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27 A Comparative Overview of the Collective Contractual Capacity of Labour Unions in Hungary*

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27.1 Introduction

In 2012, the new Labour code of Hungary introduced several major innovations regarding collective agreements. The previous regulations under the repealed Act XXII of 1992 on the Labour Code only allowed for a deviation of collective agreements from labour law rule in the interests of the employees. The new act made it possible to regulate the content of work also in a way that it would be less beneficial to employees. The general justification of the act claimed that the limited role of collective agreements in the domestic labour market was due to these so-called relatively dispositive regulations. The intention of the legislator was – as it was expressed in the justification of the Act – to provide a more flexible and extended collective autonomy to the participants of the labour market to regulate their relationship and the content of work to match their financial, social and other needs.[1] Therefore, the new act – in the spirit of extending the collective autonomy of labour market participants – allows for collective agreements to deviate from labour law provisions in the benefit of the employers. The new act also facilitated the enactment of a collective agreement, because now unions need to meet lower requirements to achieve contractual capacity for concluding collective agreements. Despite the goal of the new regulations, recent figures show that collective agreements have not been able to achieve the more significant role that they had. The aim of this paper is to demonstrate the anomalies inherent in the contractual capacity of the unions, to draw a few practical

* "The paper was created within the framework of programmes aiming the increasing of quality of lawyer education (IX - 14/6/2/2017. contract number)" – [„A tanulmány a jogászképzés színvonalát emelo programok (IX - 14/6/2/2017. iktatószámú szerzodés) keretében jött létre",].

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1 The Justification of the Labour Code states that: "The draft follows a fundamentally new policy objective in the system of employment regulations. This can be summed up as an attempt to significantly increase the so-called "contractual role" of regulations in order to extend the possibilities of the individual and collective autonomy, that is, the regulatory role of agreements between the parties in employment and the entities of collective labour law." – Justification of the draft law No. T/4786., General Justification, Articles 10-11.

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conclusions, and to examine how the contractual capacity is established in some other countries from a comparative perspective.

27.2 The Role and the Nature of Collective Agreements

Collective bargaining agreements (CBA) are an extraordinary legal institution of private labour law, where the elements of contract(ual) law and public (labour) law are concurrently present. As an agreement, the collective bargaining agreement is the embodiment of the mutual will of the concluding parties involved, the labour union and the employer, although the normative regulations are usually applicable to all the employees employed at the employer.[2] The contractual part contains provisions that regulate relations between the concluding parties, the normative part declares the content of work, in other words, the rights and obligations that arise from or are in connection with the employment relationship.[3] These normative regulations prevail not unlike legislative acts with respect to the relationship of the employer and the employee, and the employees shall perform their work in compliance with these rules, without regard to whether they did or did not have the opportunity to express their consent or to participate in the bargaining process of the collective agreement, e.g. as a member of the trade union.[4] The contractual part, practically speaking, governs the means of communication and shall be applied only to the concluding parties – the employer and the union, so it operates like the terms of a contract.[5]

Labour unions, in general, are the most significant units of collective labour law, where workers, exercising their coalitional rights, can form/join a union and together can take action collectively either on the level of the industry or the company/enterprise, to promote the rights of employees.[6] Unions are organized mostly to improve working conditions with their special tools of collective labour actions, such as strikes. They obtain bargaining power where they can negotiate as a fully independent body with the employ-

2 Para. 279. § (3) of the Labour Code explicitly states that: "The effect of the provisions of the collective agreement governing employment relationships shall apply to all the workers employed by the employer." see also *in* Kiss, György: Munkajog [Labour and Employment Law], 2005, Osiris Kiadó Budapest, p. 381.

3 KISS, op. cit., p. 486.

4 Unions or coalitions with contractual capacity in the German and Hungarian Law are empowered to conclude collective agreements that have a normative effect to third (e.g. non-unionized) workers. However, in the Netherlands and the United States, the collective agreements' effect extends to third parties under special conditions, and in the United Kingdom, only with the express approval of the employee. See KOVÁCS, Erika: *A szakszervezetek kollektív szerzodéskötési képessége Németországban és Angliában* [The right of trade unions to conclude collective agreements in Germany and the UK], Jogtudományi Közlöny, 2009/10. pp. 405-419.

