

Hungary

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1 INTRODUCTION

The two judgements of the European Court of Justice that serve as a basis for this article are instructive in several respects.¹ The decisions highlight the problem presented by the collision of fundamental rights and freedoms both defined at different levels. In connection with this the evaluation of direct versus indirect effect of fundamental rights and freedoms is of vital importance. The problem of the so-called direct or indirect horizontal effect (*Drittwirkung*)² in fact concerns the

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1. C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP*; C-341/05 *Laval un Partner Ltd v. Svenska Byggnadsarbetareförbundet*.
 2. On the problem of *Drittwirkung*, a phenomenon known in German labour law see: C-W. Canaris, 'Grundrechte und Privatrecht', *AcP*, 1984 (184), 201-246; *ibid.*, *Grundrechte und Privatrecht – eine Zwischenbilanz* (Berlin/New York, 1999), Walter de Gruyter; G. Dürig, 'Grundrechte und Zivilrechtssprechung', in Maunz Theodor (ed.), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung*, FS zum 75. Geburtstag von Hans Nawiasky], (München, 1956), 157-190; H. C. Nipperdey, 'Gleicher Lohn der Frau für gleiche Leistung', *RdA* 1950/4, 221-255; *ibid.*, *Gleicher Lohn der Frau für gleiche Leistung (Rechtsgutachten)* (Köln, 1951); *ibid.*, *Die Würde des Menschen* [in Neumann, F., L. – Nipperdey, Hans Carl – Scheuner, Ulrich (Hrsg.): *Die Grundrechte*, Bd. II.] (Berlin, 1954); *ibid.*, *Grundrechte und Privatrecht* (Krefeld, 1961).

Roger Blanpain, Andrzej M. Świątkowski (eds), *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Union*, pp. 83–101.

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assessment of actions by non-public persons.³ In this respect there appears to be a contradicting tendency between Community and Member State level. While in the legal systems of the Member States the principle of indirect effect prevails (though with numerous exceptions and not without ambiguities) in many respects, at the level of Community law we are able to witness the increasing influence of direct effect.⁴ Again, the decisions shed light upon disputes over the equality of economic and social rights as well as the legal nature of social rights.⁵ Finally, the relevant decisions draw our attention to the discrepancy between Community law as well as the laws of the Member States. If we only consider the employees' right to collective action – which so far has borne no Community law relevance – we can observe fundamental differences in the regulation and assessment of this right in the various Member States.⁶

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3. On the theory known as the 'strong indirect horizontal effect' theory and the 'five-fold hierarchy' theory in English law see: M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart, 1997); *ibid.*, The horizontal effect of the Human Rights Act, PL, 1998 Autumn, 423-443; G. Phillipson, The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper? MLR, 1999, November, 824-849. Reverse opinion is presented by: I. Leigh, 'Horizontal Rights, the Human Rights Act and Privacy, Lessons from the Commonwealth?', ICLQ, 1999, 57-87; D. Feldman, 'The Human Rights Act 1998 and Constitutional Principles,' *Legal Studies*, 1999, 165-192; R. Buxton, 'The Human Rights Act and the Private Law', LQR, 2000 Jan., 48-65.
 4. Let us emphasize that the tendency is far from being unambiguous. In relation to the freedom of movement of goods the ECJ's case law did not prioritise the direct effect of fundamental rights. Case *Dansk Supermarked v. Imerco* was an exception in this respect. The following sentence has never since been repeated by the Court (or at least not this expressly and unambiguously): 'It is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods.' However, many commentators point out that no far-reaching conclusions should be drawn from this argument and that the decision itself is more of a 'runaway judgement' and not one that could serve as a solid ground for future arguments. T. O. Ganten, *Die Drittwirkung der Grundfreiheiten (Die EG-Grundfreiheiten als Grenze der Handlungs- und Vertragsfreiheit im Verhältnis zwischen Privaten)*, Berlin, Duncker&Humblot, 1999; W-H. Roth, *Drittwirkung der Grundfreiheiten?* [in Due, Ole – Lutter, Marcus – Schwarze, Jürgen: *Festschrift für Ulrich Everling, Band II.*], Baden-Baden, 1995, Nomos Verlagsgesellschaft, 1231-1247; in relation to freedom of movement of persons see especially the following cases: B.N.O. Walrave, *L.J.N. Koch v. Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie & Federación Espanola Ciclismo*, C-36/74; *Gaetano Donà v. Mario Mantero*, C-13/76; *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman, Royal Club Liégeois SA v. Jean-Marc Bosman and others*, and *Union des Associations Européennes de Football (UEFA) v. Jean-Marc Bosman*, C-415/93 and with slightly different connotation *Pilar Allué and Carmel Mary Coonan v. Università degli Studi di Venezia C-3388 (Allué I.)*; *Pilar Allué and Carmel Mary Coonan and others v. Università degli Studi di Venezia and Università degli studi di Parma* joined cases C-259-91, C-331-91 and C-332/92 (Allué II.).
 5. R. Arango, *Der Begriff der sozialen Grundrechte*, Baden-Baden, 2000, Nomos.
 6. For writings on Laval and Viking in the Hungarian academic literature see for example V. Attila, *Conflicts of fundamental freedoms and fundamental rights (Az alapszabadságok és az alapjogok konfliktusa)*, *Európai Jog*, 2008/1, 15-20; H. Nikolett, *Community Law – Labour Law in the Member States (Közösségi jog – tagállami munkajog)*, *Európai Jog*, 2008/1, 21-35.

