is clear that the effective execution of participation rights requires cooperation between a trade union and a works council, Slovakia's LC provides little detail on what this cooperation should look like. According to article 229 (8) of the LC, if a trade union body and a works council both concurrently exist, a representative of the trade union body may participate at meetings of the works council if an absolute majority of the members of the works council agree. This provision stems from the fact that a works council is deemed to represent the entirety of the workforce at the employer, including trade union members (Švec and Toman et al. 2019). Members of the works council, on the other hand, have no legal right to attend meetings of trade union bodies.

In practice, it is customary that a special tripartite agreement is concluded between the employer, trade union and the works council, which sets out detailed

standards for mutual cooperation in the exercise of participation rights (Švec and Toman et al. 2019). Such an agreement can establish procedural rules for the implementation of these rights, such as time limits, whether the information will be provided upon request, periodically or in other fashion, dispute resolution mechanisms and so forth. Furthermore, it could also define the composition of various committees (for example, catering, damages, social affairs) as well as specify the contents of particular participation rights so long as the relevant LC provisions are respected. Typically, such a tripartite agreement also includes provisions on mutual recognition of both forms of workers' representatives in a workplace and a declaration not to undermine each other (Švec and Toman et al. 2019). This special tripartite agreement is not to be confused with a collective bargaining agreement.

It is incumbent to note that the distribution of powers between a trade union and a works council is also affected by article 233 (4) of the LC, according to which a works council (or a shop steward) shall have the right to co-decision in the form of an agreement or in the form of granting previous consent – only if the working conditions or conditions of employment requiring co-decision are not covered by a collective agreement. This provision effectively limits the prerogatives of works councils by a collective agreement (Barancová 2022, 1465–1469).

Although the work councils and trade unions can coexist at the company level, it is rarely the case in practice. Cooperation is assessed by the trade union representatives as problematic for several reasons. First, the work council representatives may have different interests from trade unions, which may further weaken employees' voice at the company level (Škvarková et al. 2006). Second, trade union representatives cite examples where a works council is purposely established by an employer to weaken trade unions at the company level (Ibid.). Third, there is no clear definition of rights and duties between the trade unions and works councils, especially in terms of layoff consultation and co-determination. Fourth, works councils' representatives are burdened by a lack of knowledge and experience among their members, especially legal awareness. They may be vulnerable and highly dependent on the employer, while trade unions can rely on the external support of sector-level lawyers or other experts (INT1). Fifth, in some cases employees in decision-making positions are members of the works council, which decreases its reliability among regular employees. Sixth, works councils are often established upon an employer's initiative, which decreases their perceived independence and reliability among employees. From all of the above, trade unions neither aim to engage in works councils nor support their establishment.

In practice, the co-existence of a works council and a trade union organization is very rare and has not changed much over time. In 2006, based on the provided research among sectoral trade union representatives, their co-existence was not recorded (Škvarková et al. 2006). This report has followed up with Slovak trade union members, and the situation has not changed. Employers in earlier research confirmed that work councils are rare, and employers do not support them often (Ibid.).

On the positive side, in some cases work council can serve as an easy method for employees to begin to organize, which later can be transformed into a trade union organization. For employees who want to improve working conditions at the company level, it can be a good

steppingstone in advocating for employees' interests. The establishment of the works council may be, in some cases, more acceptable to an employer, because if requested, they have to organize elections for the works council and support its creation – which may raise awareness about its existence among employees and gain more support from them.

The main motivation for transforming works council to a trade union organisation is the experience that works council do not bring about a significant change in working conditions and wages, and only a trade union organization with the right to collective bargaining can make an impact. So, although not supported by the trade union explicitly, work councils may serve as a transition for the establishment of a trade union organization and help to raise awareness about the importance of representation among employees.

In the case of multinational corporations (MNCs), a works council can be initiated by the employer for the purpose of delegating its member to the European Works Council. Although these are only specific cases from some of the MNCs operating in Slovakia, the evidence from the interviews in the automotive sector in 2022 suggests that this reason for establishment led, in some cases, to the transformation into a trade union organization. An employer also may initiate the establishment of a work council to streamline communication with employees via elected representatives instead of dealing with employees' requests and suggestions case-by-case. Both parties may also have a role in avoiding the establishment of a works council because employees are uninterested in creating a council, and employers want to neither encourage nor discourage such activities.

The last available Slovak data on works councils are from 2011, which provides an insight into the occurrence of the work councils between 2008 and 2011. The occurrence of work councils has been decreasing over time, and we expect this trend did not change in the last few years. In 2011, 17.3 per cent of organizations in the sample of the data collected by Trexima for the Ministry of Labour in Slovakia (Eurofound 2012). The actual number of work councils' occurrence in the economy is thus suspected to be even lower.

Work councils are more often present in economic sectors that require physical presence at the workplace (for example, manufacturing) and are less present in sectors with dispersed workforces (for example, construction). In sum, work councils are a more common feature in larger companies, less common in SMEs and rarer still in the public sector.

Works councils may possess some advantages in creating employee representation in a non-unionized

sector. According to Slovak legislation, the employer is obliged to establish a work council if it is requested by a minimum of 10 per cent of employees. Thus, the establishment of a work council – which has no authority to bargain for collective agreement to improve working conditions – is relatively easy compared to the creation

of the trade union organization. Nevertheless, given the contractual relationship of platform companies with their sub-contractors, none of these provisions of the LC apply, and thus there is no possibility of executing workers' rights on information, consultation, and negotiation.

► Conclusions

Since their introduction into the Slovak legislation in 2002, works councils have been regarded as alternatives and competition to trade unions. The competencies and division of rights have been changed several times, mostly because of politics: right-wing parties' efforts to assign works councils more rights to undermine trade unions, and left-wing parties' efforts to maintain trade unions' powers. Their ability to cohabitate has been modified several times in Slovakia's legislation.

In practice, these legislative changes did not mirror much of a change in the number of works councils nor did it influence the co-existence of work councils and trade unions. Anecdotal evidence suggests that employees, in their effort to execute their rights on information, coordination and negotiation, will demand

the establishment of the work council, and then later will aim to establish a trade union which possesses the right to collective bargaining. In other cases, works councils are established by the employer but have little trust among employees. Nevertheless, exact data about these incidents are missing.

