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OPERATION AND ACTION OF A TRADE UNION (IN TERMS OF CZECH REPUBLIC LABOUR LAW)

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Abstract
Social dialogue constitutes an important part in the process of shaping of social relationships. The importance of social dialogue comes to attention particularly in connection with working conditions for employees. They also have the right to establish different forms of employee representatives so that their economic, social and cultural interests can be promoted and protected with a higher level of dignity and with greater force. A trade union represents one of the fundamental employees' representatives recognized by law and it also has the right to bargain collectively. Collective bargaining leads to the conclusion of collective agreements that guarantee better working conditions for employees. The prerequisites for operation and action of a trade union within an undertaking differ according to national legislation. The presented article points out the terms and prerequisites of operation and action of a trade union within an undertaking in the scope of the Czech legal order. It brings to attention several application impacts of a trade union's fulfillment prerequisites of its operation and action, as well as the yet unresolved issue of plurality of trade unions.

Key words
social dialogue, labour condition, trade union, acting, right to collective bargaining

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Introduction

The Czech legal order implements transnational sources of law (for instance Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC); 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 Community, etc.) and guarantees the right to information and consultation for employees. In order to exercise their right to information and consultation, employees can choose their representative, typically a trade union. The employer is obliged to inform the employees and to deal with them directly if there is no trade union, workers council or a representative for occupational safety and health protection (hereinafter referred to as "Employees Representatives"). Where there are more employee representatives within the employer's undertaking, it is required that the employer fulfills obligations (duties) pursuant to Labor Code in relation to all employee representatives

unless another manner of collaboration is agreed within the Employee Representatives and between the Employee Representatives and the employer (Toman & Švec &Schuszteková, 2016). An employee information and consultation procedure is implemented at the level corresponding to the subject-matter of consultation and with regard to competence and scope of powers of the employee representatives and the management level - Section 276 (1) of Act No. 262/2006 Coll., hereinafter '*Labor Code'*). The Labor Code does not prioritize any type of Employee Representative (Tomšej, 2018). They can operate and act parallelly. In the Czech Republic, however, the representation of employees is historically carried out mainly by the trade union (Horecký, 2012).

The wording of the above-mentioned provision also implies the possibility of parallel operation and action of more Employees Representatives. It does not mean that only different types of Employees Representatives (e.g. trade union and workers councils - the rule under which the workers council was dissolved and all competences were supposed to be transferred to the trade union was abolished in 2008 - abolition of the ban on the coexistence of the workers council and the trade union) could act simultaneously, but parallel operation and action of more trade unions is in compliance with law as well. So-called plurality of trade unions may exist within the employer's undertaking. The employer has no legal right to prohibit or otherwise prevent the establishment of an Employees Representative (the establishment of a trade union or operation and action of an already existing trade union - Section 276 (1) of the Labor Code).

The presented article points out the terms and prerequisites of operation and action of a trade union within an undertaking in the scope of the Czech legal order. It brings to attention several application impacts of a trade union's fulfillment prerequisites of its operation and action, as well as the yet unresolved issue of plurality of trade unions.

Theoretical background

The transition from the planned economy to market economy resulted in almost complete disintegration of both economic and legal norms. The emergence of the new economy based on market forces has changed not only the existence of companies or organizations, but also the position of individual actors and their mutual relations. The gradual establishment of organizational-legal forms of entrepreneurship has brought about the establishment of statutory and facultative bodies of enterprises. Large companies have gradually disappeared or transformed into small and medium-sized businesses. The new circumstances have brought about significant changes in the employer-employee relation.

According to Bronstein (2011), the gradual liberalization of the business environment in the post-communist countries with an emphasis on removing barriers and facilitate entrepreneurship resulted in series of changes in the employer-employee status. The new situation created unequal conditions for employees, with extremely small space for improvement with absence of employee representation. Several professional discussions have been made about the legal protection of individual participants. Expert dilemmas have emerged whether or not enter the way of liberalization. The issue was closer discussed by Koldinska (2008).