This study focuses on those segments of the rulings that are particularly important from the aspect of the internal structure of Hungarian labour law. In the cases discussed reference was made to point 12 and 22 of the Preamble, Article 3 (1) second line point c) and furthermore Article 3 (8) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. From another angle, recital 14 and 86 of the Preamble as well as Article 1 (7) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal Market are equally worthy of our attention.⁷

These parts attach great significance to the dialogue between social partners and to collective agreements. As a result, the system of labour law sources of a given Member State and, in close relation to this, the method by which directives are adopted are not secondary factors regarding the effective implementation of the Directive and the accomplishment of its goals.

2 SOME REMARKS ON THE STRUCTURE AND SOURCES OF HUNGARIAN LABOUR LAW

To understand the present structure of Hungarian labour law sources we must touch upon the circumstances of the Labour Code's (LC) creation in 1992. The intention of the legislator was rather clear: labour law regulations had to be placed within the system of private law. In the official reasoning it was emphasised that the Act defines only so-called minimum standards, while the establishment of rules more favourable for the employees rests upon agreement between the parties, with special regard to collective agreements.⁸ The objective of the legislator has not yet been realised. One of the causes of failure can be attributed to the peculiar interpretation of 'rules or conditions more favourable for the employee.' The legislator regulated this requirement not only in relation to collective agreement and contract of employment but also in relation to rule of law and collective agreement.⁹ It should be noted that according to this principle, the LC contains *ius cogens* or *ius dispositivum*¹⁰ and the latter permits only one-way deviation for

7. In any case, from the cited texts the requirement to be in conformity with Community law is to be highlighted. For example, the wording of Art. 3 (7) goes as follows: 'This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.'

8. See: Official Reasoning p. 1.

9. Section 13 (2) LC 'A collective agreement may govern any employment-related issues: however, with the exception set forth in Subsection (3), such agreement may not be contrary to legal regulations. Under Subsection (3) Unless otherwise provided for by this Act, a collective agreement or an agreement between the parties may depart from the provisions set forth in Part Three of this Act on condition that such deviation provides more favourable terms for the employee.'

10. Later on this rule changed with the adoption of Directive 93/104/EC.

the collective agreement. It is understandable that employers have not been motivated to conclude a collective agreement. The other cause explaining the lack of any collective bargaining net can be found in the large-scale privatisation which restructured a major part of large corporations and which disintegrated trade unions.¹¹ On the one hand, employers did not want to employ under terms of a collective agreement, while on the other trade unions were not able to force the employers to enter into a contract.

As a consequence of the aforementioned circumstances, the role of contractual sources is minor in Hungarian labour law. It may be added that most collective agreements are concluded at the workplace level, and therefore their regulatory function is limited. At present only four collective agreements are extended¹² by the Minister of Labour, that is they have been declared universally applicable according to Article 3 (8) of the Directive 96/71/EC (see below).

3 EMPLOYEE'S COLLECTIVE RIGHTS IN HUNGARIAN LABOUR LAW

3.1 COLLECTIVE RIGHTS REGULATED BY THE LABOUR CODE

The employees' collective rights are regulated in a relatively detailed manner in the LC. The German system served as a role model in the structuring of Hungarian collective labour law. In accordance with this, collective labour law consists of two parts: firstly the trade unions and collective bargaining, and secondly the participation of employees (workers' council, constitution of work).¹³ The significance of the latter is minor compared to that of the German *Betriebsverfassung*, yet its existence is crucial from the angle of establishing the trade union's ability to conclude a collective agreement (see below).

The trade union's rights have priority. Their legal basis is laid down in the Hungarian Constitution (HC), Act 1989 No. 2 on the Right to Assembly (ARA) and the LC. The HC contains numerous rules applying to trade unions. The importance of trade union legal status is emphasized among the General Provisions of the Constitution, and was affirmed by the Constitutional Court (AB).¹⁴ Under HC

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11. S. Laky – L. Neumann – I. Boda, The effect of privatization on employment (A privatizáció foglalkoztatási hatásai) DJW – CONSULTATIO, 2001, p. 160; With regard to the other states in central Europe see G. Bogdan, The Economic and Political Logic of Mass Privatization in Czechoslovakia and Poland, Cardozo, *J. Int'l & Comp L.*, 1996/1, 43.
 12. The four collective agreements are the following: Collective Agreement in Bakery Sector (first extension: 1995); Collective Agreement in Building and Construction Industry (extension: 2006); Collective Agreement in Catering Trade and in Tourist Industry (extension: 2001); Collective Agreement in Electric Energy Industry (first extension: 1995).
 13. On the connection of collective labour law's two parts see R. Richardi, *Betriebsverfassung und Privatautonomie*, Berlin/New York, 1973, Walter de Gruyter.
 14. In the opinion of the Hungarian Constitutional Court trade union is deemed as 'advantaged civil society organization' [24/1990. (XI. 8.) AB; 49/1991.(IX. 27.) AB].

Article 4 'Trade unions and other representative bodies shall protect and represent the interests of employees, members of co-operatives and entrepreneurs.' Under HC Article 63 (1), 'On the basis of the right of assembly, everyone in the Republic of Hungary has the right to establish organizations whose goals are not prohibited by law and to join such organizations.' This general fundamental right to assembly is made tangible once more in HC Article 70/C (1): 'Everyone has the right to establish or join organizations together with others with the objective of protecting his economic or social interests.'

The ARA regulates the right to organise on the basis of Article 63 of the Constitution, calling it a 'fundamental freedom to which everyone is entitled.' From the aspect of our topic it is to be underlined that these organisations are co-called 'civil society organizations' that are legal entities. Such a kind of organisation is founded when at least 10 founding members have decided to establish it, have adopted its statutes and have elected its managing and representative bodies.