As for future challenges in the labour market related to flexibilization and platformization, there is an overwhelming need to change the legislation and assign contractual self-employed workers the same rights as to regular employees. Under the current state of the legislation, platform workers can organize in trade unions, although conducting a collective agreement has not been yet applied in Slovakia.

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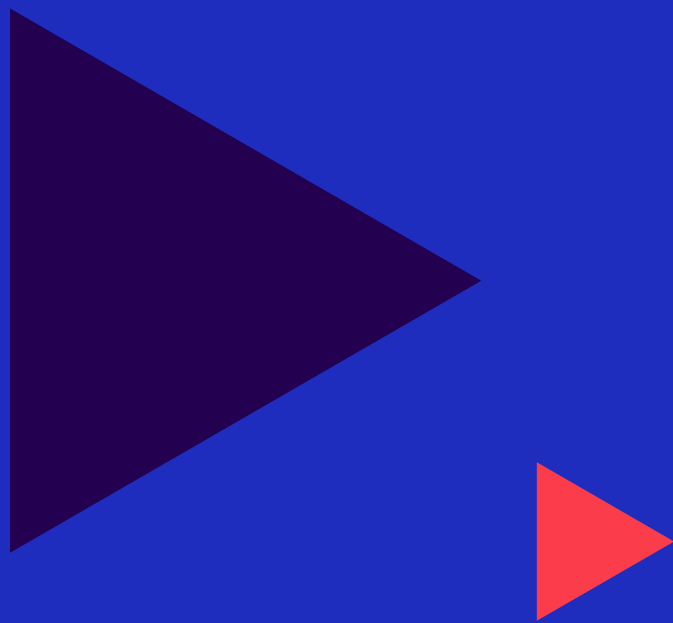
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14

The case of Slovenia

By Valentina Franca



► Introduction

Workers' representatives, that is, works councils, represent an important pillar of worker participation in Slovenia. Together with trade unions, they ensure workplace representation. In some cases their roles overlap, and in others the rights of the works council are more extensive. Importantly, the right to participate in business decision-making is a constitutional right in Slovenia. Article 75 of the Constitution of the Republic of Slovenia (1991) stipulates participation in management: "Employees shall participate in the management of commercial organisations and institutes in a manner and under conditions provided by law."

This is the basis of the most important law on worker representation, namely the Worker Participation in Management Act (WPMA), which was passed in 1993 and is based on experience in Germany. Despite the transition from a socialist to a capitalist system, the core

of the law remains in force. The law was amended only in 2007 with respect to board-level workers' representative in the single-tier management system due to the reform of the Companies Act. However, this does not mean that workers representatives are not exposed to challenges in practice. On the contrary, both the works council and the representatives at the board level are confronted with many different issues, which also may end in court proceedings. Often the connection with the trade unions is also questioned, especially regarding "dual" mandates. Therefore, in this report we present the position of workers' representatives *de lege lata*, considering the possibilities of both the works council and the workers' representatives at board level (section 2). Next, section 3 analyses the complex relationship with the trade unions, both *de iure* and *de facto*. The last two points deal with recent challenges, including government proposals (section 4) and future prospects (section 5).

► 1. Workers' representative de lege lata

A works council in Slovenia may be established in companies with at least 20 workers, while companies with at least 50 workers must provide for board-level workers' representatives. There are no official data regarding the number of works councils and board-level worker representatives in Slovenia, but it is estimated that both are present in larger companies, generally those with more than 250 workers (Eurofound 2013; Franca and Pahor 2014). The WPMA sets out the details for works council participation, as explained in subsection 2.1, while the analysis of the legal status of board-level workers representatives must also consider the Companies Act (2.2). This report focuses more on the

works council as elected employee representation, and therefore only provides a brief overview of the board level.

It is worth noting that although works councils can also be established in public institutions, in practice few exist. The main reason for this is that the legislature was obliged to pass a special law for worker participation in public institutions, since the WPMA is mainly intended for companies, but this never happened. The case was also brought before the Constitutional Court in 2001, which ordered the legislature to draft and pass such a law, but to date this has not happened.

2.1 Works council

Election and performance

The members of the works council shall be elected by secret ballot by the workers employed in the organization. Candidates may be nominated either by a representative trade union of the organization (which, depending on whether it is part of a trade union confederation, has either 10 per cent or 15 per cent of the workforce as members) or by a determined number of workers as set in the WPMA. The number of workers to

be nominated starts at three and increases with the size of the organization's workforce, up to a maximum of 50.

All employees who have been employed by the company for at least six months are eligible to vote, except for the director and management and their family members. Part-time employees and those who are employed for a definite or fixed period of time have the same voting rights as permanent full-time employees, provided

they have sufficient length of service. However, temporary workers and other persons who do not have an employment contract with the employer, such as students or platform workers, are not entitled to vote (see also item 4). The same restrictions apply to candidates for election to the works council, except for the period of service, which is 12 months rather than six months.

The term of office is four years, and there are no limits on the number of times a person can be re-elected. Therefore, in practice, it is not uncommon to run for several terms in a row, even five or more. While this is not illegal, it is not considered good practice. In addition to the usual problems that such long tenure brings, such as lack of new ideas, declining motivation and the like, it is often reported that such works councillors become "too close" to either management or other officials, which can prevent them from arguing objectively.

The works council must elect a chair and a deputy chair and draw up its own rules of procedure. In practice, it has been shown that these rules are of crucial importance when it comes to sensitive decisions for workers, including the appointment and recall of board-level worker representatives. Procedural rules are especially important to ensure transparency and compliance with

the WPMA. It should be noted that the works council does not have a "control body" and can only be recalled by the workers themselves or by the representative trade union in accordance with the procedure laid down by the WPMA. A works council will typically meet once a month and normally there will be regular meetings with the employer.

A works council may establish specialized committees to deal with specific issues such as health and safety or issues of particular interest to specific groups of workers. These may be broad groups such as women or younger workers or specific areas of the company. The committees also may include employees other than the elected members of the works council, but two-thirds of the members of these specialized committees must be works council members, and only the works council can make the final decision. In practice, the works council tends to appoint at least a few specialized committees, depending on the specifics of the company's business. However, health and safety committees are a must, as these issues arise in all companies. They are not only concerned with physical working conditions but also with less tangible issues such as harassment, discrimination and the like.