5 Berke, Gyula: A kollektív szerzodés a magyar munkajogban [The Collective Agreement in the Hungarian Labour Law], 2014, Utilitates Bt., Pécs. p. 148.

6 Kovács, Erika: *A kollektív szerzodés jogi természete* [The Nature of the Collective Agreerment], In: Jura 2011/1., p. 77.

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er, and, under special circumstances, they are entitled to conclude collective agreements. Both the contractual and the normative part of the collective agreement are the embodiment of coalitional rights, where the agreement itself through its binding power determines, but also limits, how the concluding parties and the employees can exercise their rights and obligations that arise from the collective agreement and the employment relationships. In fact, collective agreements constitute a so-called labour peace obligation, which means that industrial actions – such as strikes – against the terms and conditions laid down in collective agreements are prohibited during the period of the collective agreement.[7] In light of these facts, unions with a contractual capacity on the one hand represent those workers who are involved in union activities by joining a union, but on the other hand, limit the opportunities of those workers who did not join the particular union or the workers whose intentions are contrary to its activities and the prevailing collective agreement.[8] This raises the question whether provisions ensuring that the collective will of the majority of the workers is represented through the union with contractual capacity would be desirable.

27.3 Collective Contractual Capacity and 'Democratic Legitimacy' of the Labour Unions in Hungary

In Hungary, the collective contractual capacity went through a deep change when the new Labour Code entered into force in 2012. Under the previous Labour Code, the collective contractual power of unions was linked to the results of works council elections, where union members, standing as candidates for works council membership, were required to receive the majority of the votes at the elections to achieve contractual capacity.[9] The new code abolishes the connection between contractual capacity and works council elections, and establishes a system where solely the membership of the union determines whether it gains contractual capacity or not. Now, unions having the membership of at least 10% of the total number of employees employed at the employer are entrusted with contractual capacity to conclude collective agreements by operation of the law. If the workers are represented by more unions with contractual capacity, unions conclude the collective agreement jointly.

As I have mentioned above, the majority support of the employees is not required for the collective agreement to become binding, but is applicable to all employees employed at the employer. This means that only 10 percent of the employees can render significant decisions without the actual approval of the majority. It has to be noted that neither the

7 Kovács op. cit. 85-87.

8 Technically leaving the workers no other option than to join a union or to form an opposing bargaining unit, if they do not agree with the activities of the union and/or with the regulations of the collective agreement.

9 Act XXII on the Labour Code, para. 33 (3)-(5).

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Labour Code, nor any other Hungarian legal instruments state that collective agreements should be concluded with the support of the (democratic) majority of workers. The question whether the absence of the majority rule is unconstitutional was brought before the Hungarian Constitutional Court, where two unions wanted to conclude a CBA at a time when the earlier rules were applicable. Before 2012, so-called representative unions[10] were entitled to conclude the agreement with the employer if their members obtained 50% of the votes as nominees at works council elections. If there were two or more representative unions, they were required to hold 50% of the votes altogether to conclude the agreement jointly. If the representative unions having the 50% support of the elections and the employer could not reach an agreement jointly (e.g. due to disagreements between the unions), the union that had received at least 65% of the votes, could conclude the agreement individually, without the involvement of the other unions. In the case before the Curia, two unions jointly acquired 63,5% of the votes in the works council elections, but because of the presence of another, third union, they could not conclude the collective agreement. It has to be noted, that the third, minority union, barely had the support that was required to reach the criteria of a representative union (10% of the votes). Considering that none of the unions held 65% of the votes individually, the only way to conclude a collective agreement would have been to do it jointly, with the involvement and the cooperation of the minority union. The two majority unions argued that the minority union undemocratically blocked the majority decision as they were unable to reach a middle ground. The Constitutional Court ruled that the definition of coalitional rights and freedoms does not incorporate that the will of the democratic majority shall prevail in the bargaining procedure, therefore, earlier provisions were actually in conformity with the constitutional principles.[11] In my opinion, this case also demonstrated that democratic legitimacy was not required under the earlier rules either. In fact, unions with the support of the democratic majority could not adopt a decision without the approval of the minority union. In the absence of recent decisions that are based on the present regulations, it can only be assumed that the Constitutional Court would state even today that the democratic support of the majority is not a constitutional requirement for unions to conclude collective agreements.

