LATEST AMENDMENTS TO LAW NO 62/2011 ON SOCIAL DIALOGUE ENACTED BY LAW NO 1/2016

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Abstract

Law no 62/2011 regarding the social dialogue is the most important regulation of the collective labor relations. Since 2011, when it was adopted, Law no 62/2011 was modified several times, the last legislative intervention being done by Law no 1/2016. The main modification are regarding the following aspects: method of payment by the trade union's members of their monthly subscription; new rules regarding the possibility of the trade union or employer to affiliate at a higher level organization; the rules regarding the employers and employer's representatives in the collective bargaining.

Keywords: *social dialogue, social partners, collective bargaining, dues paid by union members, representativeness of the trade unions.*

I. Introduction

1. It is indeed salutary that the lawmaker is permanently concerned to identify and legislate the regulatory solutions necessary for improving the manifestation of social dialogue. Traditionally, the social dialogue institution is defined as the voluntary process through which the social partners not only inform and consult one another, but also negotiate in order to establish agreements on issues of common interest[1].

On numerous occasions, legal doctrine has emphasized the role and functions of social dialogue in any democratic society based on a market economy, this institution being qualified as a prerequisite, an axiom of economic and social development[2]. From another perspective, it is stated that social dialogue at national level requires a forum of discussions and negotiations that go beyond issues relating to employment; social dialogue is also manifested in connection with professional relations and social protection, as only in this way the effects of globalization on macroeconomic and social policies[3] can be analyzed, assessed, acquired, or where appropriate, counteracted.

2. Based on this theoretical background, which gives special value to the institution of social dialogue in its effort to mitigate the often divergent positions manifested by the social partners, the Labour Code – Law no. 53/2003[4], stipulates in art. 211 that procedures for consultation and permanent dialogue between social partners are legally regulated so that stability and social peace could be fostered.

The legislative framework the Code refers to currently comprises the following normative acts:

- Law no. 62/2011 on social dialogue[5];
- Law no. 67/2006 on the protection of employees' rights in the event of transferring undertakings, businesses or parts thereof[6];
- Law no. 467/2006 on establishing a general framework for informing and consulting employees[7].

In the future, the lawmaker is to intervene in order to group in a single normative act – *the Labour Code* – all aspects referring to how (individual or collective, respectively) employment relationships, including those relating to social dialogue, start, manifest or terminate.

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[1] For further details, consult I. Sorică, *Social Dialogue*, in I.T. Ștefănescu (coordinator), *Labour Law Dictionary*, Universul Juridic Publishing House, Bucharest, 2014, p. 149-150.

[2] For further details, see I.T. Ștefănescu, *Theoretical and Practical Labour Law Treatise*, 3rd Edition (revised and improved), Universul Juridic Publishing House, Bucharest, 2014, p. 102.

[3] For further details, see Al. Țiclea, *Labour law Treatise. Legislation. Doctrine. Jurisprudence*, 8th Edition (revised and improved), Universul Juridic Publishing House, Bucharest, 2014, p. 135.

[4] Republished in *National Gazette of Romania*, Part I, no. 345/18.05.2011, as subsequently amended and supplemented.

[5] Republished in *The Official Gazette of Romania*, Part I, no. 625/31.08.2012, as subsequently amended and supplemented.

[6] Published in *The Official Gazette of Romania*, Part I, no. 276/28.03.2006. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, published in *The Official Journal of the European Communities* (OJEC), no. L 82/ 22 March 2001, is transposed into Romanian legislation, via this normative act.

[7] Published in *The Official Gazette of Romania*, Part I, no. 1006/18.12.2006. 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, published in *The Official Journal of the European Communities* (OJEC), no. L 820/ 23 March 2002, is transposed into Romanian legislation, via this normative act.

II. 1. The legal instruments specific to social dialogue are mainly regulated by law no. 62/2011. This normative act was adopted in the context of the legislative changes that marked the economic crisis in Romania (2009-2013). This legal document represented a significant setback in terms of union activity and collective bargaining (especially by suppressing both the level of negotiation and the possibility of concluding the single collective bargaining agreement at national level).