Participation in management decision making

The participation of works council in management decision-making is mainly regulated in the WPMA, and a few additional rights were gained with the amendment of the Employment Relationship Act in 2013. It is worth noting that under article 5 of the WPMA, the works council and management may enter into an agreement allowing for more participative rights than those set forth in the WPMA. Although in practice management is reluctant to extend statutory rights, there are examples where the works council was able to achieve that.

The works council has important rights, namely the right to information and consultation, the right to co-decision and the right to veto, as described in more detail below. However, the general powers of the works council under the WPMA (article 87) are as follows:

- ensuring that laws and collective agreements are properly implemented and honour agreements with the employer;
- proposing measures for the benefit of workers;
- accepting initiatives from employees, and, where justified, taking them into account when negotiating with the employer; and

- assisting disabled, older and other workers receiving protection to integrate into employment.

The works council must be informed about (article 89):

- the company's economic status,
- the development goals of the company,
- the state of production and sales,
- the general economic situation in the industry,
- changes in company activity,
- any reduction in activity,
- changes in the organization of production,
- changes in technology, and
- receive a copy of the company's annual accounts.

The WPMA does not explicitly say how the employer should inform the works council. The employer must provide information in advance if it concerns changes in the company's activity, a reduction in activity, changes in the organization of production, changes in technology and the annual accounts (article 90). With the exception of annual accounts, the employer must also obtain the

consent of the works council within eight days if such decisions result in an increase or decrease in the number of employees, in accordance with the Employment Relationship Act.

In addition, under the Employment Relations Act, the works council, like the union, has the right to be informed annually of the use of working time, considering the annual distribution of working time, the performance of overtime or the temporary redistribution of working time, if it so requests (article 148). And, like the trade union, it must be informed about the use of temporary (agency) workers (article 59) if it so requests. The works council must also be consulted before it adopts rules on the organization of work if there is no trade union in the company (article 10).

The works council must be consulted about decisions on company-related issues, worker-related issues and health and safety issues. In these cases, consultation means giving the works council the information at least 30-days beforehand and having a consultative meeting with the works council at least 15 days before the employer takes the decision concerned. The goal of consultation is to arrive at a mutually agreed position, as the WPMA explicitly states that the employer "shall seek to harmonize positions" (article 91)

The main *company-related* issues on which the employer must consult the works council are (article 93):

- changes in the company's legal status,
- sale of the company or substantial parts of it,
- closure of the company or substantial parts of it,
- significant changes in ownership,
- a transformation in the status of the company under company law, and
- changes in corporate governance.

The employer shall also obtain the consent of the works council within eight days if the decisions about the changes in the company's legal status or the sale of the company or substantial parts of such decisions result in an increase or decrease in the number of employees, in accordance with the Employment Relationship Act.

Both researchers and practitioners find these provisions problematic in practice because most of the items listed above are the decision of owners and not employers as such. For example, significant changes in ownership are a matter that workers cannot influence, so it is questionable what is the purpose of the consultation here. On the other hand, issues that are company-related should be included, such as company restructuring, which usually has a direct and often far-reaching impact on workers.

Article 94 specifies the worker-related issues on which the employer must also consult the works council:

- the need for new workers (how many and what type),
- job classification,
- worker transfers (more than 10 per cent moving out of the company or somewhere else within it),
- new rules on pensions and other benefits,
- job losses, and
- the disciplinary code.

The employer is also required to consult the works council on **health and safety issues** (article 91). The rights of the works council about safety and health, which include the right to be present during inspections, are set out in more detail in the Occupational Safety and Health Act (2011). It determines that the employer should consult with works council or, if there is none, the health and safety representative on:

risk assessment and any measure which might affect health and safety at work;

designation of the safety officer, company doctor, workers designated for first aid and employees responsible for fire safety and evacuation, and

provision of health and safety information to employees and the organization of health and safety training.

In addition, the works council or health and safety representative can require that an employer adopts suitable measures and prepares proposals for the elimination or mitigation of occupational health and safety risks. They can request an inspection by the competent inspection service if they consider that the safety measures taken by the employer are inadequate. They also have the right to be present at any inspection that concerns the safeguarding of health and safety at work and have the right to submit observations.

The employer should provide the works council or health and safety representative, as well as the trade unions in the company, with the safety statement and risk assessment and documents on accidents at work kept by the employer. The employer should also inform the works council or health and safety representative, and the trade unions of the findings, proposals or measures imposed by the health and safety inspectors.

It should be noted that the employer is not legally obliged to make the decision in accordance with the opinion of the works council. Repeated rejection of the works council's opinion may cause tension in the relations between the works council and the employer.

Therefore, it is advisable to follow the principle of WPMA and try to find a compromise.

On the other hand, the right to co-decision means precisely that the employer cannot decide before the works council agrees to it. This applies in the case of the following decisions (article 95):

- arrangements for annual leave,
- performance assessment criteria,
- criteria for rewarding innovation (suggestion scheme),
- the use of social facilities, such as holiday homes, owned by the company, and
- the criteria for promotion.

However, the works council can only refuse consent if a proposal involving a loss of jobs does not include proposals for dealing with redundancies, as required by legislation, or has not been justified. As with other areas requiring the works council's agreement, the issue goes to an arbitration body if the works council objects.

The works council has the same rights as the union in the areas of planned dismissal and in disciplinary cases under the Employment Relations Act. In other words, it can express a view where someone is to be dismissed (article 86) and participate in disciplinary proceedings (article 174). However, the involvement of the works council only comes when the individual concerned is not a union member.

Board-level workers' representatives

Works councils can nominate their representatives to the board of directors (a non-executive director in the one-tier system) and the supervisory board (in the two-tier system) when the threshold is reached. Works councils, equally, have the power to recall these representatives if unsatisfied with their work. The method for choosing worker representatives and the procedure for their recall are both determined by the works council in its rules of procedure. The number of board-level worker representatives varies depending on the corporate governance system, and the company's legal status. Their legal status is the same as that of the representatives of the capital, so in considering their position, corporate law must also be considered. Therefore, workers are guaranteed the right to elect representatives, irrespective of whether they work in a public limited company or a limited liability company;

According to article 98, the works council has the right to veto (to withhold individual decisions of the employer) and, at the same time, the right to initiate the procedure in front of an arbitration body, with an equal number of members appointed by the works council and the employer and an independent chair, whose appointment must be agreed by both sides. A works council can use this right in certain cases, when it violates the rights to information, consultation, and co-decision. In these cases, the employer may not implement the decision until the final decision of the competent authority.