Workers may agree with the activities of the unions without taking any part in unionization. In fact, coalitional rights of the employees include the individual right of the employee to refrain from union activities, in fact, agency shopping or closed shopping is prohibited in Hungary.[12] The Labour Code explicitly declares the right of employees and

10 Under the previous Labour Code, the trade union whose candidates received at least ten per cent of the votes in the workers' council election was to be construed as representative – see Act XXII on the Labour Code, para. 29 (2).

11 Hungarian Constitutional Court Decision No. 911/B/2000 ABH.

12 In an earlier stage of unionization history, employers could declare themselves closed shops, in which employees were required to be members of the union when they were hired; union shops, which require newly hired workers to join a union after a certain amount of time; agency shops, which allowed workers to

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employers to establish organizations/associations, without any form of discrimination whatsoever, for the promotion and protection of their economic and social interests.[13] This right also includes their discretion, to join or not to join an organization of their choice. When an employee decides not to join a union, this includes his or her approval to the activities of the people who are actually exercising their coalitional rights as members of the unions.[14] However, if the employees are represented by more than one union at the workplace, and the employee joins the minority union which does not possess the mandatory 10 percent support of the members, neither the union, nor – indirectly through representation – the employee will take part in the conclusion of the agreement. Furthermore, neither the union, nor the employee as an individual will have the power to influence the bargaining agreement, e.g. to terminate, to modify, or to contest it. It must also be mentioned, that if none of the unions hold a 10 per cent membership of the employees individually, even if they could agree on mutual terms with the employer, with the majority or significant support of the employees (through e.g. a certification election or an approval ballot), they would still not be entitled to conclude a collective agreement.

The Curia of Hungary, which is the supreme judicial body of Hungary, expressed in two of its decisions that only those unions are entitled to amend or modify the CBA, that were concluding parties to the collective agreement.[15] Furthermore, the Curia expressed in its decision on a principle issue, that the union that concluded the contract is entitled to amend it even in case it loses its collective contractual capacity.[16] This was a decision based on the earlier Labour Code, where unions representing the workers at the workplace had joint collective contractual capacity if they obtained altogether 50% of the votes at works council elections. In this case, the Curia declared several amendments to the CBA to be null and void, because one of the unions (having contractual capacity) was absent from the conclusion of the modifications. Under the new rules of the Labour Code, only 10 percent of the employees employed are required to join the union to conclude a collective agreement, and if the employees are represented by two or more unions at the employer, the unions with collective contractual capacity are entitled to conclude the contract jointly. Although neither the old, nor the new provisions explicitly foresee it, it can be inferred from the text of the Labour Code that the rules and conditions for conclusion are applicable for the amendment or modification of the collective agreement.

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opt out of paying regular union dues if they pay a one-time fee to cover the costs of their representation. These options are prohibited throughout most of the nations of the European Union. Open shop regulations – which are now in force in Hungary – do not compel workers to join a union at all. See also the case law of the European Court of Human Rights e. g. *Young, James And Webster v. The United Kingdom ECHR (1981).*

13 Para. 231 (1) of the Labour Code (2012).

14 This is also called negative coalitional freedom or negative freedom of association, *see inSigurður A. Sigurjonsson v. Iceland. 16 E.H.R.R. 462 (1993).*

15 Curia Decision Mfv. II. 10.174/2001.

16 Curia Decision on a principle issue EBH2002. 684.

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The problem is that the case law of the Curia shows that without the consent of all those unions that were originally the concluding parties, the collective agreement cannot be modified. If we take into consideration that according to the Labour Code, the collective agreement will cease to apply only if all concluding unions lose their contractual capacity, as long as just one of the unions remains capable of concluding the CBA, the consent of all the smaller unions, who actually lost their contractual capacity, would be required to amend the contract. This also means that the smaller unions who lost their contractual capacity (therefore their relevance at the workplace) since the conclusion of the agreement, can block the process of bargaining and the conclusion of modifications.