The memorandum of reasons itself points to the following:

- "The way that social relations between employers, on the one hand, and employees, on the other hand, were regulated by Law no. 62/2011 on social dialogue, republished, as subsequently amended and supplemented, practically dismissed the possibility to exercise the fundamental right to collective bargaining for the overwhelming majority of employees in Romania, which contradicts the Constitution of Romania (...)[8]";
- "A drop of almost 40% in the number of collective agreements concluded in a year at business level represents a decrease of paramount importance, demonstrating that the national legislation does not encourage the development of collective bargaining, quite the contrary. There will be major consequences if this situation is postponed indefinitely instead of being remedied as soon as possible.[9]"

Ever since drafting the bill for Law no. 62/2011, in a document entitled 'Memorandum of ILO technical comments on the draft Labour Code and the bill on social dialogue in Romania", the International Labour Office expressed the following view: "Regarding the criteria of representativeness which must be fulfilled for collective bargaining to take place at business level, which for the most part are not consistent with the ratified Conventions no. 98, no. 154, no. 135, according to the current bill, namely art. 132, representativeness threshold increases to 50% + 1 for collective bargaining at business level. This would mean that unions at business level could engage in collective bargaining only if they represent at least 50% + 1 of the employees. In accordance with art. 128 para. (2) and art. 135 para. (4) minority unions that do not meet this threshold shall be able to engage in collective bargaining, only if the members of their federation participated, provided that their business union represents 30 percent of the employees and their federation is acknowledged as representative within the respective field of trade. When unions do not meet these cumulative criteria, neither at business level and nor at the level of their field of trade, collective bargaining will take place only with the elected representatives of the employees, for whom no criterion of representativeness is established. ILO anticipates that it may be difficult to achieve these new thresholds and, therefore, it will mean that, in reality, collective bargaining will take place especially with workers' representatives, thereby undermining unions established in the business. This situation would neither allow the promotion of collective bargaining within the meaning of art. 4 of the Convention no. 98 and nor would it be consistent with the Convention relating to employees' representatives, no. 135/1971 or with the Convention on collective bargaining no. 154/1981, both ratified by Romania, which contain explicit provisions guaranteeing that, when in the same business there are both union representatives and elected representatives, appropriate measures should be taken so as to ensure that the existence of elected representatives is not used to undermine the position of the existing trade unions"[10].

2. The legal doctrine signalled both loopholes and ambiguous solutions that Law no. 62/2011 has instituted. Actually, the lawmaker's intervention was and is still necessary to establish rational normative solutions, to ensure a balance between the parties involved in employment agreements. A first step in this regard is the adoption of Law no. 1/2016 amending Law no. 62/2011.

In the current study, we will comparatively present the rules which were amended, the new rules introduced by the lawmaker, we will try to explain the rationale behind the normative act and to determine the future effects of applying the new solutions.

III. Specifically, amendments and supplements to Law no. 62/2011 refer to the following:

1. Prior to Law no. 1/2016's coming into force, art. 1 (r) defined the sectors of activity (higher maximum level that a collective bargaining agreement can be negotiated and concluded) as sectors of the national economy grouping domains defined in the Romanian Code on the National Classification of Economic Activities (NACE). The activity sectors are established by Government decision, after consulting the social partners.

The normative act which specifically established the sectors of activity was the Government Decision no. 1260/2011 on the sectors of activity established under Law no. 62/2011[11].

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[8] According to art. 41, para. (5) in the Constitution of Romania, the right to collective labour bargaining and the binding force of collective agreements are guaranteed.

[9] Under these circumstances, it is interesting to point out that the bill was filed with the Chamber of Deputies as early as 2013.

[10] See Memorandum of reasons for the bill ammending and supplementing Law no. 62/2011 on social dialogue, http://www.cdep.ro/proiecte/2013/400/60/0/em788.pdf.

[11] Published in *The Official Gazette of Romania*, Part I, no. 933/29.12.2011.

Currently, the sectors of activity are defined as the sectors of the national economy which are established by the National Tripartite Council, and they are approved by Government decision.

The amendment was meant to change the way in which the sectors of activity are established, by involving the National Tripartite Council in this process. This institution – the result of the formalized social dialogue – is an advisory body to the social partners at national level. It is composed of (in accordance with art. 76 of Law no. 62/2011):

− presidents of nationally representative confederations of employers and unions;

− government representatives, appointed by the Prime Minister's decision, at least at the level of secretary of state, from each ministry, as well as from other public sector bodies, as agreed with the social partners;

− the representative of the National Bank of Romania, the chairman of the Economic and Social Council and other members agreed with the social partners.