The WPMA does not provide for any special rights with respect to the processing of complaints. In Slovenian legislation, only the employer is entitled to formally process the complaint, but the works council (and the trade union) can be of great value. The works council or its specialized commissions are not primarily there to deal with individual worker complaints, but with more general problems within the company. In the case of a complaint from a worker who has evidence of a violation of the employment contract by the employer or even of a criminal offense, the works council can refer the worker to the trade union, which assists its members. However, the works council plays an important role in handling complaints from workers that express dissatisfaction at the workplace (and may also constitute a breach of the employer's obligations). How the works council proceeds in such cases depends on its rules of procedure, how it operates, and on its links with trade unions. When such violations or dissatisfaction are identified in practice, they are discussed at the works council meeting, where it is agreed to take various measures to improve the situation, which may include discussions with the employer.

the only condition is that the company is either medium-sized or large, pursuant to the Companies Act. However, considering the legislative text, workers employed in a limited liability company have poorer chances of enforcing the right because the currently valid provisions are adapted to public limited companies. Namely, the WPMA sets forth the methods of appointment of board-level workers representatives in a one-tier and two-tier management system, which are typical governance models in public limited companies pursuant to the Companies Act. In limited liability companies, a supervisory board is not a mandatory body, and the management is most often represented by only one person, usually the director. Workers thus are left with the sole option to arrange with management and company owners the method of the realization of the right in the memorandum of association.

► Relationship with trade unions

The WPMA draws a clear line regarding the role of the works council in collective bargaining and the organization of strikes, as these activities are reserved exclusively for trade unions (articles 5 and 7). In fact, trade unions in Slovenia have focused primarily on their function in collective bargaining. This has not been without success, as collective bargaining coverage in Slovenia is high at almost 80 per cent (ILO 2017; OECD 2018). However, this does not mean that they are unaware of the importance of works councils. It should be noted that they were heavily involved in the adoption of the WPMA, for example, by organizing and participating in workshops with German experts on worker participation (Franca 2020). In any case, the formal role of unions under the WPMA is very limited. Their influence is mostly indirect, especially the right to nominate works council members, who are then elected by the entire workforce. According to article 27 of the WPMA, the representative trade union at the company level may propose members of the election committee and candidates for works councils. In practice, the unions made use of this right, although in recent years it has become increasingly common for candidates to be nominated by the workers themselves by collecting the required number of signatures for a particular candidate. The counterpart to this is the right of the trade unions to recall a candidate elected to the works council, which does not happen in practice.

Although legislation establishes a dividing line between the two workers' representatives at the local level, unions and works councils have coexisted rather uneasily, with their relationship described as somewhat competitive (Stanojevic and Gradev 2003; Franca and Pahor 2014). This is evident, for example, in the establishment of the Slovenian Association of Works Councils, a privately founded network that aims to provide professional support to works councils and the development of economic democracy in Slovenia. There are attempts to improve relations. In 2018, the Association of Works Councils signed an agreement with the largest trade union federation in Slovenia (*Zveza svobodnih sindikatov Slovenije*) to promote the further development of works councils and support the establishment of joint committees of works council members and trade union representatives (Gostiša 2018). However, this relatively new initiative has not yet shown any demonstrable impact at the local (company) level.

The complexity of the relationship between works councils and unions is also evident in the recent events surrounding the outsourcing of cleaning staff at a Slovenian hotel chain (RTV 2023a). The hotel management announced that it would transfer the employed cleaning staff to a cleaning company, which would then take over the cleaning service for the

hotel. This would worsen significantly the employment situation of the cleaning staff, as the cleaning company is not bound by collective agreements, resulting in lower wages, lower bonuses, less paid vacation and the like. While the union vehemently opposed it, the works council voted in favour of the transition (RTV 2023b). This was an unusual step and the first of its kind in Slovenia, and it was criticized not only by the Association of Works Councils of Slovenia but also by academics.

Although both the works council and the trade unions are workers representatives at the company level, there still exists some rivalry, as reflected in recent events. This can only worsen workers status and should be avoided. Moreover, the role of the two is still misunderstood (Franca and Pahor 2014; Nahtigal 2014), especially in collective bargaining and strikes. Under Slovenian law, this is the responsibility of the unions, and the works council cannot participate. Another problem is dual mandates, for it is common practice for the same person to hold two or more mandates, for example, trade union representative and/or general secretary of the trade union, works council chair and/or works council chair and/or worker representative at board level. The dual mandates are tricky for two main reasons. First, worker representatives who have dual mandates often have a problem with not distinguishing when they are acting in the role of the union (and in accordance with their legal competences) and when they are acting in the role of the works council. This blurs the lines and confuses both management and the workers who they represent. Second, this creates problems regarding confidential information, especially if they are worker representatives at the board level. The information discussed at board level may not be passed on to third parties, which is violated more often than not. In some companies, works councils even officially demand that they pass on all information discussed in board meetings. Because of their dual mandates, workers representatives may use this information while performing other duties, leading to even greater resistance from management to share information with worker representatives (Franca 2018; Franca and Doherty 2020).

Both works council members and trades union representatives have the same protection against dismissal. Provided they have not acted illegally or broken their employment contract, they cannot be dismissed without the consent of the body to which they belong, except when a business is being wound down or the concerned individual has refused to accept a reasonable transfer (article 112 of the Employment Relations Act). The protection lasts for the entire period of office, plus a year after leaving office. The number of union representatives enjoying this protection is determined by collective agreement. The Association

of Works Councils has long expressed concern about the current regulations. It says employers are using the two-step warning system prior to termination to

intimidate workers representatives and turn their backs on activities to secure the voice of workers (Gostiša 2021).

► 4. Recent developments

Academics, professionals, the Association of Works Council and trade unions have called on legislators to amend the WPMA as well as other collective labour laws. The current law is outdated and unable to meet the challenges of the labour market. As mentioned in the introduction, the law hardly has not changed since independence. The current government has not yet announced any concrete activities in this area. However, in their coalition programme (Government of the

Republic of Slovenia 2022), they have agreed to introduce workers' profit sharing and worker participation in the ownership of companies by introducing stimulative taxation of remuneration in the form of shares or units, stock options or shares, and employee participation in company profits. They have also proclaimed to promote economic democracy, especially worker participation, but so far no action has been taken.

