CONSIDERATIONS REGARDING COLLECTIVE BARGAINING IN ROMANIA. A THEORETICAL AND PRACTICAL APPROACH

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Abstract: *This study will analyze the situation of collective bargaining in Romania. Collective bargaining has a special role to play in ensuring social peace within society. Good collective bargaining able to secure state consensus between employees and employees is a decisive factor in social progress. Advantages concern both the business environment and those who work. In Eastern Europe, given the influence of multinational companies, the social rights legislation has suffered a regress, as evidenced by the small number of collective labor contracts concluded over the last 7 years, and from the time of the major change in labor law. The present study includes the theoretical and practical analysis of the current situation in the field of social dialogue, while presenting alternatives for improving the legislation on collective bargaining, ensuring a real image of the situation in this field within a representative state in Eastern Europe.*

Keywords: *collective bargaining in Romania, social rights, collective labor contracts, labor legislation*

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1. Introduction

The negotiation represents an essential component of the social life, being closely related to one of the main characteristics of the human being, namely the sociability. The negotiation is always present in each person's life, being used both to fulfil persons' individual goals and to regulate aspects of common interests (e.g. votes for the parliament laws or other legal acts which determine the norms by which the company runs, which are often the result of negotiations between the political factors).

Along with the development of international relations, negotiation has acquired a greater role in the geopolitical matter, the destinies of international societies represent largely the result of negotiation between the world`s great powers[2]. Regarding the labour relations, the collective negotiation has established itself as an essential tool in social dialogue, having a significant function for social peace building[3].

The social dialogue is defined by the legislator in art. 1 letter b) of Law no. 62/2011 (of the Social Dialogue)[4] as being the "voluntary process by which the social partners inform, consult and negotiate to each other in order to establish agreements in matters of common interest". The social dialogue can be bipartite (when it occurs only between trade unions or trade union organizations and employers or employers organizations) or tripartite (when in the social dialogue are involved the public administration authorities too).

The social dialogue can be achieved through information, counseling and collective negotiation. Law no. 62/2011 (of the Social Dialogue) defines in art. 1 letter b) (iii) collective negotiation as "negotiation between the employer or employers association and trade union or employees' association, as appropriate, which seeks to regulate the labour or employment relations between the two parties, as well as any other agreements in matters of common interest ". A successful collective negotiation results with the signing of the collective labour agreement, which confirms the effectiveness of social

2 See in this sense R.Ş. Pătru. (2014). *Contractele şi acordurile colective de muncă*. Bucharest: Hamangiu Publhing House, p. 43-44.

3 Term of collective negotiation is of British origin and it was first used by Beatrice Webb at the end of XIX century. See also B. Vartolomei. (2016). *Dreptul muncii, Curs universitar*. Bucharest: Universul Juridic Publishing House, p. 40.

4 Law no. 62/2011 (of Social Dialogue), republished in the Official Gazetteno. 625 from 31st August 2012 pursuant to art. 80 Law no. 76/2012 to implement the Law no. 134/2010, regarding the Civil procedure code (Official Gazette no. 365 from 30th May 2012).

dialogue. Effective social dialogue results in the achievement of social peace, which can be defined as a state of understanding (harmony) between the main social parts in the society[5].

In Romania, collective negotiation was first regulated in the Law on employment contracts in 1929. Later, this concept was found in Labour codes of 1950 or 1973, but being thus marked by the restrictions specific to socialist society[6]. After 1989, by Law no. 13/1991 regarding the collective labour[7] contract, we can see a revival of collective negotiation, as well as the entire collective labour law, which is specific to the transition to a market economy.

Law no. 130/1996 regarding the collective labour agreement[8] represented an important moment of collective negotiation legislation in Romania, being considered as the best regulation on the matter after 1989, this is being confirmed by the number of collective labour agreements concluded by unit groups and activity branches, but also by the Collective labour agreement at national level for the years 2007-2010.