The issue of forming new conditions anchored in law was not only the problem of former Czechoslovakia, but also the problem of other post-communist countries in Central and Eastern Europe. Several examples have emerged, in terms of substantial changes the analysis made by Dimitriu (2017) is worth mentioning. Trade unions were established in the former Czechoslovakia during the era of planned economy. Their main objective was to create suitable social conditions and possibilities for regeneration of employees instead of representing the rights of employees. Nowadays, trade unions mainly focus on protection of employee rights and the employees' status in relation to the employer. Effective functioning of the organization requires a bilateral dialogue based on constructive proposals and collective bargaining. That has not been and not only the problem of former post-communist countries in Central and Eastern Europe. It is considered to be a global and transnational problem (Blackett, 2018).

National conditions for application of legal acts are based not only on legal background, but also on the economic and social development of the country. According to co-authors Wasileski and Turkel (2008), this served as a basis for the Czech reforms of labour law. Even though national conditions vary from one country to another, there are still a number of conditions that are similar. It is possible to conduct both a legal analysis and comparison on professional and scientific level to provide and impulse on international level of employment law (Burchill, 2016).

Currently, not only the Czech, but also the international labour law is striving to contribute to establishment of proper working conditions for employees, ensuring and respecting their rights in the framework of labour relations. This might happen in form of a demanding social dialogue between the employees and employers (Magnani, 2018). Collective bargaining is the most suitable tool that enables better conditions to be achieved through adoption of the collective agreement of particular company or organization. Further part of this article will deal with the legal arrangements and the ideas of recognized Czech experts on labour law e.g. Pichrt (2010).

The described issues are not addressed by many authors. It rather represents an area out of focus and beyond the interest of practical interpretations. Although the theme of pluralism of trade unions and the operation and action of a trade union organization at the undertaking originally formed part of conceptual changes to the Labor Code (2016) as a result of the pressure of the Central Workers' Representative in the Czech Republic – Czech Moravian Confederation of Trade Unions, the issue was dropped during the amendment work. As the result of this situation in the Czech Republic still persist especially the question, how to solve the question of trade union plurality. Although the issue of plurality and conditions of operating and action was dealt with by the Constitutional Court No. 10/12 and the Supreme court (21 Cdo 2622/2017-160), but with regard to international conventions (e. g. ILO Convention No. 87)., the current state of affairs can be criticized. With regard to the logical structure of the contribution, the sources are mentioned in the respective sections.

Employee representatives – that is, trade unions, Works Councils, and safety at work and health protection stewards – are statutorily required to keep employees in all workplaces duly informed about their activities and about the content and conclusions of all information and negotiations with the employers. Employee representatives must not be disadvantaged, advantaged or discriminated against because of their membership in a Works Council (Pichrt, 2017). Trade unions play by far the most significant role in employee representation by virtue of regulation in terms of competency but also in practice from the perspective of occurrence, function in social dialogue and particularly collective bargaining. Only trade unions can represent employees in labour relations, in collective bargaining by concluding collective

agreements and in tripartite negotiations. Regulation of the role and prerogatives of trade unions is such as the reduction of working hours without reducing wages and leave entitlement. The agreements also cover employment conditions, for example fixed-term work, part-time work and temporary agency work. Furthermore, the agreements consider social policy, such as employee recreation and transport, as well as continuous vocational training, and health and safety. Collective agreements usually also set principles for the cooperation of the contractual partners (Alberti & Pero, 2018).

Material and methods

The objective of the paper is to discuss the issue of plurality of trade union and conditions of operation and action of trade union organization at an undertaking according to the Czech Labour Code and partially sketch the situation to propose possible solutions. The main goal of this text is to map and evaluate the current system of the above mentioned topics of using the employee participation rights in terms of the Czech labour law and to lead theoretical criticism (and prepare the first step for upcoming contributions). The partial goal is to point out the interdependence and interaction of the economic and legal definition of labour relations and protection of employee interests.