Before 2011, the Hungarian National Interest Reconciliation Council – which was a tripartite body made up of the representatives of the employers, labour unions and the Hungarian government –adopted three-party agreements regarding the amount of minimum wages in Hungary. These agreements concerning minimum wages were mandatory regulations effective in the whole country, not unlike legislative acts. The Constitutional Court declared that the National Interest Reconciliation Council exercised the executive power of the state when it enacted such decisions, even though these were reached through agreement. The Court expressed furthermore that the agreements regarding minimum wages concluded within the National Interest Reconciliation Council are binding upon the legislator, therefore they are required to have the democratic support. The Court also expressed that from the democratic principles it can be inferred that the represented unions were also required to have the majority support of employees in order to reach a democratically legitimate decision.[17] The relevance of this judgment for the present paper is that unions with contractual capacity conclude collective agreements with normative effects in Hungary. Unions do not exercise legislative power of the state when they conclude collective agreements, but they regulate the content of work with a legal instrument which has the same normative power in employment relations as a legislative act.[18] As far as employment relationships are concerned, the provisions of collective agreements prevail just like acts where the state exercises its legislative power. The earlier provisions provided some democratic control over the operation of a union and its bargaining agreements through works council elections, but there are no such regulations in force under the new Labour Code.

27.4 Emergence of Democratic Principles Regarding Collective Contractual Capacity

As it may be inferred from above, there is no instrument in Hungary to ensure that unions obtaining the majority of workers' support shall conclude the collective agree-

17 Constitutional Court Decision No. 124/2008. (X. 14.).

18 Kovács, op. cit. 77. and Hueck, Alfred – Nipperdey, Carl, Hans: *Lehrbuch des Arbeitsrechts*, 6. Aufl. 2. Band, Kollektives Arbeitsrecht, Verlag Franz Vahlen, Berlin und Frankfurt 1957. pp. 265-266.

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ment. In the practice of other European nations, however, either legislation or in several cases when legislation does not provide guarantees for the democratic principles to prevail, the national courts establish further requirements through jurisprudence. In German law, there is no legal definition for the concept of collective contracting ability (Tariffähigkeit). The Act on Collective Agreements (Tarifvertragsgesetz; TVG) recognizes trade unions, individual employers, and employer associations as tarif partners. However, solely the existence of a union does not mean that it would possess this ability, simply as a result of its registration or formation. The Federal Labour Court (BAG) made a clear distinction relatively early between trade unions and coalitions in general, and established a test of Social Dialogue Capacity (*soziale Mächtigkeit*).[19] This means that the court examines if the union has sufficient leverage to represent the interest of the employees employed at the employer (which is determined e.g. on the basis of membership rate, financial situation, independence, history of the particular union).[20] Technically, in Germany, with its decisions the Federal Labour Court established a control mechanism over the unions.

In the Netherlands, if an agreement between employers and a union is considered to be a collective agreement, not only the union that entered into the agreement, but also the members of the unions are legally bound by those agreements, as far as they fall within the scope of that agreement at the employer. However, non-union members or members of unions who do not take part in a collective labour agreement are not legally bound by it. Furthermore, an employer bound by a collective labour agreement is obliged by law (against the trade union(s) with whom he entered into the agreement) to follow this agreement in employment contracts with workers who are non-unionized as well.[21] Overall, the Dutch collective agreements do not bind employees who are not members of a union party to the collective agreement; they are the so-called non-organized or otherwise-organized workers. However, according to Art. 14 of the Collective Labour Agreements Act, an employer who is bound by a collective agreement is obliged to apply the benefits of the agreement to his non- or otherwise-organized employees.[22] As far as democratic legitimacy is concerned, in order to achieve a binding obligation with employees, Dutch employers tend to conclude labour contracts with each of their employees prescribing the application of the collective agree-

19 Kiss, György: *The legal dogmatic status and law policy opportunities of trade unions based on Hungarian employment regulations from 1992 till today*, In: Trade Unions and Collective Agreements in the new Labour Code. MTA-PTE Research Group of Comparative and European Employment Policy and Labour Law, 1. Akadémiai Kiadó, Budapest, pp. 11-44., p. 23. Accessed at: <http://real.mtak.hu/25657/1/KissGyangol_11_44.pdf> on July 11, 2017.

20 BAG v. 28.3.2006 ABR 58/04; BAG v. 05.10.2010 ABR 88/09.

21 Van Hoek, Aukje A.H., *Collective Agreements and Individual Contracts in Labour Law – the Netherlands* (2003). In: M. Sewerynski, Collective agreements and individual contracts in labour law, Kluwer Law International 2003, pp. 248-270.