2. Collective negotiation under the Law no. 62/2011 (of Social Dialogue)

Year 2011 was a very important year for labour legislation, mainly due to the entry into force of Law no. 40/2011 and Law no. 62/2011 which have largely reshaped the provisions of labour legislation. Law no. 40/2011 amending and completing the Law no. 53/2003 – Labour Code[9], brought important changes especially in the legal regime applicable to the employment contract. By Law no. 62/2011 (on the Social Dialogue) was achieved a division in the regulatory area between the individual and collective labour law, which are currently regulated separately. Thus, the Labour Code remained mainly a code of employment contract, while the aspects regarding the collective labour law were taken up by Law no. 62/2011 (of the Social Dialogue). Moreover, by the Social Dialogue Law a number of important institutions of collective

5 See also Georgeta Codreanu.(2017). *Dialogul social şi pacea socială*. Bucharest: Tribuna economică Publishing House, p. 27.

6 In that period, the collective negotiation followed by the conclusion of collective labour agreements had a formal role, and some rights belonging to the collective labor law, such as strike could not be exercised.

7 Published in the Official Gazette no. 32 on 9th February 1991.

8 Published in the Official Gazette no. 184 on 19th May 1998.

9 Published in the Official Gazette no. 225 on 31st March 2011.

labour law have been amended. Further on, we will present the main changes introduced by Law no. 62/2011 concerning the collective negotiation:

1. Since 2011, the law authority has not allowed the conclusion of collective labour agreement nationally. Thus, art. 128 par. (1) of Law no. 62/2011 stipulates the following: "the collective labour agreements can be negotiated in units, unit groups and activity sectors". The social partners are thus deprived of an important negotiation level which in proved its efficiency the past, mainly by the provisions of Collective labour agreement at national level concluded for the period 2007-2010[10], which included a series of relevant provisions.

Note that the Romanian Constitution, art. 41 par. (5) establishes that "The right to collective negotiation in terms of labour and the mandatory aspect of collective agreements are guaranteed" without adding and extension "according to the law", which means that this right should be exercised by the social partners no restriction, at all possible levels. That was just one of the reasons why the Law no. 62/2011 was disputed in the Constitutional Court in 2011. The Court answered by a controversial decision by giving constitutionality to the contested provisions[11]. Given the mandatory characteristic of the Constitutional Court decisions, the contested provisions remained in force being applied today.

2. Another important change is about the representativeness of trade unions established at unit level, which gained representativeness only if the number of members represents half plus one of the employees in that unit. The old provision of Law no. 130/1996, the trade unions had to have a representation threshold of 1/3 of the number of employees. This provision was judicious, setting a reasonable threshold for the trade unions. In the current regulation, given the degree of unionisation in Romania, for trade unions it is difficult to achieve representativeness regarding the number of employees, this clearly makes harder the collective negotiation.

Moreover, the legislator's option to establish a single trade union representative for the unit is in contrary to the principle of trade unions

10 Published in the Official Gazette, Part 5 no. 5 on 29th January 2007.

11 Decision no. 574 on 4th May 2011 regarding the unconstitutionality of the provisions in Law on Social Dialogue as a whole, as well as, especially art. 3 paragraphs. (1) and (2) art. 4 art. 41 par. (1) Title IV regarding the National Tripartite Council for Social Dialogue, title V on the Economic and Social Council, Art. 138 par. (3), art. 183 par. (1) and (2) art. 186 par. (1), Art. 202, art. 205, art. 209 and art. 224 lit. a) of the law, published in the Official Gazette no. 368 on 26th May 2011.

pluralism[12]. Also, there is a risk of so-called "homemade" trade unions, true to employer's interests that the new regulation negotiates to conclude collective labour agreement with just one trade union and not with 3 as in the old legislative provided[13].

Provisions of Law no. 62/2011 (of the Social Dialogue) on the representativeness of trade unions for units were contested at the Constitutional Court. The Court, by the Decision no. 1089/20123[14] and Decision no. 24/20134[15] rejecting the pleas of unconstitutionality regarding laws on the representativeness of trade unions for units, establishing thus that the contested law texts are constitutional.