Although the Constitutional Court of the Czech Republic and the Supreme Court held the situation of plurality of trade union and the conditions of operating and action of trade union at an undertaking for clear, there is enough place, with regard of some of the conventions of International Labour Organization to determine and assume that the Czech Labour Code does not correspond entirely with the international convention anchored rights of employee participations. Qualitative scientific methods were used for the discussion of above mentioned issues: critical in-depth analysis of the current legal framework, descriptive method and scientific cognitive methods.

Results and discussion

The operation and action of a trade union within the employer's undertaking. A trade union can perform a number of activities within an undertaking and possesses a wide range of authorizations (which is mirrored by the employer's obligations that need to be fulfilled towards the trade union). As a result of the fulfillment of the prerequisites which are mandatory so that the trade union can start its operation and action within an undertaking, the trade union has the right to information (e.g. about development in wages, the average wage and its individual constituents /elements/, including breakdown according to individual occupational categories unless it is agreed otherwise) consultation (e.g. amount of work and working pace or remuneration system for employees), co-determination (the period of collective leave), control (compliance with working conditions and health and safety conditions) and the right to collective bargaining - concluding a collective agreement (Horecký & Samek, 2015).

In order for a trade union to be able to exercise all the above mentioned rights and authorizations, it must meet the legal prerequisites of its operation and action. If such prerequisites have been met, the trade unions can exercise their rights and authorizations within the particular undertaking, regardless of its age, size or original professional orientation. The Charter of Fundamental Rights and Freedoms of the Czech Republic prevents unequal treatment of trade unions. Reducing the number of trade unions operating and acting within an undertaking is inadmissible, as well as favoring some of them (whether in the enterprise or in the industry - Article 27 (2) of the Charter of Fundamental Rights and Freedoms).

The prerequisites of operation and action of the trade union are explicitly stated in section 286 of the Labor Code. A trade union that operates within the employer's undertaking may only act if it is authorized thereto in the Articles and if at least three members of such trade union are in an employment relationship to the employer (i.e. such undertaking); collective bargaining may be done and collective agreements may be concluded under hereinbefore mentioned conditions only by a trade union or its branch organization if the trade union is in that respect authorized by its statutes. Having met the minimum number of union members who are in an employment, the trade union still has to fulfill the so-called obligation to notify. The trade union may start to operate the day following the day on which it notified the employer that it had met the abovementioned prerequisites. If the trade union ceases to comply with these prerequisites, it shall notify the employer about such fact without undue delay.

In sum, the legal order of the Czech Republic assumes the basic three prerequisites for the operation and action of a trade union within the employer's undertaking:
(a) the right of a trade union to operate and act within an undertaking (must be established in its Articles),
(b) the fact that the trade union has at least three employees in employment, and
(c) a notice to the employer showing that it has met the prerequisites under (a) and (b) - point no. 18 of the Judgment of Constitutional Court of Czech Republic from the 23th of May 2017, ref.. Pl. ÚS 10/12. (hereinafter „*Judgment2*"). Although the prerequisites seem to be quite formal, the interpretation of each of them causes complications and practical problems.

The fact that a trade union associates at least 3 members who are in employment relationship to the employer is perceived as conflicting with the right to freedom of association (compare point no. 21 of Judgment2). As for the minimum number of employees, the said provision permits the establishment of a trade union, but at the same time it does not allow a trade union to be established and operate within an undertaking with fewer than three employees or, where fewer than three employees are members of the trade union. This approach practically prevents employees from exercising, for example, their right to representation in dealing about the amount of property damage (for which the employee is responsible) and the manner of its compensation (section 263 (3) of the Labor Code) or professional representation in cases of solving individual questions related to the employee (section 279 of the Labor Code). However, according to the Czech Constitutional Court, the described situation is constitutionally conforming, i.e. it does not violate the rights of employees (point 52 of Judgment2).

The Czech Constitutional Court has also dealt with the question whether it is righteous that the prerequisites for operation and action of a trade union apply only to the employees in the employment relationship (in the Czech Republic, employees may perform dependent work also outside the scope of employment based on so called agreement to complete a job or agreement to work - as the flexible forms of employment). The Czech Constitutional Court has concluded that the prerequisite mentioned is entirely consistent with the law (Sil, 2017), since the long-term stability of the employment relationship cannot be expected for employees working outside the scope of employment (flexible forms of employment) and it is, therefore, necessary to take into account the legitimate interests of the employer. The Constitutional Court has thus practically stated that the protective function of labor law is shifted to the employer's side (point 53 of Judgment2).