The LC provides the legal definition of trade unions on the basis of the Constitution and the ARA. According to Section 18 LC 'In the application of this Act, "trade union" shall mean all employee organizations whose primary function is the advancement and protection of employees' interests related to their employment relationship.' In addition to the right to organise the delineation of the trade union's territory is a matter of vital importance, influencing the entire system of Hungarian labour law. After long discussions it has become evident that the trade unions' primary field is that of the workplace (employer). According to Section 19 (1) of the LC employees shall be entitled to organize trade unions within the employer's organization. It is the trade union's right to operate divisions inside any employer's organization and to involve its members in the operation of such divisions. The workplace-level operation is strengthened by Section 19/A (1) 'An employer may not deny entry of a person acting on behalf of a trade union who is not employed by the employer onto the employer's premises if any member of the trade union in question is employed by the employer...' This condition is primarily relevant with relation to the scope of the collective agreement.

The collective rights of the employees (in simplification: the rights of the trade unions) are exercised at the employer's level. From the point of view of our topic, attention has to be drawn to the following: according to Section 21 (1) of the LC, the employer shall ask the opinion of the trade union operating at the employer's workplace prior to passing a decision in respect of any plans for actions affecting a large group of employees, in particular those related to proposals for the employer's reorganization, transformation, conversion, privatization and modernization of a strategic business unit into an independent organization. If the employer fails to fulfil this obligation or – in the opinion of the trade union – fulfils it improperly the trade union may take advantage of its right to veto. According to 23 (1) LC the trade union operating at the employer shall be entitled to contest against any unlawful action taken by the employer (or his failure to take action)* by way of veto if such action directly affects the interest of the employees or the trade union. The strength of the veto is stemming from its pending effect, an effect acknowledged by the Hungarian legal practice. According to 23 (5) of the LC, contested

actions shall not be executed or, if already in progress, shall be suspended until the negotiations between the employer and the trade union are concluded, or until the court's final decision.

It is important to refer to these rules because they can influence the employer's/entrepreneur's freedom of decision. The obligation to ask the opinion of the trade union is in line with the content of the Directive concerned.¹⁵ On the contrary, the right to veto is immensely debated in Hungarian labour law.¹⁶ For example, it is not clear whether the exercising of one's right to veto against an employer's decision (which differs from the trade union's opinion) after the trade union's opinion has been asked is acceptable or not. This problem is particularly significant in a situation when the employer decides, contrary to the opinion of the trade union, that he will restructure it abroad. Before answering this question let us analyse how the trade union's right to conclude a collective agreement is regulated.

3.2 RIGHT TO CONCLUDE A COLLECTIVE AGREEMENT

Under the LC a collective agreement may be concluded by an employer, an employer's associations, or several employers on the one hand and by a trade union or several trade unions on the other. The capability to conclude a collective agreement is regulated on two levels. In principle the above mentioned parties shall be entitled to conclude a collective agreement provided their actions are mutually independent from one another. This rule, while universally applicable, mostly applies to collective agreements made at a level higher than the workplace, a type which is exceptional in Hungarian labour law. More closely this means that no other criteria but independence exists for concluding a collective agreement.

The LC contains detailed norms on capability to conclude a collective agreement at the workplace level in addition to this general requirement.¹⁷ On this level the trade union's capability depends on the result of the workers' council election.¹⁸ Under this construction the following question rises: how can a trade union conclude a collective agreement in case the election fails, or if the election is null and void? The answer to this question is embedded in the obligation to negotiate

15. 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.

16. For critical analysis of the right to veto see Gy. Kiss, *Labour Law (Munkajog)*, Budapest, Osiris, 362-365.

17. Under Section 33 (2) LC 'a trade union shall be entitled to conclude a collective agreement with the employer if its candidates have received more than half of the votes in the workers' council election.' Whether or not a trade union is considered as representative also depends on its 'result' achieved at the workers' council election.

18. Under Section 49 (3) LC 'A trade union operating at a place of employment may independently nominate a candidate from among its members.' Under the Section 49 (4) LC 'A candidate may be nominated by at least ten per cent of the employees eligible to vote or at least by fifty employees eligible to vote.'

after the proposal of negotiation. Under Section 37 of the LC neither party shall have the right to reject a proposal for negotiations for the conclusion of a collective agreement. This duty obliges the employer only if the trade union presenting the proposal is representative. However it must be emphasized that the trade union is qualified as representative, if its candidates have received at least ten per cent of the votes at the workers' council election.¹⁹ If that is not the case, it is within the employer's discretionary power (goodwill) to decide whether or not negotiations will commence. As the system of collective bargaining is based on the workplace level, the trade union's associations cannot *de iure* influence the behaviour of the given employers. The comprehensive regulative function of collective agreement is degraded by this structure.²⁰

3.3 EXTENSION OF COLLECTIVE AGREEMENT

In a fragmented system that concentrates on workplace level collective bargaining the extension of collective agreements has an important role. Behind these extensions social policy and competition objectives can be detected. Under the LC the Minister for Employment may extend the scope of the collective agreement to the entire sector (or sub-sector), if so requested by the parties, and following requests of the opinion of the national employee and employer associations affected by such extension of scope, provided the organizations which are parties to the agreement qualify as representative for the sector (or sub-sector) in question.²¹ The minister decides by an administrative resolution, against which any trade union, employer association or employer operating in the sector affected by a collective agreement may file for court action. The claim can be deemed well-founded only when the resolution of the Minister is unlawful. Resolution relating to extension is unlawful if one or more of the parties whose opinion has been requested do not qualify as representative, or the extended collective agreement itself is unlawful. It has to be underlined that claims cannot be based on competition or economic considerations.

19. Section 29 LC.

20. The content of collective agreement is regulated in the LC comprehensively. Collective agreements may govern the relations between the parties to the collective agreement (obligation part) and rights and obligations originating from employment relationships (normative part). Thus the collective agreement may govern any employment-related issue; however, such agreement may not be contrary to legal regulations (Section 30 LC).