► 5. Future prospects

New forms of work, outsourcing and digital voice

In general, the existing system of worker participation is employee-based, that is, founded on workers who have concluded employment contracts with their employers. However, new forms of work have been emerging on the labour market for some time, and these are excluded from the workers participation system because no employment contracts are concluded in such cases. This can be claimed for most people who work for employers on other legal bases, for instance, the self-employed, students, temporary workers, subcontractors and alike. This problem is more widely addressed in issues about efficient labour right protection; however, there is less focus on the inclusion in specific aspects of collective employment relationships (Franca 2020). Therefore, these changes in the labour market must be considered in future changes. For example, a first step would be to count temporary workers as part of the workforce and give them voting rights for the works council. In addition, counting temporary workers would allow workers to form a larger works council (article 10 of the WPMA). In addition, some European countries have given temporary workers who work for hirers the right to vote and even to stand for election. Second, works councils can exercise the right to information, consultation and, to some extent, co-determination on issues related to the involvement of temporary workers in work processes. *De lege ferenda*, it would make sense in Slovenia to examine the possibility of including at least temporary workers in

works council elections, including the right to vote under conditions comparable to those for regular employees.

The next challenge will be to include current topics that the employer should inform and consult the works council about, such as outsourcing, green transformation and artificial intelligence, to name a few. Many European countries have recognized the role of works councils and included them in various topics related to outsourcing. Recent studies (Eurofound 2022; Franca 2022) show that worker representatives are trapped in traditional social dialogue issues, and, for various reasons, recent challenges are not effectively included in information and consultation processes. *De lege ferenda*, one option is to amend the WPMA and open the agenda. While waiting for the legislature to act, policymakers could encourage worker representatives and their counterparts to update their programmes.

It is very doubtful that worker representatives in Slovenia will be able to give a voice to platform workers in the near future. As they are mostly self-employed and students (Domadenik et al. 2020; Franca 2021), they are *de lege lata* excluded from collective labour law. Apart from some trade union actions to secure minimum rights for platform workers, no major campaigns or actions have been carried out. Moreover, it could be argued that the issue did not arise among works councils *per se*.

One of the areas to which the workers' representative could devote more attention is education and training,

considering both sectoral development and workers' needs, in a strategic aspect and joint effort to provide resources. Research shows (Domadenik et al. 2020; Franca 2021; Domadenik et al. 2023) that Slovenian workers lag behind the EU average in education and training inclusion and that worker representatives still have many untapped opportunities to improve the situation. Their role is of utmost importance as they can be **key facilitators** in motivating workers to participate in such activities, and they can encourage employers to provide their workers with the relevant knowledge and skills. Such activities by workers representatives can also have other positive effects and reinforce the belief that a collective voice is good for the welfare of workers.

This report posits that the works council should not be seen as a competitor to trade unions, even though this may be the case in some companies. To avoid competition and strengthen cooperation, the role and purpose of both types of worker representation should be **clear** to all parties, including the employer. It is important to have a stark understanding of formal and informal interactions without crossing the line of confidentiality. The union's agenda should not be imposed on the works council (or vice versa), much less the on board-level worker representatives, which can happen especially when a worker representative has dual mandates. It is therefore unsurprising that the Association of Directors in Slovenia does not recommend that worker representatives take on more than one mandate (ZNS 2018). To secure this workers' right, the institutional framework must be respected, and within this framework it is important to form a strong alliance, even if the opinions of individuals may differ.

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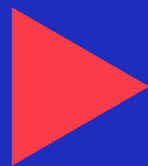
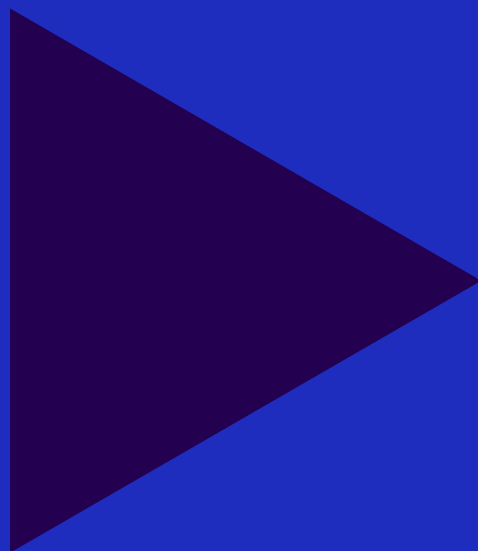


15

The case of Ukraine

By Sergii Venediktov

Taras Shevchenko National University of Kyiv, Ukraine



► Introduction

Industrial relations in Ukraine are full of contradictions. This is caused primarily by an unstable historical background regarding the development of relations between employers' and workers' representatives, which can be traced throughout the existence of the country's labour law. A vivid example is the institution of strikes, which, when Ukraine was part of the Union of Soviet Socialist Republics (USSR), was outside the scope of labour law regulation. After all, the ideology of that period determined that a strike could not exist in a country where class confrontation was overcome. It is noteworthy that the legal regulation of strikes was implemented in the country only in the final years of the existence of the USSR, namely, in 1989, when the Law on the Procedure for the Settlement of Collective Labour Disputes (Conflicts) was adopted. The legislation was negatively perceived in society and still is associated with an unsuccessful legal transplant of Western legislation, without considering the specifics of a then-existing Soviet law. Even today, the attitude of Ukrainian workers towards strikes remains sceptical. For example, according to [official statistics](#), there were no strikes at all in Ukraine between 2018 and 2020 and only 11 in 2021.

The overly detailed regulation of labour relations by legislation is not in favour of the role of workers' representatives in Ukraine. A significant number of rules provides neither employers nor workers with adequate opportunities to independently apply their labour rights and responsibilities at the company level. In fact, the main purpose of a collective agreement concluded at this level is to regulate domestic issues in the world of work (in particular, benefits for recreational activities or

the purchase of Christmas gifts for employees' children) but not to regulate the employment relationship. This fact discourages employers and workers from entering into collective agreements. For example, statistics show that in 2020 only 40 per cent of Ukrainian workers were covered by collective agreements at different levels (State Statistics Service of Ukraine 2020).