However, the Constitutional Court's approach on the matter is not protected from critics. Constitutional Court's reasoning was based on the following arguments[16]: 1) trade unions have a discretionary right to participate in collective negotiations and the conclusion of collective labour agreement, to establish the conditions related to the exercise of these rights is the prerogative of the legislator; 2) also, the legislator has the right to set the threshold of representativeness to be achieved by the trade unions, this is therefore a legislator's policy; 3) legal provisions do not affect the trade unions function, on the contrary they will have a stronger representation in front of employers; 4) the legal provisions are intended to equalize the employees' representation with employers, because in cases of multiple trade unions there is a risk of contradiction of opinions within the trade union representatives, this being anachronistic.

The solution brought by the Constitutional Court is objectionable because it is mainly based on formal, procedural analysis of the aspects regarding the representativeness of the parties, and not on substance analysis. It is true that the legislator establishes the conditions under which the trade unions get representativeness and may participate in collective negotiation and in the conclusion of collective labour agreement, but the Court had to decide on how the legislator has exercised that right, and more specifically, if the legislator has not violated other provisions setting a high representation

12 See I.T. Ştefănescu.(2014). *Tratat teoretic şi practic de drept al muncii – ediţia a III a revăzută şi adăugită.* Bucharest: Universul Juridic Publishing House, p. 160.

13 *Ibidem*, p. 159.

14 Published in the Official Gazette no. 75 on 5th February 2013.

15 Published in the Official Gazette no. 82 on 7 February 2013.

16 See also I.T. Ştefănescu, *op.cit.,* p. 160.

threshold (e.g. pluralism principle of trade union) or concerning the risks arising from a threshold so high (difficult collective negotiation)[17].

3. Law no. 62/2011 (on the Social Dialogue) replaced the branch activity with the activity sectors, which, in the original law form, were established by a government decision[18]. Currently, according to Law no. 1/2016 to amend and complete Law of social dialogue no. 62/2011[19], activity sectors are established by the National Tripartite Council for Social Dialogue and approved by government decision.

The legislator established in the art. 143 par. (3) of Law no. 62/2011 that "in case of contracts negotiated at activity sectors, the collective labour agreement will be made at that level only if the number of employees in the members units of the signatory employers' associations is greater than half the total number of employees in the business sector. Otherwise, the contract will be registered as a contract of group of units." This explains the small number of collective labour agreements signed at activity sector under the Law. 62/2011 (the Social Dialogue).

4. The legislator has expressly established the fact that the provisions of collective labour agreements signed at group and activity sectors units applies only to the contracting parties. Thus, art. 133 par. (1) of Law no. 62/2011 (of the Social Dialogue) provides the following: "The clauses of collective agreements have effects as follows: a) for all employees in the unit, in case of collective labour agreements signed at this level; b) for all employees occupied in units which are part of the group of units for which the collective labour agreement was signed; c) for all employees occupied in the business sector units for whom the collective labour agreement was signed and who form part of the signatory employers association of the contract." For collective labour agreements signed at sector activity, the legislator established for the first time the institution to extend the collective effects of all units in the sector (art. 143 par. (5) of Law no. 62/2011)

5. It was introduced, as new, the possibility that the social partners could conclude other contracts, conventions and agreements, other than collective labour agreement. In this respect, art. 153 of Law no. 62/2011 (of the Social Dialogue) determines the following: "according to the principle of mutual

17 See also I.T. Ştefănescu, *op.cit.,* p. 160.

18 Government Decision no. 1260/2011, published in the Official Gazette no. 933 on 29th December 2011 established the activity sectors.

19 Published in the Official Gazette Part I, no. 26 on 24th January 2016.

recognition any legally constituted trade union may celebrate with an employer or an employers' association or any other types of contracts, conventions or agreements, written, and that represents the parties' law and whose provisions are applicable only to members of the signatory organizations."

It's about labour law contracts signed by the union trade organisations constituted legally, but unrepresentative and which applies exclusively to signing parties[20]. It should be mentioned that, regarding their conclusion, these contracts, conventions and agreements are not applied provisions on collective negotiation, and in case of disagreements between the parties concerning the termination or their execution are not applicable legal provisions concerning labour disputes and strike.