21. In the application of the rule of extension, the employers' association which is deemed the most significant in its field of activity by virtue of its size in terms of membership, market position and number of employees shall, in particular, be regarded as representative. In the application of the rule of extension the trade union that by virtue of its size in terms of membership and the support it receives from the employees is deemed the most significant in its field of activity shall, in particular, be regarded as representative. The degree of employee support of a trade union shall be determined primarily on the basis of the results of the last workers' council election prior to the conclusion of the collective agreement governing the employers falling under the scope of such agreement (Section 34 LC).

It is to be emphasised that only extended collective agreements satisfy the definition provided by Article 3 (8) of the Directive. As a result of extension by administrative resolution the extended collective agreement must be observed by all undertakings in Hungary in the given profession or industry concerned. From our topic's point of view the content of the construction industry's extended collective agreement, more precisely its chapter on remuneration is relevant; though it merely repeats the parts of the LC that concern us insofar as it contains only minimum requirements. On the other hand we must call attention to the special features of regulation of collective agreements in Hungary. Even if there is an extended collective agreement in force, the trade union operating at the workplace maintains the right to conclude a collective agreement with the employer. Nonetheless, this collective agreement will only apply to the given employer and employees in an employment relationship. In other words, posted workers for example will be excluded from its scope. This has to be emphasised because under Section 41 LC 'a collective agreement of limited effect shall only depart from one with a broader scope insofar as it contains more favourable regulations for the employees.' Consequently such collective agreement is not equivalent with the model incorporated in Article 3 (8) of the Directive.

4 THE RIGHT TO STRIKE

4.1 THE BIRTH OF ACT VII OF 1989 ON STRIKE

Regulation of the fundamental right to strike either in a separate act or in the LC was out of the question for a long time in Hungary. To understand this we must take a short glimpse at the economic-political environment of the late 1980's. According to socialist labour law ideology the interest of the employees and that of the employers were identical or at least very similar. Consequently acknowledgement of the labour force's right to protest was not an option. However, everyday practice contradicted this ideology, the economic-social-political environment of the second half of the '80's provided fertile ground for major industrial actions. Organised labour stoppages took place in various sectors, even at politically sensitive workplaces, strategic state-owned companies under state administration control. These strikes were organised for rather peculiar reasons.²² They also projected that

22. For example, the participants of the first miners' strikes fought for the central increase of the price of coal (which was kept down artificially), hoping that the miners' wages would rise along with the price of coal. These strikes constituted a threat to the socialist regime as they attracted masses of people to the streets and though they could not be labelled as political strikes, they were obviously 'politically tainted.' The following case depicts well the special characteristics of strikes in Hungary at that time: The employees of a state-owned company under state administration control went on strike to protest against their manager's replacement. For details see Gy. Kiss, *Labour Law (Munkajog)*, Budapest, Osiris, 2005, 521-526; J. Radnay, *The Hungarian Act on Strike (A magyar sztrájk- törvény)* Magyar Jog, 1990/12, 993-1006.

strikes are not always strictly connected to the employment relationship. Later on this circumstance very likely contributed to the shaping of the Strike Act.

Act VII of 15 April 1989 on Strike (SA) was adopted at a sensitive period. Privatisations were taking place, the transition to a market economy and political pluralism was on its way but the change of regime was not yet complete. The result of the hasty legislation was a rudimentary act with contradictory regulations. Though 20 years have passed since the political transition, no political consensus aiming at its amendment has ever since been reached. The act is still in effect, essentially without any modifications, and it is not likely to be thoroughly reformed in the near future since modification would require a two-thirds Parliamentary majority.

4.2 DEFINITION AND CHARACTERISTICS OF STRIKE ACTION UNDER HUNGARIAN LAW; CASES OF UNLAWFUL STRIKES

The Reasoning of the SA states that the rules concerning the right to strike and its exercise are regulated in harmony with international treaties and practice. In 1957 Hungary ratified both ILO Convention 87, concerning freedom of association, and Convention 98 on the Right to Organize and Collective Bargaining. The European Social Charter's sections on the right to organize (Article 5) and the right to bargain collectively (Article 6) and most importantly the right to strike (Article 6(4)) are applicable as well.

The HC provides for the right to strike under the title 'Fundamental Rights and Freedoms' in Section 70/C (2) in connection with the right to work and within the framework of the law regulating such rights. Act VII of 1989 on Strike implements the right to strike, broadly stating that the aim of the strike should be the 'protection of the workers' social and economic interests'. In other words, strike action is not limited to the context of an employment relationship or of collective bargaining.²³ Though it is the workers' right, in reality most strikes are organized by trade unions.²⁴

23. Under the first proposal the wording of the Act was as follows: 'The right to strike is a legal due of the workers – under the conditions provided for by the present Act – for the assurance of their rights originating from employment relationship.' This draft was rejected after lengthy discussions. However, in practice the basis of strike action has been expanded in the last five years. Probably under the influence of this experience some employers' associations and experts have initiated the limitation of the strike's objective. In their understanding a strike is lawful if its target is subject to a possible collective agreement. In other words this understanding is similar to the above-mentioned first proposal of the Act. (See the section on the content of collective agreement afore.)