Ukraine maintains an unclear state policy towards workers' representatives. This is confirmed by one of the latest interviews with the Head of Committee on Social Policy and Protection of the Veteran's Rights of the Parliament of Ukraine, when she said:

► Several years ago, we started a gradual update of the Labour Code in accordance with the challenges and needs of the labour market. Labour relations are gradually being digitalized (we have introduced an electronic employment record book and automatic assignment of pensions). New types of labour relations have been introduced, such as remote work, task work and many others. Trade unions from the Soviet past, which are losing their influence and added value in new types of labour relations, are resisting legislative changes. Perceiving such changes as a reduction of their influence, union "bosses" publicly interpret the legislative process as discriminating against the rights of employees (Committee of the *Verkhovna Rada* of Ukraine on Social Policy and Protection of Veterans' Rights 2023).

This report aims to explore the concept of the institution of workers' representatives operating at the company level, to assess their legal status and importance for national labour law and to trace the current policy trends affecting industrial relations in Ukraine.

► Legislative framework

The regulation of the role of workers' representatives in Ukraine is characterized by a wide scope of legislative acts, starting with the Constitution of Ukraine and ending with secondary legislation at different levels. The Constitution of Ukraine (1996) contains a significant number of labour guarantees, among which the right to freedom of association (article 36) and the right to strike (article 44) should be highlighted. Special attention should be paid to the Labour Code (LC), which is the principal legislative act governing labour relations in Ukraine. Despite the focus of the LC on the regulation of the individual employment relationship, it contains a number of rules governing the legal status of workers' representatives (primarily contained in

chapter 2 "Collective agreement", chapter 16 "Trade unions. Employees' participation in the management of enterprises, institutions, organisations" and Chapter 16A "Personnel of the enterprise", among others).

Industrial relations are governed directly by the Law on Collective Agreements; the Law on Social Dialogue; the Law on Trade Unions, their Rights and Guarantees for Activities; the Law on Employers' Organizations, their Associations, and the Rights and Guarantees of their Activities; and the Law on Procedure of Settlement of Collective Labour Disputes (Conflicts). Meanwhile the Law on Labour Collectives and Increasing their Role in the Management of Enterprises, Institutions and Organizations continues to be in force. However, this

Law was enacted in 1983 and is virtually unchanged since then, so its rules are hardly applicable in today's context.

In addition, some issues of industrial relations can be traced back to laws that are not directly related to the world of work. For example, strike restrictions for certain categories of workers are contained in the Law on the Armed Forces of Ukraine, the Law on Nuclear Energy Use and Radiation Safety, the Mining Law, the Law on Service in Local Self-government Bodies, the Law on the State Border Guard Service of Ukraine, the Law on District Heating, the Law on Electric Energy Market and so forth. A particular example is the Law on Ensuring Equal Rights and Opportunities for Women and Men,¹⁷⁶ which states that in the case of collective bargaining, collective agreements must provide for the assignment of the duties of a gender representative to one of the employees, promotion of employees at

work in compliance with the principle of preference for a person of the gender of which there is an imbalance and elimination of wage inequality between women and men.

Ukraine is a member of International Labour Organization (ILO) since 1954. As of the beginning of 2023, Ukraine ratified, among others, the following ILO conventions: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Workers' Representatives Convention, 1971 (No. 135); Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); Collective Bargaining Convention, 1981 (No. 154). In accordance with article 81 of the [LC](#), the provisions of these international labour standards have the highest legal force compared to national legislation.

► War and the regulation of industrial relations in Ukraine

On 24 February 2022, martial law was introduced by a presidential decree in Ukraine due to military aggression by the Russian Federation. In order to harmonize the regulation of labour relations during martial law, the Law on the Organization of Labour Relations under Martial Law¹⁷⁷ was adopted and revised in its present form on 19 July 2022. This legal act is only valid during martial law and ceases to have effect after martial law has been cancelled. In accordance with article 1(2) of the Law, during martial law, restrictions are imposed on the rights and freedoms guaranteed by articles 43 and 44 of the Constitution of Ukraine. If article 44 of the Constitution declares the right to strike, then article 43 spells out a wide range of constitutional labour rights and freedoms: the right to labour, including the possibility to earn a living by labour that a person freely chooses or to which agrees freely; the State shall create conditions for citizens to fully realize their right to labour, guarantee equal opportunities in the choice of profession and types of labour activities; forced labour shall be prohibited; everyone shall have the right to occupational safety and health at work and to remuneration no less than the minimum wage determined by law; employment of women and minors for hazardous work shall be

prohibited; workers shall be guaranteed protection from unlawful dismissal.

The Law on the Organization of Labour Relations under Martial Law also stipulates that certain provisions of a collective agreement may be suspended unilaterally at the employer's initiative during martial law (article 11) and that employers are not obliged to deduct funds earmarked to primary trade union organizations in the amounts stipulated by collective agreements. This Law also obliges trade unions, as part of their activities, to contribute as much as possible to national defence.

In addition, on 19 July 2022, the Law on Amendments to Certain Legislative Acts of Ukraine on Simplifying the Regulation of Labour Relations in the Field of Small and Medium-Sized Entrepreneurship and Reducing the Administrative Burden on Entrepreneurial Activity was adopted.¹⁷⁸ This Law significantly amended the [LC](#)¹⁷⁹ by establishing a simplified regime for the regulation of labour relations during martial law. The concept of simplified regime means that the parties to the employment contract, at their own discretion and by mutual agreement, can regulate their relations in terms of the creation and termination of the employment relationship, wage system, labour standards, working time and rest periods. Employers using the simplified

¹⁷⁶ No. 2866-IV of 08 September 2005.

¹⁷⁷ No. 2136-IX of 15 March 2022.

¹⁷⁸ No. 2866-IV of 08 September 2005.

¹⁷⁹ In this case, it remains unclear why the amendments were made to the [LC](#) and not to the Law on the Organization of Labour Relations under Martial Law. It should be noted that the specifics of the legal regulation of labour relations under martial law are revealed precisely at the level of this Law. In turn, the introduction of amendments directly to the [LC](#) (which involve, among other things, significant interference with the structure of the Code), the provisions of which have a general and seemingly unlimited application, creates risks of continued application of the simplified regime even after the cancellation of martial law.

regime are also not obliged to adopt local regulations and administrative documentation, including those regulations on working hours and rest periods.