The mentioned legislative changes significantly influenced the process of collective negotiation. The legislator has established as central point in collective negotiating the unit level, the dissolution of the collective labour agreement nationally, without encouraging the collective negotiation at this level, mainly by tightening the legal conditions by gaining representativeness of the trade unions established at unit level[21]. It should be stated that the current regulation gives increased rights to the employees' representative in relation to the trade unions, which is in conflict with the relevant provisions of the International Labour Organisation.

Given the background, the collective negotiation has not conducted satisfactorily, resulting a small number of signed collective labour agreements As example, there are currently in force 5 collective labour agreements at the level of groups units, and at the level of the sector of activity no collective labor agreements are concluded It is a small number of collective labour agreements, which requires certain modifications in legislator's view that would lead to the revival of collective negotiation which is so important to for the society.

In this respect, the doctrine considered that the regulatory scope reserved for collective labor contracts tends to be reduced, being used (as a defensive tool) only to supplement the legally established rights[22].

20 For the detailed analysis of these contracts, conventions and agreements, see R.Ş. Pătru, op.cit., p. 266-273.

21 See information in this sense R.Dimitriu, *Reflecţii privind actuala legislaţie a muncii – Interviu realizat de redacţia R.R.D.M*. in R.R.D.M. nr. 3/2013, p. 17.

22 See R. Dimitriu. *Dreptul muncii. Anxietăţi ale prezentului* (2016). Bucharest: Rentrop&Straton Publishing House.

The same author asserts in a judicious way that the effects of this are devastating[23]

3. Mandatory requirements in governing collective negotiation

To improve the legal regulation of collective negotiation, we consider that the legislator should refer to the following mandatory requirements:

1. Regarding the national sole collective labour agreement

As previously shown, the legislator quit using the national sole collective labour agreement by breaking a tradition of regulation started shortly after Romania had switched to market economy. By this legislator's decision, also made due to the pressure of multinational companies, we have lost an important legal employment institution. Furthermore, the National sole collective labour agreement concluded for the years 2007 - 2010 which contained a series of important provisions for labour relations, it could not be renewed and thus, those dispositions became inapplicable.

Given the background, to improve the collective negotiation in relation to matters concerning national sole collective labour agreement, it is mandatory that the legislator proceeds either to instate it in the Romanian legislative sector or to include it in the labour legislation of the relevant provisions of the contents of the latest collective labour agreement signed nationally, namely for the years 2007-2010[24]. If reintroduction of national sole collective labour agreement in the Romanian legal system is an inexhaustible source of disagreements between the social partners, the second solution appears to be equitable for both sides.

It is therefore about taking over the old sole collective bargaining agreement to a national level of the relevant provisions which complemented labour legislation and their inclusion in the labour legislation. The most important provisions were matters of wage (the most important provisions of the sole collective bargaining agreement mentioned before), in the matter of disciplinary liability (appointing a discipline commission as in case of public clerks), concerning the evaluation of employees for professional inadequacy

23 *Ibidem.*

24 To include the provisions of National sole collective labour agreement for 2007 – 2010 see also I. T. Ştefănescu, *Repere concrete rezultate din recenta modificare şi completare a Codului Muncii,* in "Revista Română de Jurisprudenţă", no. 1/2011, p. 26.

(where a disciplinary committee was usually appointed), regarding the dismissals (defining the phrase "due time", establishing social criteria to be considered for employees' collective dismissal, who, after being tested for performances, are tied)[25]. The mentioned provisions, which contributed significantly to establishing a balance within the labour relations are the result of collective negotiation conducted nationally. Their introduction into the labour legislation would approve on one hand the importance of collective negotiation, and on the other hand the aspects negotiated and agreed mutually by the social partners would still find applicability.

2. Regarding the representativeness of trade unions

Another mandatory requirement necessary for an efficient collective negotiation is to establish a reasonable threshold for the representativeness of trade unions at unit level. Currently, as we have shown, the representation limit is very high, this affects both collective negotiation and trade union movement generally.