24. Only trade unions may initiate a sympathy strike. Section 1 (4) In case of a sympathy strike no duty to prior negotiation (Section 2 (1)) exists. Participation in a strike is voluntary; no one can be forced to participate or prevented from doing so. The initiation of a lawful strike, and/or participation in it, does not qualify as a violation of the duties stemming from employment relationship. Participants enjoy legal protection, they may not be fired or otherwise penalized, though naturally – unless the parties otherwise agree – wages are not paid out either. Strike action must be preceded by attempts at conciliation and employers and employees are also obliged to cooperate with each other during the process of strike action. ↵

The right to strike is not absolute; the law provides protection but also limitations for it. First of all, strike action may only be used as a last resort, being the 'ultima ratio' it must be applied when other methods have failed. Secondly the strike always has to serve a purpose, i.e. to improve the social and economic conditions of the workers (Section 1 SA). Thirdly, the nature and immensity of the means applied by the strikers always have to be proportionate with the aim of the strike. It follows directly from the fundamental principle 'the rights and duties... shall be exercised and fulfilled in accordance with their intended purpose'²⁵ that abuse of the right to strike is forbidden.

Labour courts have jurisdiction to rule on the lawfulness or unlawfulness of strike action within five days after a complaint is filed by someone who has a legitimate interest in the settlement of the issue. Under current practice the labour courts examine the question of legality only in relation to ongoing strikes, in other words there is no place for 'preliminary decision.'²⁶ According to the Supreme Court Decision No. 255 of 1991 the sole ground for determining the lawfulness or unlawfulness of a strike is its compliance with the applicable law (i.e. Section 3 of the Strike Act).

A strike is unlawful if it:

- is not related to the protection of the economic and social interests of workers (for example it has a direct political aim);
- fails to exhaust the opportunities for conciliation;
- is initiated with the purpose of amending the provisions of the collective agreement currently in force (breach of peace obligation);
- has unconstitutional objectives;
- is initiated against a specific act or omission of the employer that falls within the jurisdiction of a court.²⁷

Out of the scenarios listed above the breach of the peace obligation and strikes aiming at unconstitutional objectives have to be briefly discussed.

4.3 THE REGULATION OF PEACE OBLIGATION

Peace obligation, i.e. prohibition of strike and other forms of collective actions against conditions fixed in the collective agreement during the lifetime of the

25. Section 4 LC.

26. Budapest Labour Court 21 Mpk. 50.489./2007./7; Budapest Labour Court 55. Mpkfv.631.349/2007/2.

27. Certain groups are not allowed to strike (e.g. organs of the judiciary, the armed forces, armed corps, organs of law enforcement). With organs of state administration, the right to strike may be exercised according to special regulations fixed in the agreement between the Government and the trade unions concerned (such an agreement was concluded in 1994 between the Government and the civil servants' trade unions). Strike action is also unlawful if it would directly and seriously endanger human life, health, corporal integrity or the environment, or would impede the prevention of the effects of natural disasters.

collective agreement exist in almost every Member State.²⁸ In Hungarian labour law there is an extensive tradition of peace obligation. Once the content of the collective agreement have been established, peace must be maintained and the parties must refrain from actions that would compromise the execution of their agreement. Peace obligation is linked to the general duty to act in good faith. In relation to the exercising of the right to strike and peace obligation, this mutual obligation means that as long as the collective agreement is in force the parties may only challenge its content via peaceful means (negotiation, conciliation, mediation, etc.). According to Section 3 (1) d) of the SA, strike action cannot be initiated with a view to altering the provisions of a collective agreement that is still in force. Strike action that infringes this is unlawful. We can see that in Hungarian labour law peace obligation is not regulated via peace clauses in collective agreements but provided by the SA with a general prohibition. This characteristic of the Hungarian system has been scrutinized many times by the European Committee of Social Rights for not being in conformity with the European Charter.²⁹ This regulation of the Act ignores not only the traditions and the organic development of the right to strike, but also the relation between strikes and collective agreements.³⁰ It appears that the legislator prioritised the maintenance of industrial peace and the protection of existing collective agreements. However such a universal limitation is contrary to the very essence of the right to strike.

In relation to this it has to be emphasised that the discussed part of the Strike Act was not found unconstitutional by an earlier decision of the Constitutional Court.³¹ The Court dismissed the claim on this issue, arguing that the prohibition of strike concerned all trade unions and that thus it was neutral towards them. Sólyom notes that indeed the priority of the stability of collective agreements lies behind this decision.³²

28. It is present in both Luxembourg, the role model for industrial peace and in Italy, a country famous for its strikes. On the other hand, the degree of prohibition varies from Member State to Member State. French collective agreements traditionally do not contain a peace clause. Contrariwise, in Germany peace obligations are implied in all collective agreements. In Sweden the institute of peace obligation is undermined; it often cannot be guaranteed. In: A comparison of industrial conflict rules in 10 European countries. Sweden – the country with the broadest scope for industrial conflict. *Svenskt Näringsliv*, 2005, 4. On the contrary, in Belgium peace clauses rely on trust, they have to be respected; even if they are legally enforceable only to certain extent. In: W. Warneck, *Strike rules in the EU27 and beyond. A comparative overview*. ETUI-REHS, Brussels, 2007, 10; T. Novitz, *International and European Protection of the Right to Strike*, Oxford Monographs on Labour Law, 2003, 143, 273–284.

29. Conclusions XVI-1, vol. 1, at 251; Conclusions XVII-1, vol. 1, at 207 (F.R.G.). Cited by: E. Kovács, *The Right to Strike in the European Social Charter*. *Comparative Labor Law & Policy Journal*, Vol. 26, No. 4, Summer 2005. 452.

30. E. Kovács, *ibid.*, 452.

31. See 1061/B/1990. AB.

32. L. Sólyom, *Beginnings of the Constitution Jurisdiction in Hungary (Az alkotmánybíráskodás kezdetei Magyarországon)*, Budapest, Osiris, 2001, 523.

