DISCUSSIONS ON THE REGULATION OF THE LOCK-OUT IN THE ROMANIAN LEGISLATION

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Abstract: *The lock-out, which represents the employer's right to react in the event of an illegal strike by employees by the closure of the unit, is not regulated by Romanian labor law. This problem it is not regulated at the level of the European Union, and at the I. L. O. given the sensitive of the subject. It is desirable to analyze the usefulness of this labor law institution under the internal law. In the legal doctrine, a series of proposals were made for the introduction of lock-out within the Romanian law system, but this did not happen, the lock-out not being included in the draft of the law on social dialogue initiated by the Ministry of Labor and Social Justice together with the trade union and employers' confederations in January 2018. In this study, we will refer to the usefulness of introducing the lock-out into the Romanian legal system.*

Keywords: *labour legislation, lock-out, employers' rights*
JEL Classification: K31, K35, K30

1. Introductory aspects

Lock-out was defined as a temporary measure adopted by the employer correlative to the strike or the intention to trigger a strike known as "employer strike" and which consists in the total or partial closure of a unit in order to force the employees to accept certain conditions, such as giving up the strike, claiming salary increases, limiting trade union rights, etc[1]. Lock-out represents a reaction of the employers to a strike of employees, which causes damage to the employer.

1 I. Sorica, *Lock-out, in Dicţionar de drept al muncii, Ion Traian Ştefănescu – coordonator* - Universul Juridic Publishing House, Bucharest, 2014, p. 241.

It is obvious that lock-out has a preventive character, but when it is used by the employer to intimidate employees by stopping the legal strike they have started, lock - out is illegal.

This is why the applicability of the lock-out is a controversial aspect, accepted in some countries and completely banned in others, precisely because of the major implications it implies.

Lock-out has a preventive character meaning employer's possibility to answer an imminent strike, or a defensive character meaning.

In the doctrine it was stated that the lock- out can be *offensive* when the employer prevent a strike of the employees by establishing the lock-out, *defensive* when the lock-out occurs as a reaction to a strike of the employees, *totally* when it has the effect of interrupting the whole activity at the level of the employer, *partly* when the interruption of activity does not concern the entire unit, and, *solidarity lock–out,* when it is the result of solidarity with another employer's strike triggered by another employer[2].

2. Lock-out from the U. E. and I. L. O. perspective

The European Union does not regulate in certain aspects of social policy. We refer to lock-out, remuneration, the right to association and the right to strike, these aspects being totally left at member states' discretion.

It has been appreciated that the non-intervention of the European Union in these important areas is a consequence of the applicability of the principle of subsidiarity[3]. It would be very difficult for the European Union to regulate in those areas, which are intimately linked to the internal policy of the Member States. Moreover, we can appreciate that the strike, is a social phenomenon, which varies from state to state, for example in Greece strikes are particularly energetic social movements, while in countries such as Finland or Sweden social movements like strikes are much more temperate.

Similarly, in the matter of lock-out, the E. U. legislator did not want to intervene, allowing states to individually translate this issue.

Similarly, the International Labour Organization does not consecrate any convention or recommendation for lock-out.

It is noteworthy that both international organizations are similarly dealing with this problem, so the ILO does not intervene in major social policy issues, so between those two organizations the provisions in the field of non –

2 B. Vartolomei, *Dreptul muncii. Curs universitar*. Universul Juridic Publishing House, Bucharest, 2016, p. 282.

3 Andrei Popescu, *Dreptul internaţional şi european al muncii,* CH Beck Publishing House, Bucharest, 2008, p. 369.

intervention in major aspects of social policy are correlated.

Finally, we emphasize, that the option of E. U. and I. L. O. of not intervening in these issues is based on the economical social and political reasons regarding the consequences in this areas.

3. Lock-out in the legislation of different states.

On the escape of regulation in domestic law, there are states in which lock-out is forbidden.

In other states it is allowed, however, under strict conditions, and in other states the legislation is more permissive.

In the Russian Federation, Portugal or Greece, the legislator has expressly forbidden the institution of lock-out.

In Germany, consecrated both legally and jurisdictionally, lock-out is possible as an answer to an illegal strike.

In the Czech Republic, lock-out is also possible being expressly regulated with an juridical regime similarly to strike.

Finland and Croatia are other states where lock-out is concretely regulated under the law.

In Japan the lock-out is consecrated exclusively by jurisdictional way.

In Italy, lock-out is not legally consecrated, but is possible as an answer of employer to a strike which creates big problems for the employer, like stopping the activity.

In France, lock-out is not regulated, but is possible in the case of force majeure, like the employer's impossibility to pay wages, or as an answer to an illegal strike.