The condition of notification - notification to the employer that the trade union meets the prerequisites and thus can act and operate - also poses a conflicting question in practice. The Labor Code places a requirement on the trade union to notify the employer in writing that it fulfills the prerequisites for operation and action (i.e., first of all, that it associates three of its employees in the employment relationship). Employers, supported by the views of some authors, insist that the trade union demonstrates to the employer the fulfillment of the abovementioned prerequisites, i.e., they insist that it also designate the three employees from whom they derive their right to operate and act (Vozábová, 2014). The author of this article, on the contrary, takes the opinion that the trade union does not have the obligation to prove the fulfillment of the conditions to operate and act (Act no. 89/2012 Sb., hereinafter "*Civil Code*").The Civil Code· i.e. the statute establishing the general rules of legal action, constitutes the rule that those who act are considered to act honestly and in good faith, in other words that they do not seek to deceive the addressee of the negotiations (the employer) and abuse their rights. It is up to the employer to initiate a lawsuit to confirm the fulfillment of the prerequisites of operation and action. This opinion can be supported by the case law of The Supreme Court of the Czech Republic (though The Supreme Court of the Czech Republic had assessed the situation before the obligation to notify was enacted), which indicates that the trade union acts and operates not only after having notified the employer, but also "as soon as it (effectively) exercises (has begun to exercise) acts that are characteristic for the activities of trade unions and from which the employer must have (with no reasonable doubt) recognized (Judgment of The Czech Supreme Court from 28. Mai 2013, ref. 21 Cdo 390/2012) that it is a sui generis association – a trade union.

A trade union's entitlement to act and operate must result from its Articles. Articles are considered to be a public document (Decision of Constitutional Court of Czech Republic from 25. August 1998, ref. III. ÚS 195/98). The legislator does not require trade unions to lay down specific names of the employers in their fundamental documents, but they must lay down the rules under which they can perform their activities, i.e. to determine who can act on behalf of the trade union. A trade union has the right to create an internal organizational structure without the intervention of the state or the employer (point 333 ILO - Digest of decision and principles of the Freedom of Association Committee of Governing Body of the ILO). The operation of a trade union can also be linked to a particular sector, but it cannot be understood that a trade union can only operate within an employer (undertaking) which, from the point of view of the industry, falls under the umbrella union confederation. The law does not require any identification of a particular employer and does not impede operating in an industry other than the original one, and nor can such obligation be inferred from the case law. In practice, however, it is possible to meet the views that trade unions cannot operate outside of their original sector (for example, KOVO – metal workers - could not operate in the chemical and energy industries). However, it is clear from the available decision-making practice that the autonomy of a trade union is not only a matter of defining its internal structure but a trade union can also define its scope of operation, irrespective of the specific industries (Judgment of the Czech Supreme Court from 21. December 2017, ref. 21 Cdo 2622/2017-160).

The solution of the issue of the trade union's right to operate and act also involves the need to deal with the problem of pluralism of trade unions during collective bargaining, realization of the right to information and consultation. It is of high importance not to forget to focus on other issues, such as the employer's duty to ensure adequate opportunities for the exercise of trade union's operation and activity. The provisions of section 277 of the Labor Code implies an obligation on the part of the employer to create, at own cost, conditions for proper performance of activities by Employee Representatives, in particular by providing them, within operational

possibilities and within appropriate scope, with rooms (furnished and equipped as necessary) and by bearing the cost relating to their maintenance and technical operations and also by covering the cost of necessary documents. Simultaneous activity of several trade unions may impose a considerable economic burden on the employer. It is clear from the case law of Supreme Court of the Czech Republic that an employer may not treat individual trade unions unequally, in other words the employer must not discriminate one trade union against another one. On the other hand, taking into consideration the adequacy and proportionality of the rights of the trade union on the one hand and the obligations of the employer on the other hand, the employer does not need to equip all the trade unions with the same tools, resources and/or provide them with the same amount of money, etc. In carrying out their duties, the employer can take into account the popularity of the trade union, its size and the extent of its activities the trade union actually carries on, etc. (Judgment of the Supreme Court of Czech Republic from 28. January 2013, ref. 21 Cdo 974/2012).