Under Section 3 (1) b) SA, a strike is unlawful if its aim contravenes the Constitution. The official reasoning of the Act does not contain interpretation in relation to this formulation. It can be stated that several cases could fall under this definition. Particular attention has to be paid to any collision between the right of enterprise – as a fundamental right³³ – and the right to strike.³⁴ From our standpoint, in addition to the hierarchy of fundamental rights the relationships between the HC, international law and the law of the European Union have to be examined. The Constitution declares that: 'The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.'³⁵ Apart from the priority of community law, the principle of loyalty and the *effet utile* are also acknowledged by the HC. Article 2/A states that 'by virtue of the Treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union.' From this part of the Constitution it follows that that legislation has to consider community law.³⁶

In this context the aim of the strike (along with the exercise of all collective employees' rights) is 'unconstitutional' if it collides with the above-mentioned rules of the Constitution. However we still do not have an answer to our question, 'In which concrete cases shall a strike be deemed unlawful?'

33. On the legal nature of the right to enterprise under Hungarian Constitution see L. Sólyom, *Beginnings of the Constitution Jurisdiction in Hungary (Az alkotmánybíráskodás kezdetei Magyarországon)*, Budapest, Osiris, 2001, 627-630.

34. Due to the rather vague regulation of the right to strike in Hungary the collision of the two rights is more of a 'fake collision.' See: W. Rübner, *Grundrechtskonflikte*. In: C. Starck (Hg.), *Bundesverfassungsgericht und Grundgesetz*, Tübingen, JCB Mohr (Paul Siebeck), 1976, 452-479.

35. Article 7 (1) of the Constitution of the Hungarian Republic.

36. This rule is known as the 'Europe Clause.' See: *Constitution Annotation (Alkotmánymagyarázat)*. Budapest, KJK. Kerszöv, 2006, 127-131.

5 THE IMPLEMENTATION OF DIRECTIVE 96/71/EC
CONCERNING POSTING OF WORKERS WITHIN THE
FRAMEWORK OF THE PROVISION OF
ESTABLISHMENT AND SERVICES

5.1 RULES IN HUNGARIAN LAW PROVIDED FOR ESTABLISHMENT

The effectiveness of Articles 43 and 49 of the Treaty is secured by several rules in Hungarian law. The most important ones are Act XXIV of 1988 on the Investments of Foreigners in Hungary; Act LXXV of 1988 on Foreigners' Settlement as a Self-Employed Entrepreneur with a Business Objective, and Act CXXXII of 1997 on Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies.

Under Section 1 (1) of Act XXIV of 1988 on Investments by Foreigners, investments and business establishments of foreigners in Hungary shall enjoy full protection and security. Section 1 (1) of Act LXXII of 1998 on foreigners' settlements as a self-employed entrepreneur with a business objective goes as follows: Under this Act a foreigner as a self-employed entrepreneur is entitled to initiate and pursue activities with a business objective in the form of individual entrepreneur defined in a separate act or an individual firm registered by him or in the form of self-employment regulated under subsection (3), under the same conditions as Hungarian nationals, if this right with regard the practice of this right is granted explicitly by international agreement.

In relation to operations of branch offices, Section 9 of Act CXXXII of 1997 on Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies goes as follows: 'Unless otherwise provided for in this Act, a foreign company shall, in respect of the establishment and operation of its branch office, receive the same treatment as a domestic company. In harmony with the international commitments of the Republic of Hungary, different regulations may be prescribed by law with respect to branch offices

- in the interest of protecting any legitimate interests relating to public order, public safety, public health, the stability of the monetary system as well as creditors, account holders, investors and insurance policy holders, which interests cannot be enforced by other means, and
- within the scope and extent justified by the legal and technical differences between the branch offices of foreign companies and the branch offices of domestic economic organizations.'

Regulation of the employment of foreigners in Hungary is connected to these Acts. Some rules of Decree No. 8/1999 (XI.10.) SzCsM on work permits issued to foreign nationals in Hungary also touch upon the freedom of services and establishment. In general it can be stated that the rules on work carried out by foreigners in Hungary do not set a barrier against freedom of services or establishment.

In relation to this topic let us note that in Hungarian law the content of some rules concerning the transfer of the headquarters of a Hungarian company to

another Member State is debated. This discussion is illustrated by the ongoing *Cartesio* case. However, proposals on how to solve the collision between the so called ‘incorporation principle’ and the ‘principle of headquarter’ are on their way for the Hungarian legislator.³⁷

5.2 REGULATION OF TERMS AND CONDITION FOR POSTED WORKERS

With regard to the terms and conditions for posted workers it is necessary to analyse two issues. We must clarify firstly the definitions, i.e. forms of employment, and secondly the content of these rules concerning terms and conditions of employment.

5.2.1 Forms of Employment

In accordance with Article 1(3) of the Directive, three forms of employment are regulated by the LC:³⁸ posting (sending-out), assignment, and temporary agency work (hiring-out of workers).

Posting covers cases when the employer obliges his/her employee for economic reasons to work temporarily at places other than the normal place of work. Temporary assignment covers those cases when the employer obliges his/her employee to perform work on a temporary basis with another employer, based on an agreement between the employers concerned. This does not mean that there will be an employment relationship with the other employer. The condition of an assignment is that there is no fee of any kind involved and that:

- the owner of the other place of employment is also the owner – in part or in full – of the regular place of employment employer, or
- at least one of the two employers holds some percentage of ownership in the other place of employment, or
- the two employers are connected through their ownership in a third organization.

37. M. Király, *From Daily Mail to Inspire Art – the effect of the European Court of Justice on the company law’s ‘choices of value.’* (A Daily Maitól az Inspire Artig – az Európai Bíróság ítéleteinek hatása a társasági jog értékválasztásaira), *Magyar jog*, 2004/11; P. Metzinger, *The headquarter and domiciliation of companies de facto governed from abroad from the angle of European law de lege lata and de lege ferenda* (A de facto külföldi irányítású magyar társaságok székhelye és honossága az európai jog tükrében de lege lata és de lege ferenda.) *Európai jog*, 2006/3; Z. Nemessányi, *Principles regarding legal persons’ domiciliation in the case law of the European Court of Justice* (A jogi személyek honosságára vonatkozó elvek az Európai Bíróság gyakorlatában) In: Z. Nemessányi (ed.) *Articles from the realm of European civil law. (Tanulmányok az európai magánjog köréből)*; Z. Nemessányi, *The sunset of ‘principle of headquarter’? Daily Mail – Centros –Überseering. (A székhely elv alkonya?)* *Daily Mail – Centros –Überseering*, *Európai jog*, 2003/6.