22 Most employers fulfil this duty by agreeing with each of their employees that the current sector agreement will apply to their contract. In this way up to 85% of workers are covered by collective agreements even though only approx. 26% are members of a union. Ibid.

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ment, which thereby comes into effect through the individual agreement, not through the union membership. The collective bargaining power and capacity of the unions therefore – technically speaking – is limited to its membership. However, the influence of the Dutch unions far exceeds their representative power based on the membership rates.

In the United States, the collective contractual capacity is not dependent on forming a union. It is the authority of the National Labour Relations Board (NLRB) to determine in each case whether the representing unit or group of workers is appropriate for the purposes of collective bargaining, therefore collective bargaining capacity is often linked to the Board's decision. The National Labour Relations Act (NLRA) gives guidelines, but does not establish an 'absolute rule of law' as to what constitutes an appropriate bargaining unit. From the text of the NLRA it can be inferred that it is not a condition for bargaining to form a union, or to propose the 'best' possible unit – the law focuses on the *appropriate* unit.[23] In the case *Lundy Packing Company Inc. (Lundy) v. NLRB*, the Board issued a bargaining order against Lundy because of its refusal to bargain with a union recognized by the Board. The Court of Appeals found that the execution of the Board's order would have improperly excluded certain quality control employees from a production and maintenance bargaining unit.[24] So, even if there is an organized union, the Board examines whether it fulfils the requirements to be appropriate. In the case *NLRB v. Catherine McAuley Health Ctr*., the Court upheld the NLRB's reasoning, and expressed that a bargaining unit is shall be deemed appropriate when the community represented by the unit shares a community of interests in wages, hours, and other conditions of employment.[25] If an employer refuses to bargain with the representatives of the employees, it is the authority of the NLRB not just to determine whether the refusal itself was an unfair labour practice, but also to find whether the representatives of the employees formed an appropriate unit to bargain. These cases briefly demonstrate that how the NLRB exercises control over whether a group of (organized) workers may be considered as an appropriate unit with contractual power, particularly for bargaining purposes. Otherwise, if a union that operates at the workplace was previously certified as a bargaining unit, the bargaining power of the union cannot be questioned by the employer. As a form of democratic control over the operation of the

23 Basic Guide to the National Labour Relations Act General Principles of Law Under the Statute and Procedures of the National Labour Relations Board, accessed at <https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> on July 15, 2017.

24 Among them: ?drivers, waste management operators, garage employees, office clerical employees, process sales coordinators, hog buyers, quality control employees, and industrial engineers. See *Lundy Packing Company, Inc., v. National Labour Relations Board* (1994) accessed at <http://caselaw.findlaw.com/us-4th-circuit/1463864.html#sthash.Uts4pM5E.dpuf> on July 15, 2017.

25 The Court of Appeals also expressed that the following factors indicate a community of interests: a) similarity in skills, interests, duties, and working conditions; b) the functional integration of the plant, including interaction and contact among the employees; c) the employer's organizational and supervisory structure; d) the bargaining history; e) the extent of union organization among the employees. See *National Labour Relations Board, Petitioner, v. Catherine Mcauley Health Center*, accessed at on <http://law.justia.com/cases/federal/appellate-courts/F2/885/341/144322/> July 15, 2017.

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bargaining unit, the NLRA allows employees to call for a 'decertification election' to revoke the union's 'certification' to act as the exclusive bargaining representative.[26] Without bargaining power and an appropriate representative, the workers have no voice at the workplace, and it is technically impossible to seek remedies before the NLRB.[27, 28]