A trade union that fulfills the prerequisites for operation and action has the right to collective bargaining. Collective bargaining represents one of the basic possibilities in the Czech Republic how to adapt the working conditions within the employer's undertaking. In a collective agreement, the contracting parties may modify their mutual (reciprocal) rights and obligations (e.g. the employer's duty to provide a trade union with premises - an office for a trade union official, including the facilities, or the possibility to be present at meetings of the higher decision-making bodies of the employer, or limiting the scope of agency employment or its use only in agreement with the trade union, etc.) and consequently the collective agreement shall include the regulation of employees' rights - not obligations. In the collective agreement, the employer may, in agreement with the trade union, guarantee more favorable working conditions than the Labor Code and other labor law provisions. Determining new obligations for employees, modification of the existing ones, does not belong in a collective agreement - employers may use an internal regulation to modify employee obligations, typically the Work Rule. Where a trade union exercises activity within the employer's undertaking, the employer may issue or modify the work rules (work regulations) only with a prior written consent of the trade union (section 306 (4) of the Labor Code).

Collective Agreement represents one of the possible sources of law in labor law (in the normative part - collective regulation of working conditions for an indefinite number of employees). The process of conclusion of a collective agreement is governed by a specific legal regulation - Act No. 2/1991 Coll., On collective bargaining, hereinafter "*Collective Bargaining Act*"). The Collective Bargaining Act contains the regulation of the collective bargaining process and the settlement of disputes concerning the fulfillment of collective bargaining obligations or disputes on conclusion of collective agreements. The Collective Bargaining Act, Labor Code and other labor law regulations do not address the situations in which collective bargaining is about to take place and more than one trade union operate within the employer's undertaking.

Consequences of plurality of trade unions

The basic rule, which can be inferred from the Labor Code, states that the trade union concludes a collective agreement on behalf of all employees within the employer's undertaking, that is, also on behalf of the employees who are not trade union members (Aimo & Izzi, 2018). However, with regard to the question of the operation of a trade union, a crucial question arises - and that is how many collective agreements can be concluded within the employer's undertaking in a situation when there are several trade unions operating within the employer's

undertaking, i.e. there is a plurality of trade unions within the employer’s undertaking. The plurality of trade unions is compliant with the Czech legal order (see above). It would, therefore, be possible to derive from the abovementioned fact the plurality of collective agreements. The Labor Code, however, in the provision of Section 24 (2) contains the explicit rule according to which where two or more trade unions operate within one employer's undertaking (plant, enterprise), the employer must negotiate the conclusion of the collective agreement with all such trade unions. Unless the trade unions agree between (among) themselves and with the employer otherwise, the trade unions act and negotiate the collective agreement jointly and in mutual consent, with legal consequences for all employees (of the employer concerned). Thus, the plurality of collective agreements is not admissible by law. In connection with the question of the operation of the trade union within the employer’s undertaking and its right to conclude a collective agreement, it is, therefore, decisive how to deal with the situation when the operating trade unions do not have the same intentions and wish to negotiate the working conditions to a different extent, or when trade unions compete or when one of the trade unions can be considered a so-called yellow trade union, which is established only with the purpose to complicate the use of the right to collective bargaining and the conclusion of a collective agreement (Horecký, 2012).