The present legislative episode was also found in the previous regulation, the legislator originally established by Law no. 130/1996 the collective labour agreement a limit of half plus one of the employees for acquiring the representativeness of trade unions at the unit level. Being aware of the danger arising from such provision for collective negotiation, the legislator returned the following year by Law no. 143/1997 for the amendment and completion of Law no.130/1996 regarding the collective labour agreements[26] and established the limit of 1/3 in the number of employees, a provision that was maintained until the entry into force of Law no. 62/2011 (of the Social Dialogue).

Currently, we are in the same context as the starting point of the entry into force of Law no. 130/1996, so that the intervention of the legislator in terms of reducing the threshold for representation of half plus one of the employees at 1/3, appears as an mandatory for the purposes of collective negotiation.

3. Regarding the collective labour agreements concluded at activity sector level.

It is obvious that in order to improve the collective negotiation at activity sector, the legislator must waive the excessive condition of art. 143 par. (3) of

25 For the detailed analysis of these aspects, see R.Ş.Pătru, *op.cit*., p. 226 – 234.

26 Published in the Official Gazette no. 172/28th July 1997.

Law no. 62/2011 (of Social Dialogue), so that the level of negotiation should be functional and have concluded as many collective labour agreements as possible in the activity sectors.

Currently, only two collective labour agreements are into force at activity sector level, which confirms that collective negotiation is actually non-existent at this level.

As shown before, by Law no. 1/2016 the necessary skills to establish the activity sectors were decided by the National Tripartite Council for Social Dialogue. This aspect gets the current regulation closer to the previous provisions which established that the activity branches (as they were called previously) were established by collective labour agreement at national level.

Moreover, the recent doctrine it states that "the definition of identity and affiliation to activity sectors is the attribute of the national collective labour agreement and that only under its terms the Government, by decision, is entitled to certify activity sectors"[27].

The solution suggested would, in authors' view, a capitalisation of the subsidiarity principle in the European Union, under which the directives validate agreements between the social partners at European level. Similarly, in the national law, the government decision issued by the state would validate the agreement of the social partners described in the collective labour agreement nationally[28]. Finally, it is considered that if no collective labour agreement is concluded nationally, the activity sectors should be established by written agreement by the trade union confederations and employers' associations nationally[29].

4. *Regarding the agreements, conventions and arrangements set in art. 153 of Law no. 62/2011 (of the Social Dialogue).*

The agreements, conventions and arrangements of art. 153 of Law no. 62/2011 appear as alternatives to collective labour agreements for trade unions legally constituted but unrepresentative.

27 Al. Athanasiu, A.M. Vlăsceanu, *Propuneri de lege ferenda cu privire la negocierile colective şi conflictele de muncă,* in the Book of National Conference *Propuneri de lege ferenda privind perfecţionarea legislaţiei muncii din România*, Sibiu, 10th October 2014, published by Universul Juridic, Bucharest, 2015, p. 137.

28 Al. Athanasiu, A.M. Vlăsceanu, *op. cit*. p. 138.

29 *Ibidem*.

However, the legislator has not regulated judicially these new institutions, allowing them only an article that does not explains entirely the practical issues raised by these new institutions. Mainly, the legislator did not clearly separate these agreements, conventions and arrangements, in terms of content of collective labour agreements. Given this background, the question was whether such agreements may have the same content as the collective agreements.

Although we have previously expressed our belief that in the content, the conventions, agreements and arrangements celebrated in art. 153 of Law no. 62/2011 and collective labour agreements do not differ in the way that they can establish the same clause, however this aspect should be regulated by legislator[30]. Also, the legislator should establish expressly if these agreements, conventions or arrangements may be signed and if there is an applicable collective labour agreement[31].

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30 See R.Ş. Pătru, *op.cit*. p. 277. R.Ş. Pătru, *Clarificări necesare, doctrinare şi legale cu privire la art. 153 din Legea nr. 62/2011 (a Dialogului Social)*, in Book of National Conference *Propuneri de lege ferenda privind perfecţionarea legislaţiei muncii din România*, Sibiu, 10th October 2014, published by Universul Juridic, Bucharest , 2015, p. 174 – 176.

31 R.Ş. Pătru, Contractele şi acordurile colective….op.cit. p. 277 . See also I.T.Ştefănescu, *Tratat teoretic şi practic,* p. 193.

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