This “simplification” of labour regulation undoubtedly has a negative impact on the labour rights of workers and the role of workers’ representatives. This is due to the fact that both employers and employees can resolve all their labour issues individually within the framework of the employment contract without the relevant local regulations that normally would provide for active participation of workers’ representatives. Given that the employee is in a subordinate position vis-à-vis the employer, in the absence of trade union(s), it is likely that the employer will in the best case scenario initiate negotiations.

The simplified regime can be applied in two cases: (a) when the employer, in accordance with the law, is a small or medium-sized enterprise; or (b) when the employee’s salary is more than eight times the minimum wage per month. It should be noted that, according to official statistics, in 2020, the number of persons employed in small and medium-sized enterprises amounted to 78 per cent of the total amount of business entities in Ukraine (State Statistics Service of Ukraine. 2020). Consequently, a significant share of the Ukrainian workforce is at a risk of exclusion from general labour law because of the establishment of a parallel and less protective regulatory regime for labour relations.

► Peculiarities of the legal status of workers’ representatives in Ukraine

In Ukraine, both trade unions and freely elected workers’ representative(s) can participate in collective bargaining at the company level, but trade unions always take priority. Under the article 12 (1) of the [LC](#), the parties to the collective agreement at company level are: (a) the employer and (b) workers, the representatives of which are the primary trade union organizations, and in their absence – freely elected workers’ representative(s). This principle is also duplicated in special laws in the field of industrial relations – the Law on Collective Agreements¹⁸⁰ and the Law on Social Dialogue.¹⁸¹

Thus, Ukrainian law *de facto* does not allow trade unions and freely elected workers’ representative(s) to operate together. This generates an after-effect in national labour legislation which does not define the interaction between the trade unions and freely elected workers’ representative(s). But if this cannot be considered as a significant disadvantage, then the lack of legal provisions defining the status of the freely elected workers’ representative(s) may have, in practice, a negative impact on their activities. It should be noted that the election of a representative(s) by the workers, follow-up communication with the employer and the application of the collective agreement remains outside the legal scope.

The most negative factor in this case, however, is that the law does not provide adequate protection for freely elected workers’ representative(s). For example, article

43 of the LC specifies that in most cases termination of the employment contract by the employer can only be carried out with prior consent of the primary trade union organization of which the employee is a member. That is, the Code extends the relevant protection mechanisms in the event of termination of the employment contract by the employer to all union members, not just trade unionists. However, the Code does not provide these protection mechanisms to representative(s) freely elected by workers for collective bargaining. This circumstance is not in line with the requirements of the Workers’ Representatives Convention, 1971 (No. 135), ratified by Ukraine. Article 1 of this ILO Convention provides that workers’ representatives shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers’ representative.

In addition to trade unions and freely elected workers’ representative(s), Ukrainian labour law also recognizes a “workers’ general meeting” category. This applies, for example, to company-level collective agreements and employers’ internal work regulations. Under the article 13 of the Law on Collective Agreements, the draft collective agreement is discussed by the workers and submitted to the workers’ general meeting. Once the draft collective agreement is approved by the workers’ general meeting, it is signed by authorized representatives of the parties. In accordance with the article 142 (1) of the [Labour Code](#)¹⁸², internal work regulations are approved by the

180 No. 3356-XII of 01 July 1993.

181 No. 2862-VI of 23 December 2010.

182 No. 322-VIII of 10 December 1971.

workers' meeting upon the submission of the employer and the primary trade union organization. The general meeting of workers shall also elect a Labour Dispute Commission – the body that is authorized at company

level to resolve individual labour disputes (article 223 (1) of the [LC](#)).

However, the power of workers' general meetings appears to be "vague" and smells of the socialist past. Many are sceptical about the future prospects of this category in Ukrainian labour law.

► A case study: Workers' representatives and digital labour platforms

Digital platforms have entered users' lives, dramatically easing some domestic matters in daily life. However, for platform workers, the situation is ambiguous. On the one hand, digital labour platforms in Ukraine are popular in so-called grey areas, which even 30 years ago were not always covered by labour law (for example, taxi drivers, tutors and couriers, among others). In addition, the platforms to some extent correspond to a spirit of modernity, that is characterized by the principle of "all and now". Traditional employment relationships are criticized by many for being too formalistic, which in some cases may not fit young workers. Furthermore, mistrust of the current pension system is forcing many workers to turn to alternatives in order to secure their own standard of living in old-age. All this undoubtedly contributes to the development of work on digital platforms. On the other hand, by being outside the scope of labour law regulation, the platforms deprive workers of social security inherent to the employment relationship (which is expressed in the recognition of fundamental labour rights, including the right to collective bargaining, in stability of earnings, safe working conditions, disability benefits and so forth).

In Ukraine, detailed references in its legislation to platform work are missing, both in labour law and other legal acts. The lack of a legislative framework provides the impetus for resolving platform workers' protection issues at the level of case law, but court decisions in this instance typically are not on the side of labour law. Paradoxically, in Ukraine, appeals to the courts to recognize the status of platform workers as a party to the employment relationship are typically observed by third parties, primarily victims of accidents caused by those who work on online platforms. This is due to the fact that being in an employment relationship is essential to determine the mechanism for compensation for harm to the injured party. However, in such cases, the courts do not recognize the relationship of platform workers as an employment relationship.

For example, take the Decision of the Shevchenkivsky District Court of Kyiv, Case No. 761/35866/19, of 15 September 2021: pursuant to that Decision, a person

applied to the court to establish the existence of a *de facto* employment relationship between all GLOVO couriers and to recover damages. The complainant substantiated his claims by the fact that there was a traffic accident involving his vehicle and a GLOVO courier, who fled on a motorbike after the accident which damaged the complainant's car. The complainant stated that the responsible person was the defendant's employee since the said person was carrying the characteristic bag of the company with the GLOVO lettering. At the same time, the complainant stated that the defendant violated the requirements of Ukrainian legislation, since it did not provide appropriate conditions for the safe operation of motorbikes by GLOVO couriers. The claim was refused by the court. The court reasoned its decision by stating that, when joining the GLOVO platform, an employment relationship did not arise between the courier and the company Glovoapp23, S.L., since the concluded transaction is, by its legal nature, a civil law contact, under which there are no guarantees of labour legislation and the obligation of the employee to comply with labour regulations.