The Labor Code introduces a rule according to which there can only be one collective agreement within the employer’s undertaking. Only after an agreement between (among) the pluralist trade unions, and followed by an agreement with the employer, a collective agreement can be concluded, and such collective agreement may contain different arrangements for employees who perform, for example, a substantially different work. However, plurality of trade unions tends to create a legal obstacle to the conclusion of a collective agreement, as trade unions are often unable to agree on a particular procedure. If there is a plurality of trade unions and no agreement on a special procedure has been reached, a collective agreement cannot be concluded. The employer cannot choose a contracting partner - a trade union – according to their liking. The employer should also not bargain collectively when being asked to do so by only the collective agreement is only valid if it is signed by the contracting parties on the same deed (section 27 (2) of the Labor Code). If the collective agreement is not signed on the same deed by the contracting parties, the collective agreement is null and void, i.e. the collective agreement is seen as if it has never been concluded. The collective agreement cannot be concluded only with one of the trade unions, i.e. without all of the trade unions having agreed on a specific procedure. Failure to proceed according to the aforesaid would result in the collective agreement being null and void under section 27 (2) of the Labor Code as there would be no manifestation of will and it would be in obvious contradiction with the law. Neither (None) of the trade unions can be excluded from the negotiations on the collective agreement·(Šubrt, 2013).

The legal order of the Czech Republic does not adequately addresses the problem of plurality of trade unions in collective bargaining. In the previous form of the Labor Code, the rule for dealing with plurality of trade unions could be found, but with regard to the ruling of the Czech Constitutional Court (Judgment of Constitutional Court of Czech republic from 12. March 2008, ref. Pl. ÚS 83/06., hereinafter “*Judgment*”), the mentioned rule was abolished in 2008. The Labor Code, as the fundamental legal norm regulating the means of solving the plurality of trade unions, acknowledged the so-called majority principle (i.e. principle of majority), according to which the employer could, in the event that the trade unions failed to come to a mutual agreement, enter into a collective agreement with a trade union, or several trade unions, which associated the highest number of union members (§ 24 sect. 2 Labour Code in wording to 13. April 2008). The case law of the Czech Constitutional Court does not leave any room for

doubt that the majority principle is not acceptable as the solution of the plurality of trade unions in collective bargaining, as that principle does not comply with constitutional principles of the Czech Republic and especially with the rules of equality (point 265 of Judgment).

The Labor Code only provides the rule for dealing with the situation of the use of the right to information and consultation and representation by an Employee Representative if the employee is not a union member or in matters of individual nature (i.e. those concerning a particular employee).

Where two or more trade unions exercise their activities within one undertaking in those cases which concern all the employees or a large number of employees and in which the Labor Code or other statutory provisions require information, consultation, the expression of consent by, or agreement with, the (competent) trade union, the employer shall fulfil the duties in relation to all the trade unions (exercising their activities within the undertaking) unless the parties determine some other information and consultation procedure or another manner of expression of consent.

Where two or more trade unions exercise their activities within one undertaking, such trade union organization, of which a certain employee is a member, shall act on his behalf in labor (industrial) relations. As regards an employee who is not a member of any trade union organization, the trade union organization with the largest number of members who are employed by (i.e. are in an employment relationship with) the employer shall act on behalf of the employee in labor relations unless otherwise determined by the employee (Magda & Marsden & Moriconi, 2012). Unlike the case of plurality of trade unions during collective bargaining (or collective adjustments to working conditions), the majority principle is seen as acceptable in situations concerning individual employees.

Conclusion

The solution of the issue of the fulfillment of the prerequisites of operation and action of a trade union within the employer's undertaking as well as the issue of plurality of trade unions represents a substantive aspect of successful fulfillment of the right of trade unions to collective bargaining (Myant, 2013) and full use of the right of employees in the Czech Republic is crucial for the successful fulfillment of the right of trade unions to collective bargaining and full use of the employees' rights – freedom of association – in the use of the right to information, consultation and representation by Employees Representatives in collective labor relations and in solving individual labor issues (Myant, 2017). At present, however, it is possible to meet completely contradictory views on the fulfillment of the prerequisites that a trade union needs fulfill to be able to operate and act (e.g. obligation to notify and proving thereof). Authorization to act in accordance with the Articles can be seen as another area triggers passionate debates, same as the yet unresolved issue of plurality of trade unions. *De lege ferenda* it is advisable to deal with the outlined situations expressly.

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