27.5 Collective Agreements and Works Agreements

Where employees are not represented by a union with a collective contractual capacity at the workplace, Hungarian works councils are entitled to conclude a works agreement with normative content, the so-called normative works agreement. A works council shall be elected if the average number of employees at the employer or at the employer's independent establishment or division is higher than fifty.[29] Normally, workers are not represented by a union at the enterprise level, because employee organizations are concentrated in large companies, particularly in state-owned (e.g. public service companies) and multinational firms.[30] Consequently, small and medium-sized companies have not really had a tradition, practice, or even interest in collective bargaining. With the changing rules and the extended collective autonomy that is provided under the new Labour Code, medium-sized employers may be motivated to conclude a works agreement in order to benefit from the flexibility of e.g. working time, wages, etc. provisions by way of derogation through a collective agreement. A normative works agreement shall regulate the rights and obligations in connection with employment relationships differently from what is stipulated in the Labour Code, just like the collective agreements would, except for the rules on remuneration. Works agreements therefore appear as a less favourable opportunity for employees to regulate working conditions at the enterprise level. In conclusion, almost all deviations from the Labour Code can be achieved through works agreements, through bargaining with a works council, but the works council has a limited power to bargain for better wage conditions.[31]

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26 The NLRA allows employees to call for a 'decertification election', to revoke the union's 'certification' to be the exclusive bargaining representative.

27 Freeman, Richard B. – Hilbrich. Kelsey (2013)- *Do labour unions have a future in the United States?*, In: The economics of inequality, poverty, and discrimination in the 21st Century, ed. Robert S. Rycroft. Santa Barbara, CA: Praeger, accessed at <https://dash.harvard.edu/handle/1/10488702> on July 15, 2017, p. 4.

28 The unionization of Harvard University's technical and clerical workers in the 1980s is an example of how hard it is for the employees to come together as a group and unionize, where it took 12 years for the workers to convince the majority to vote for the Harvard Union of Clerical and Technical Workers. See in Hurd, R. W. (1993). Organizing and representing clerical workers: The Harvard model [Electronic version]. In D. S. Cobble (Ed.) Women and unions: Forging a partnership (pp. 316-336). Ithaca, NY: ILR Press. Accessed at <http://digitalcommons.ilr.cornell.edu/articles/319/> on July 15, 2017.

29 Section 236 of the Labour Code (2012).

30 Gyulavári, Tamás – Kártyás, Gábor: *Effects of the new Hungarian Labour Code: The most flexible labour market in the World?;* In: The Lawyer Quarterly. 2015. Vol 5, No 4, 233-245 pp, Accessed at: <https://tlq.ilaw.cas.cz/index.php/tlq/article/viewFile/166/149> on July 15, 2017.

31 Bagdi, Katalin: *A Comparative Analysis of the Regulation of Works Agreements in Hungary and the EU Member States*, In: Profectus in litteris VI., Debrecen, 2014, pp. 27-28.

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When they intend to conclude a works agreement, works councils have to bargain to promote employee interests, so technically, the councils exercise union activities. At the same time, they are required by law to remain neutral, without the organizational, financial background that unions may have.[32] Works councils shall also remain unbiased in relation to a strike organized against employers, and they shall not organize, support or obstruct strikes. In fact, the mandate of works council officials participating in strikes is suspended for the duration of the strike. Strikes are mostly used to pressure the employer to improve working conditions. During strikes, the employer and the union generally bargain continuously, and in most cases, the collective action ends with a collective agreement. However, works councils are not empowered to utilize this tool for bargaining purposes. These circumstances have a vast influence on the bargaining power of the works councils, and it is questionable whether they can bargain effectively for employee interests.[33]

When a union with a contractual capacity emerges, the already functioning works agreement loses its normative power as an instrument, and the works council loses its most effective tool to influence conditions at the workplace. All the beneficial terms that were previously concluded between the employer and the works council must be achieved again in the framework of a complete bargaining process. As I have mentioned above, unions with a membership of only 10 percent of employees at the employer are entitled to conclude a bargaining agreement which is applicable to all employees, including those who refrained from or refused to join the union. Works councils, however, are elected from among all the employees employed at the workplace, and for this reason – contrary to the unions – have the democratic support of the employees. Still, if a union appears, the council loses its bargaining power, and the previously achieved and settled instruments in the works agreement lose their effect, while the role of the works agreement will be limited solely to worker participation rights. Those workers who are effectively represented by a works council, especially through a well-functioning works agreement, are possibly not interested in being involved in a union where they also have to pay e.g. union fees. If there was no opportunity to conclude a normative works agreement, both the employer and the workers would be interested in cooperating with a union to formulate more flexible working conditions through a collective agreement at the company level. Now, if the works agreement is beneficial to the employer, the employer has no interest at all to reach out to the unions to formulate better working conditions. But if there is an existing and capable union, the works council mostly becomes a neutral body of employees without any significance.[34] The more opportunities employers have to avoid con-

32 Petrovics, *A munkavállalók bevonása a munkáltatói döntéshozatali folyamatokba* [The Involvement of the Employees in the Decisions of the Employers], Pécsi Munkajogi Közlemények, 2016/1., p. 134.