Such case law in Ukraine is not unique. At the same time, the justification given by the courts for refusing to classify platform work as an employment relationship is not convincing. From the perspective of workers' representatives, platform work shows a glimmer of hope. This is due to the increasing number of cases where platform workers are organizing into trade unions to defend their rights. For example, in 2019, news was leaked to the press that Ukrainian GLOVO couriers created a trade union and submitted documents for its registration (*Our Kyiv* 2019). However, there is no information on the registration and further activities of this trade union. There is also no information on any activities of partner drivers' trade unions from the Uber and Bolt platforms, which were registered in 2021.

When it comes to the prospects for legal regulation of platform employment in Ukraine, it looks very vague. For example, the already mentioned interview with the Head of Committee on Social Policy and Protection of the Veteran's Rights of the Parliament of Ukraine

indicates that the Parliament will continue to update the LC in 2023; among the ideas discussed are government assistance in creating platforms for service providers and beneficiaries, namely a new type of employment relationship for Ukraine – platform employment. The

content of these “ideas” remains unclear, however, given the ambiguity of some of the laws being drafted, and forward-looking legislation on digital platforms may not be in favour of workers' representatives.

► Prospects for reforming the institution of workers' representatives

The Explanatory Note to the new Law on Collective Agreements¹⁸³ states: “the need to reform legislation was confirmed during the implementation of technical assistance projects of ILO in Ukraine, national and international experts developed recommendations on possible ways to solve problematic issues. The purpose of adopting this Law is to increase the role of collective agreement regulation of labour relations and to strengthen the protection of workers' rights.”

However, there are innovations in the new Law which, due to their vague nature, cannot be considered positive for workers' representatives. For example, article 19 of the Law states that “control over the implementation of the collective agreement is carried out directly by its parties”, but further the Law reveals only the powers of the trade unions in this issue and does not mention freely elected workers' representatives, who, in the absence of a trade union, can also be a party to the collective agreement. Also controversial is article 26 of the Law that provides for the right of a party to a collective agreement to suspend certain provisions unilaterally in the event of force majeure circumstances, specified in agreement. It should be noted that such unilateral actions in industrial relations often lead to conflict.

Particular attention should also be paid to draft legislation designed to replace the current LC, as some of its provisions affect the interests of workers' representatives. The Code was adopted in 1971 and has been amended 170 times. Despite this huge number of amendments, from time to time, the legislature, referring to the venerable age of the LC, raises the question of adopting a new piece of legislation. The most widely discussed are the draft Labour Codes of 2003, 2009, 2011, 2015, 2019, 2022. The newest among them is the draft Law on Labour of 2022. Therefore, in brief, it would be useful to outline some of its provisions.

In accordance with the Explanatory Note to the draft Law on Labour of 2022, the main principles of the drafting of this Law include the “demarcation of collective and

individual relations and the de-bureaucratisation of labour relations” (Ministry of Economy of Ukraine 2022). In turn, the implementation of these principles in the draft Law should not be called sufficiently effective, given its excessive and bureaucratic provisions on employer's regulations – unacceptable in a market economy. On the other hand, it is at the level of these regulations that important issues of the world of work (such as labour discipline, grievance procedures, professional development, promoting equality and non-discrimination, among others) are settled. In turn, despite the fact that certain provisions of the draft Law on Labour refer explicitly to the employer's regulations (articles 13, 32, 57, 60, 65, 101 and so on), the draft does not contain clear rules about them. For example, the draft Law, among the acts regulating the employment relationship, does not define employer's regulations and indicates only the employment contract and collective agreements. This can indirectly affect workers' rights, as it gives the employer the opportunity to adopt regulations unilaterally, without negotiation or consultation with workers' representatives.

In turn, the draft Law also contains rules that can be classified as positive for industrial relations. For example, article 16 of the draft establishes the principle according to which “if a primary trade union organization is established at the local level, the freely elected workers' representative(s) shall not have the right to exercise powers that are within the exclusive competence of trade unions or limit their statutory activities”. This principle, which is in line with Article 5 of the Workers' Representatives Convention, 1971 (No. 135), ratified by Ukraine, is currently not reflected in national legislation. The fly in the ointment in this case is that the Ukrainian law *de facto* does not allow trade unions and freely elected workers' representative(s) to operate together. Consequently, this principle is not realisable in practice.

It should be noted that, at this point, the draft Law on Labour is still under discussion.

¹⁸³ The Law was adopted by Parliament in 2022. At the time of preparation of this paper, it has not been signed by the President of Ukraine and, accordingly, has not entered into force.

► Conclusions

Ukrainian labour law recognizes both trade unions and freely elected workers' representative(s) as a party to collective bargaining at the company level. However, the national legislation gives priority to trade unions in representing the interests of workers in industrial relations. In fact, the law only considers freely elected workers' representative(s) for collective bargaining if there is no trade union. However, while a separate Law is devoted to trade unions, the legal status of freely elected workers' representative(s) is not reflected in the legislation at all. In this case, the election of a representative(s) by the workers, follow-up communication with the employer and the application of a collective agreement remains outside the legal scope.

The legislation being passed by Parliament also does not clarify the situation of freely elected workers' representative(s). This year, the Ukrainian Parliament adopted a new Law on Collective Agreements. The Law both does not stand out for its novelty and fails to address existing problematic issues with the institution of workers' representatives. The same can be said of the latest draft of the Law on Labour, which is intended to replace the LC of 1971. For example, the principle, according to which "if a primary trade union organization is established at the local level, the freely elected workers' representative(s) shall not have the right to exercise powers that are within the exclusive

competence of trade unions, or limit their statutory activities", contained in article 16 of draft Law is only an empty shiny candy wrapper as it is not harmonized with other legislative acts. After all, national law considers either a trade union or representative(s) freely elected by workers but does not allow them to operate together.

All of this illustrates a lack of understanding on the part of the state on the further role of workers' representatives in Ukraine's labour law. Many current draft Laws are contradictory in this sense.

In addition to trade unions and freely elected workers' representative(s), Ukraine's labour law also identifies another category for a "general meeting of workers", participation of which has helped to develop many employers' local regulations. This category has its roots in the days of Soviet labour law, when workers "on paper" were given considerable power in running the enterprise. In fact, the issue of this category has not been reviewed since the LC was adopted. This creates scepticism towards the future prospects for general meeting of workers in Ukraine's labour law.

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ilo.org

International Labour Organization
Route des Morillons 4
1211 Geneva 22
Switzerland