38. See T. Gyulavári, *Directive 96/71/EC concerning posting of workers in the framework of the provision of services* (National report), Budapest, 2006.

It is necessary to point out that posting and assignment are only temporary employment possibilities. According to Hungarian law currently in force the duration of posting and temporary assignment may not exceed 44 working days in a calendar year, unless otherwise specified in a collective agreement. However, even if the collective agreement does take advantage of such an option the parties cannot stipulate indefinite duration or a duration that is unrealistically long and unrelated to the purpose of posting or temporary assignment. Such provisions would be inconsistent with the provisional nature of posting and temporary assignment. A decision of the Supreme Court in 2006 pointed out that 'such part of the collective agreement that specifies the annual duration of work under reassignment as indefinite shall be null and void.'³⁹

Temporary agency employment (or hiring-out work) has been regulated in the LC since 2001. The legal definition is as follows:

- the 'hiring-out of workers' shall mean when an employee is hired out by a temporary employment company or a placement agency to a user enterprise for work (hereinafter referred to as 'placement'), provided there is an employment relationship between the worker and the temporary employment company or the placement agency;
- 'temporary employment company or placement agency' shall mean any employer who places an employee, with whom it has an employment relationship, under contract to a user enterprise for work and exercises the employer's rights and obligations jointly with the user enterprise (hereinafter referred to as 'placement agency')
- 'user enterprise' shall mean any employer who employs a worker hired out by a placement agency and exercises the employer's rights and obligations jointly with the placement agency.'

It is to be emphasized that 'temporary agency work' (the Hungarian LC uses the term: 'hiring-out work') does not only mean temporary employment.⁴⁰ Described in detail:

- in Hungarian labour law it is possible to employ employees by agencies for indefinite periods;
- the parallel existence of a temporary agency contract and a contract of employment for the same duration – particularly fixed term contracts – is not prohibited (known as 'synchronisation');⁴¹

39. Decisions of the Supreme Court (BH) 2006. 300.

40. The concerning part of the Amended Proposal is the opposite of this. Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, Brussels, 27 May 2003 Article 3 (1) c) 'assignment' means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction.'

41. With regard to deregulation or liberalization of temporary agency work in German law (Arbeitnehmerüberlassung) see W. Däubler, Die neue Leiharbeit, Kritische Justiz, 2003, 17-24., A. Kokermoor, Neuregelung der Arbeitnehmerüberlassung durch die Hartz-Umsetzungsgesetze, NZfA, 2003, 238-244.

- the equal pay for equal work requirement has to be applied only after a certain time has elapsed.⁴²

5.2.2 Terms and Conditions of Posted Workers

Unless otherwise prescribed by international private law the LC shall apply to all employment relationships on the basis of which work is performed in the territory of the Republic of Hungary, as well as to work performed by an employee of a Hungarian employer abroad under temporary status. The rules of international private law are regulated by Law-Decree No. 13 of 1979 (LD). Under sec 51 LD employment relationships shall be governed by the law selected by the parties at the conclusion of the employment contract or subsequently. If the governing law is not specified the employment relationship shall be governed by the law of the country where:

- the employee habitually carries out his/her work, even if temporarily employed in another country; or
- the business establishment that employs the employee is located, if the employee does not habitually carry out his/her work in any one country, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract is to be governed by the law of that country.

42. Under Section 193/H (9) LC 'Under the duration of placement the provisions of Section 142/A shall apply mutatis mutandis for workers employed by the user enterprise under contract and for hired-out workers as regards personal basic wage, shift supplements, remuneration for special work, and payment for stand-by or on-call duty, if:

- a) continuous employment at the user enterprise is in excess of one hundred and eighty-three days; or
- b) the hired-out worker has worked under arrangement by a placement agency at the user enterprise a total of not less than one hundred eighty-three days within the two-year period before commencing work at the user enterprise. If the aggregate duration of employment at the user enterprise under arrangement by a placement agency reaches the one hundred eighty-three-day threshold during a subsequent placement, the above provision shall apply as of the one hundred eighty-fourth day. Under Section 193/H (10) LC. By way of derogation from what is contained in Subsection (9), the provisions of Section 142/A shall apply as regards the benefits referred to in Subsection (3) of Section 142/A for workers employed by the user enterprise under contract and for hired-out workers, if:
 - a) continuous employment at the user enterprise under a fixed-term placement arrangement is in excess of two years; or
 - b) continuous employment at the user enterprise under an unfixed-term placement arrangement is in excess of one year.

With regard to the definition of 'wage' Section 142/A (3) LC goes as follows 'For the purposes of this Act "wage" shall mean any remuneration provided to the employee directly or indirectly in cash or kind, as well as social benefits, based on his/her employment.'

In this context it is important to highlight that the extent of the ‘rule of choice’ is limited. Section 1 (4) LD states that ‘The choice of law made by the parties shall not result in any detriment regarding the protection of employees afforded by the law that is to be applied in accordance with Subsection (2).’