33 Kártyás, Gábor: *Kollektív szerzodés az üzemi tanáccsal, avagy a csizma az asztalon* [Collective agreements with the works councils – in other words – 'feet on the table'] Accessed at: <www.hrblog.hu/azujmt/2011/12/22/kollektiv-szerzodes-az-uzemi-tanaccsal-avagy-csizma-az-asztalon/> on June 21, 2017.

34 Some legal scholars declared that in the present form, the existence of works councils is unnecessary. See: Gyulavári, Tamás: "Út a rugalmasságba" [Road to Flexibility] in Kun Attila (szerk.): Az új munka törvénykönyve dilemmái címu tudományos konferencia utókiadványa, Budapest, 2013, pp. 91-104.

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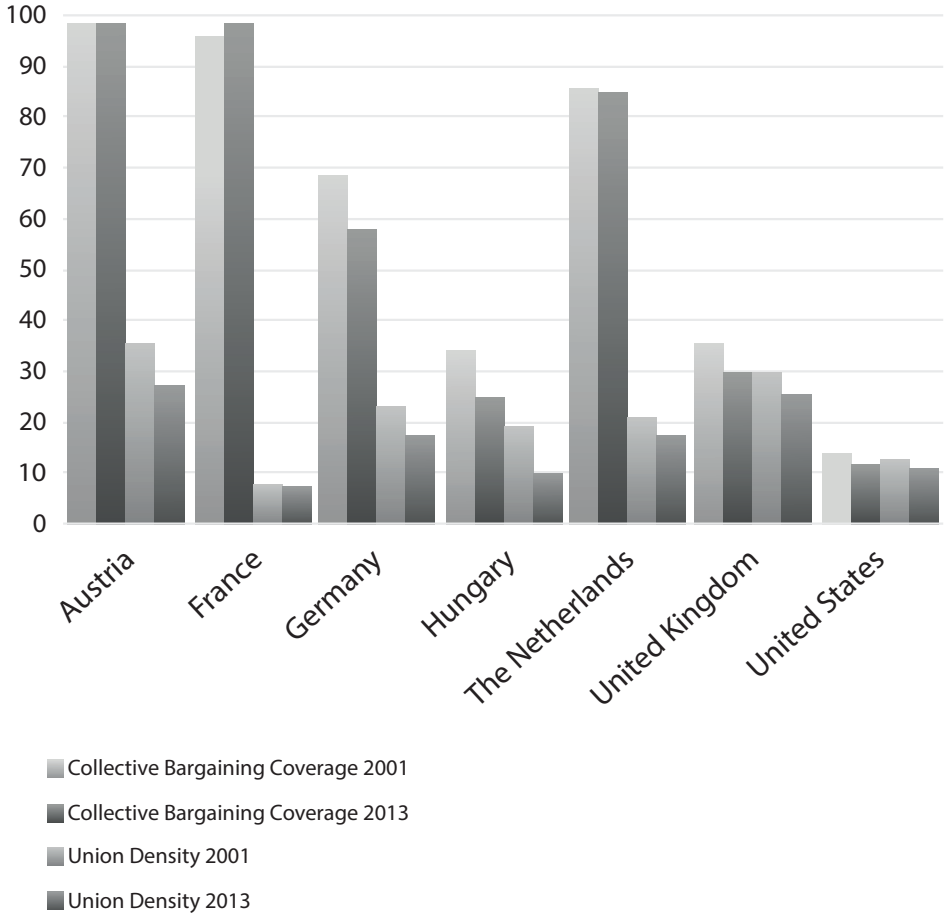
frontation with the union, the less significance the union movement will have. Overall, the general aim of the legislator to achieve a broader collective autonomy for labour unions is hampered by the parallel functioning workers' representation at the enterprise level, which, in the long run, weakens the positions of both the works councils and the unions.

27.6 The Decline of Bargaining Coverage and Union Density

Figure 27.1 Collective Bargaining Coverage and Union Density Rates from 2001 to 2013.