The National Tripartite Council is chaired by the Prime Minister, and its deputy is the Minister of Labour, Family and Social Protection.

The main tasks of the National Tripartite Council are:

− providing consultation framework for setting the minimum wage guaranteed for payment;

− discussing and analyzing projects for programs and strategies, developed at government level;

− developing and supporting the implementation of strategies, programs, methodologies and standards in the field of social dialogue;

− resolving social and economic disputes through tripartite dialogue;

− negotiating and signing agreements and social pacts, as well as other arrangements at national level and monitoring their implementation;

− analyzing and, where appropriate, approving requests for extending the application of collective bargaining agreements at sectoral level for all the companies in the respective activity sector.

Besides these tasks, the National Tripartite Council is also supposed to establish the activity sectors, which is meant to ensure a better delimitation of these negotiation levels, based on the needs of the social partners who are directly concerned.

2. Art. 24 read as follows: "Dues paid by union members are deductible provided they do not exceed 1% of their gross income, according to the Tax Code".

Currently, art. 24 reads: "(1) At the request of and in agreement with the trade union members, employers will withhold union dues on the union members' monthly payrolls and they will transfer union dues to the union account. (2) Dues paid by union members are deductible, provided they do not exceed 1% of their gross income, according to the Tax Code".

Dues paid by union members represent the main means of financing the activities of trade unions. For this reason, the collection of union dues directly by the employer by withholding and transferring the respective amounts is an advantage for trade unions since, when the employer pays the employees' wages, the trade union will get the union dues paid by their members. In this way, trade unions will no longer need to dedicate a part of their activity to collecting union dues from their members, which might prove a difficult process, as it involves allotting important human and material resources.

3. a) In order to regulate the association forms for trade unions, art. 41 of Law no. 62/2011 was supplemented with a new paragraph numbered (5), reading as follows: "A union may be affiliated to only one trade union federation, at national level. Also, a trade union federation may be affiliated to only one trade union confederation, at national level."

In this manner, a frequent problem in the activity of trade unions – in the past, many of these organizations opted for dual affiliation – was solved. Such an option is no longer possible, as only one affiliation for both unions and union federations is now permitted.

If a trade union affiliated to a trade union federation, or a union federation affiliated to a trade union confederation opts for a new affiliation, to another federation or confederation, it is considered that, by this manifestation of will, the former affiliation to the previous federation or confederation will cease *ipso jure*.

b) The solution was symmetrically regulated for employers' organizations: under the newly introduced paragraph (4^1) of art. 55 of the Law, "an employer may be affiliated to only one employers' federation, at national level. Moreover, an employers' federation may be affiliated to only one high ranking employers' confederation."

4. The main modification made by Law no. 1/2016 refers to the representation of parties in negotiating and concluding the collective bargaining agreement. In this point of law, art. 134 of Law no. 62/2011 read as follows:

"The parties of the collective bargaining agreement are the employers and the employees, who are represented in the negotiations as follows:

A. on behalf of the employers:

a) at business level, by its management body, established by law, articles of association or functional regulations, as applicable;

b) at business group level, by employers who have the same main object of activity, according to NACE code, being set up voluntarily or under the law;

c) at the level of the sector of activity, by the employers' organizations, legally constituted and representative under this law.

B. on behalf of the employees:

a) at business level, by the trade union, legally constituted and representative under this law, or by the representatives of the employees, as applicable;

b) at business group level, by trade union organizations, legally constituted and representative at the level of the businesses, members to the group;

c) at the level of the sector of activity, by trade union organizations, legally constituted and representative under this law. "

Currently, art. 134 reads:

"The parties of the collective bargaining agreement are the employer or the employers' association and the employees, by trade union organizations, represented as follows:

1. The employer or employers' organizations:

a) at business level, by its managing body, established by law, articles of association or functional regulations, as applicable;

b) at the level of sector of activity and business groups, by employers' organizations, legally constituted and representative under the law;

c) at the level of budgetary institutions, public authorities and institutions which have authority over or coordinate other legal persons employing workforce, by the manager of the institution, the managers of the public authorities and institutions respectively, as applicable, or by managers of public institutions and authorities, where appropriate, or by *de jure* deputies thereof;

d) at the level of the sector of budgetary activity, by the legal representative of the competent central public authority.