The special provisions for posted workers are in Sections 106/A-106/B of the LC. These sections make reference to those provisions of the LC which shall be applied to posted workers. As regards the employment – by virtue of agreement with a third party – of a foreign employer’s employee in the territory of the Republic of Hungary in accordance with the provisions of Sections 105 (posting), 106 (assignment) and Chapter XI (temporary agency working), such employee shall be subject to Hungarian labour laws, with the exceptions set forth in Subsection (3), in terms of:

- maximum working time⁴³ and minimum rest periods;⁴⁴
- minimum annual paid leave;⁴⁵
- minimum wages;⁴⁶
- conditions of the hiring-out of workers;⁴⁷
- occupational safety;⁴⁸
- access to employment or work by pregnant women or women who have recently given birth, of children and of young people;⁴⁹ furthermore
- the principle of equal treatment.⁵⁰

With relation to the application requirements of the Directive, Section 106/A (2) is significant. Under this rule regarding employers engaged in construction work that involves building, ‘remodelling’, maintenance, alteration or demolition of buildings, thus particularly excavating, earthwork, actual building work, the assembly and dismantling of prefabricated components, fitting and installations, renovation, restoration, dismantling, demolition, maintenance, upkeep, painting, cleaning works and improvements, in terms of the requirements specified in Subsection (1) the workers employed for these activities shall be subject to collective agreements covering the entire industry or an entire sector instead of legal regulation, provided the given collective agreement provides more favourable conditions concerning the entitlement in question.

43. Section 117/B LC.

44. Section 122–124 LC.

45. Section 131 LC.

46. The minimum wage is fixed by government decree. See 316/2005 (XII. 25.) Korm. Rendelet. Under Section 106/A (4) the minimum wage shall cover the personal basic wage, the consideration paid for special work duty and the remuneration paid for working abroad. Supplemental payments to pension funds and the part of reimbursed expenses in connection with work abroad, such as the costs of travel and room and board, that are not subject to personal income tax, shall not be included in the minimum wage.

47. Part III. Chapter XI LC.

48. Section 1 of Act 93 XCIII of 1993 on Labour Safety.

49. Section 121, 127 (6), 129/A.

50. Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunity. <

Domestic employers must ensure that the provisions of terms and conditions are applied to employees posted at their facilities by foreign employers.⁵¹

6 CONCLUSIONS

6.1 ASSESSMENT OF THE REGULATION OF FREEDOM OF ESTABLISHMENT WITH A VIEW TO EC LAW

In Hungarian law no regulation or sectoral collective agreement prohibiting or limiting the presence of foreign enterprises or employees in Hungary exists. The establishment of Hungarian enterprises shall be treated with the above mentioned reservations and doubts (See 5.1). We are unaware of collective agreements, be they local or sectoral prohibiting or limiting establishment abroad.⁵²

Regarding the terms and conditions of employment, in our opinion the Hungarian regulations analysed in this study fully comply with the requirements of the Treaty and the Directives. Under Article 3 (1) 'Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex'. In Hungarian labour law terms and conditions of employment are regulated in the LC. Sections 106/A – 106/B content and as well ensure the minimum terms and conditions for the 'posted employees.' The provisions of the LC on 'posted employees' or 'posted workers' cover all foreign employers and no distinction is made between undertakings established in a Member State and undertakings established in a non-member State.⁵³

Whereas the legislator did not decide on deviation from the requirement of the Directive, collective agreements or arbitration award which have been declared universally applicable may do so (Article 3 (8)). As we analyzed above, Hungarian labour law is based on statutory regulation and the concerning extended collective agreement purely duplicates the wording of the LC (See point 3.3).

51. For the analysis of litigation and sanctions see T. Gyulavári, Directive 96/71/EC concerning posting of workers in the framework of the provision of services (National report), Budapest, 2006.

52. In our opinion a collective agreement with such content falls outside the realm of the problem raised by the examined cases.

53. Sections 106/A-106/B LC. See T. Gyulavári, Directive 96/71/EC concerning posting of workers in the framework of the provision of services (National report), Budapest, 2006.

6.2 ASSESSMENT OF THE REGULATION OF EMPLOYEE'S RIGHT AND FREEDOM OF COLLECTIVE ACTIVITY

Collective employee's rights are regulated in the LC in detail. In the structure of Hungarian collective labour law, trade unions and the system of collective agreement enjoy priority. Regarding the exercise of all rights and duties Section 4 (1) LC must be applied.⁵⁴ This principle is of utmost importance from the aspect of the right to veto.

In providing detailed regulations the LC also limits the employees' collective rights. Thus, if an employer has fulfilled its duty to provide information, the trade union cannot exercise its right to veto the reconstruction of the enterprise abroad, because such a decision does not constitute 'decisions of the enterprise/employer subject to veto.'

As far as the right to strike is concerned, our starting point is that although the SA defines the legal ground for strike action relatively broadly, this right is far from being unlimited. In the discussed context two factors are relevant when deciding the lawfulness or unlawfulness of a strike: one is the regulation of the peace obligation, while the other is the differentiation AG Maduro makes between forms of collective action.⁵⁵ Starting from here, in our opinion the current Hungarian regulations can be characterised as follows:

- trade union action against any provision of the collective agreement while it is still in force is deemed unlawful (following from the peace obligation);
- trade union action against the entrepreneur's aim to remodel its activity fully or partially abroad is not *per se* unlawful;
- trade union action to ensure that the employer that has partially remodelled its activity abroad concludes the same agreement in that given foreign country as the agreement in force between the trade union and the employer is unlawful;
- trade union action to extend the application of the conditions of the collective agreement to posted workers is unlawful under Hungarian regulations currently in force;
- trade union action to force the posted workers' employer to quasi join the collective agreement of the employer in the hosting country is unlawful.

54. 'The rights and duties prescribed in this Act shall be exercised and fulfilled in accordance with purpose for which they are intended.'

55. See the Opinion of Advocate General Maduro in the Viking Case, para. 62. ↵