Source: <www.ilo.org/ilostat>

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The unionization in the private sector is exhibiting a downward trend that does not show any signs of changing, much less of turning around worldwide. [Figure 1.] In Europe, the Commission published several documents (e.g. Green Papers) that in order to increase flexibility and security at the workplace, the significance of unions and their collective agreements should be strengthened.[35] In Hungary, before 2012, the collective bargaining coverage rate was around 33%. One third of the employees covered were employed in the public sector, where collective agreements prevail with significant restrictions on possible deviations by law. This means that around 20% of the workers of the private/business sector fell under the regulations of collective bargaining agreements. Trade union density, which expresses union membership as a proportion of the eligible workforce, was around 12%, which was very low compared to other European countries. The vast majority of agreements were in force at a single employer: 2,701 out of 2,783 collective agreements in 2012. Almost two-thirds of the collective agreements were for employers in the public sector, although, in terms of the numbers of employees covered, the proportions are reversed.[36]

In general, it can be stated that despite the efforts the flexibility of labour law regulations and the emergence of collective autonomy have not yet been strengthened. The new code lowered the level of minimum standards of employment, but to exercise the rights that rise from collective autonomy, employees have a great need for capable unions to represent them to promote their rights and conclude agreements deviating from the standard in their favour. The existence of strong and effective trade unions is essential to match the intentions of the government, to regulate labour law with the power provided to bargaining parties by way of possible deviation in collective bargaining agreements. Although there are no figures available on present collective bargaining coverage and union density, it is not an exaggeration to say that the Hungarian labour market still lacks strong trade unions, union density and collective coverage rates remain low, therefore collective bargaining does not take a central position in most of the employee's carreers in Hungary.[37]

27.7 Acknowledgements and Conclusions

These cases demonstrate that the rules concerning contractual capacity are, in many cases, obstructed by dogmatic and interpretational difficulties. My opinion is that regarding collective agreements, in the spirit of dogmatic clarity, it would be appropriate to have

35 Green Paper of the European Commission on modernising labour law to meet the challenges of the 21st century, Brussels (2006).

36 National Industrial Relations – worker-participation.eu. Accessed at: <www.worker-participation.eu/National-Industrial-Relations/Countries/Hungary/Collective-Bargaining#note2> on July 11, 2017.

37 Gyulavári, Tamás – Kártyás, Gábor, *The Hungarian Labour Law Reform. The Great Leap Towards Full Employment?*, In: Dereito, 2012/2, Vol. 21, pp. 167-188.

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more detailed provisions in the Labour Code than what is currently foreseen. Also, the case law of the Hungarian courts should be reviewed, revised, and summarized in disambiguation with the opinions issued by the Curia. As far as the significance of the normative regulations of the collective bargaining agreements are concerned, possibilities for deviation provided to the parties are an opportunity to regulate their relationship and the content of work to match their demands, financial, social needs. Thus, it is essential to have equal participants at the negotiations, in other words, it is important to strengthen the positions of the trade unions. It is also important to increase workers' confidence in the trade unions and in their collective bargaining agreements, for example by enacting supporting legislation to encourage union membership, or to link the validity of a collective bargaining agreement to the approval of the majority of the employees at the employer.

The figures on union membership and density rates show that the employees in Hungary have a limited and declining rate of activity as far as unions are concerned, and collective agreements also often exist without the actual support of the workers.[38] In conclusion, to gain the confidence of the employees, to strengthen the position and the presence of unions in the labour market, the idea of reorganizing the union movement and structure (which extends to issues such as collective contractual capacity, membership requirements, registering with the courts, independence, authority of the law, relationship with works council, etc.) must be considered. Without the unions having a strong bargaining position, the idea of extended collective autonomy fails to support the flexible and secure working environment, promoting instead cheaper and easier conditions for employers to employ unprotected workforce. In conclusion, without the support of employees, unions and their collective agreements have much less influence on labour relations.

38 According to recent research, most of the workers are unaware of whether a union or a collective agreement exists at the employer. Accessed at: http://szabim.blog.hu/2016/05/17/_hianypotlo_adatokat_kozolt_a_kozponti_statisztikai_hivatal on July 15, 2017.

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