2. Employees:

a) at business level, by legally constituted and representative unions. If the union is not representative, representation is made by the federation to which the union is affiliated, if the federation is representative for the sector to which the business belongs; in situations where there are no unions by the elected representatives of the employees;

b) at the level of the business groups and the sectors of activity, by trade union organizations, legally constituted and representative under the law;

c) at the level of budgetary institutions, public authorities and institutions which have authority over or coordinate other legal persons employing workforce, by the trade union organizations, representative under the law."

The amendments are mainly aimed at the following aspects:

a) In the case of employers:

- the normative solution concerning the representation of employers at the level of both the business group and the sectors of activity is correlated with the current solution for establishing the sectors of activity (which no longer necessarily relates to the same main object of activity, according to NACE code);
- for the first time, the manner of representation of employers who have the status of budgetary institution or public authority or institution, which has authority over or coordinates other legal persons employing workforce, was expressly regulated (the representation function being assigned to the manager of the institution, the managers of public authorities and institutions respectively, as applicable, or *de jure* deputies thereof);
- moreover, for the first time, the manner of representation of employers belonging to the level of the sector of budgetary activity was expressly established (the representation function being assigned to the legal representative of the competent central public authority).

b) In the case of employees:

- the rule referring to the uniqueness of the trade union representativeness at the level of the employer was repealed; currently, the legal text refers to "representative trade unions" (the plural is used), a circumstance that is likely to allow the existence of two or more representative unions with the same employer;
- as far as the representativeness of the union constituted at the employer's level, at present this status can be obtained just as previously, by meeting the condition of the minimum number of members (at least 50% + 1 of the total number of employees of the respective employer); however, under the current wording, art. 134 para. B(a) states that unless the union is representative, representation is made by the federation to which the union is affiliated, if the federation is the representative at the level of the sector the business belongs to. Thus, the text seems to introduce a *sui generis* form of representativeness, by means of the loan which the union takes out under these circumstances from the federation to which it is affiliated;
- at the level of budgetary institutions and public authorities and institutions, which have authority over or coordinate other legal persons employing workforce, the employees' representation is made by trade union organizations representative under the law.

Unfortunately, the lawmaker has not solved *de plano* the issue of representativeness (as, indeed, it was stated in the memorandum of reasons accompanying the bill), keeping the solution provided by art. 51 (1) (C) (c) of Law no. 62/2011, referring to the necessity of the representative union to have at least half plus one of the employees of the business as members.

5. For certain special categories of employers, art. 138^1 of Law no. 62/2011, newly introduced by Law no. 1/2016 provides the following solutions:

− collective bargaining agreements are also negotiated at the level of autonomous administrations, state-owned companies, assimilated as business groups, as well as at the level of public authorities and institutions, which have authority over or coordinate other legal persons employing workforce. In the case of public authorities and institutions, which have authority over or coordinate other legal persons employing workforce, the collective bargaining agreement is concluded between the manager of the public authority or institution and the unions legally constituted and representative, under the law;

− in the collective bargaining agreements concluded at the level of the sector of activity, for the employees belonging to the budgetary sector, the parties will expressly establish the ways of negotiating the collective bargaining agreements at the level of public authorities and institutions, which have authority over or coordinate other legal persons employing workforce, authorities/institutions being under coordination or subordination with central public authorities.

IV. Conclusion

It is obvious that the legislative intervention enacted by Law no. 1/2016 does not solve the fundamental problems that Law no. 62/2011 generated in the regulatory field of social dialogue. Major shortcomings, ambiguities, contradictions, which hinder the enforcement of the law, still remain and duly occur.

Nevertheless, we consider that the adoption of Law no. 1/2016 represents a first step towards normalizing the regulation of the institution of social dialogue, so necessary for fostering social peace between the parties involved in employment relationships.

Bibliography:

- I.T. Ştefănescu, *Theoretical and Practical Paper for Labor Law*, 3rd Edition, revised and completed, Universul Juridic Editor, Bucharest, 2014;
- Al. Ţiclea, *Paper on Labor Law*, 8th edition, revised, Universul Juridic Editor, Bucharest, 2014;
- I.T. Ştefănescu (coordinator), *Labour Law Dictionary*, Universul Juridic Publishing House, Bucharest, 2014.