The United States of America recognize the right to lock-out, as an answer to the illegal strikes initiated by workers being forbidden to violate workers' right to strike through the initiation of lock-out.

4. Lock-out in Romanian legislation

In Romania, lock-out was regulated in the interwar period but after that, this institution was no longer regulated in the internal law.

In the Law on collective labour disputes of 1920 in chapter II entitled "Collective stoppage of work", in art. 4 it is stipulated that "no collective work stoppage for reasons regarding the work conditions, either from employer's initiative or employees' initiative shall occur in any of the industrial or commercial establishments specified below before the pacification procedure has been carried out".

It was the first time when the Romanian legislation permitted the employer to stop the work. The law on employment contracts of 1929 regulated the lock-

out in art. 84 stipulating that "the strike or lock-out does not represent a fair reason for the cancelation of the individual labour contract; yet it is suspended in all its effects throughout the strike or lock-out, except for the advantages in kind that the employee currently has".

In the socialist period, lock-out was not regulated and permitted taking in consideration the specificity of this political regime.

Currently, labor law does not explicitly regulate the lock-out, so the question is whether the lock-out is tacitly admissible in view of the legislator's silence. In the doctrine, previous to the current Labour Code, there is an isolated opinion which consider lock-out possible even if it is not expressly regulated[4].

In our opinion, although in a legal system characteristic of the market economy it can be stated that everything that is not prohibited by law is allowed, in this context, given that the legislator did not expressly regulate this institution it cannot be applied .

We held this opinion considering the importance of this institution, which is a correspondent of the employee strike, so should be exhaustively regulated, and on the other hand, we support our point of view through the analysis of the current legislation.

Law no. 40/2011 introduced a new paragraph in art. 52, namely paragraph (3) stipulating that "In case of temporary reduction of work for economic, technological, structural reasons or others similar for periods that exceed 30 working days, the employer shall have the possibility to reduce the working hours from 5 days to 4 days per week, with the adequate diminution of the wages, until the situation which caused the reduction of working hours has been remedied, after the prior consultation of the representative trade union at unit level or the employees' representatives, as the case may be".

Even if they seem similar, there is a fundamental difference between the above-mentioned situation and the institution of lock-out.

The labor code establishes in art. 40 par. (2) lit. b) employers' obligation to continuously provide employees with working conditions.

This provision appears to be contrary to the lock-out because it does not provide for exceptional situations in which this employer's obligation would no longer be valid, such as for example the force majeure or the response to an unlawful strike.

The employment stability also results from other legal texts like art. 223 letter c) from the Labour Code where employees' representatives must promote employment stability.

4 Ioana Vasiu, *Discuţii despre necesitatea reglementării Lock-out-ului,* Dreptul Magazine no. 9/1993, pages 41-42.

We emphasize that the strike is expressly regulated by the legislator in art. 233 - 236 of the Labor Code and art. 181-207 of Law no 62/2011 on Social Dialogue.

As a matter of fact, the legislature's tendency to permanently regulate the strike while the lock-out was not regulated at all after 1990 reveals other arguments against the applicability of this institution at present.

5. Conclusions

Law no. 62/2011 on social dialogue has brought many novelty issues into collective labor law.

Under this law, important labor law institutions have stagnated and more have entered in a clear regression, and here we refer to collective bargaining and to collective labor contract, and naturally at this moment is in discussion the amending of the Law no 62/2011 – on Social Dialogue.

In this context, the draft of the New Law on Social Dialogue is being submitted to the Government of Romania, meant to significantly improve the current regulation[5].

In the above-mentioned draft law there are no issues regarding the lock-out.

In these circumstances, we consider that a de *lege ferenda* proposal on the inclusion of the lock-out on the agenda of the legislator, would be a necessary decision.

The regulation of lock-out is in line with the most important international documents in the field, such as, Charter Of Fundamental Rights Of The European Union, which provide in art. 28 following: "workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action"[6].

The term collective action does not refer only to the workers, but also to the employers, and if a member state will regulate this in the labor law system, for instance both strike and lock-out, does not infringe the E. U. legislation or tradition of not intervening in the social politic big issues.

Regulating the lock-out would be a fair exercise by the legislator that would also allow the employer to respond to an unlawful action of the employees.

5 For the draft of the New law of Social Dialogue, see http://sm.prefectura.mai.gov.ro/wp-content/uploads/sites/32/2018/01/Proiect-NOUA-Lege-a-dialogului-social-15-dec.-2017-FINAL-orele-13.pdf, verified in 15 May 2018.

6 https://eur-lex.europa.eu/legal-content/EN-LT/TXT/?uri=CELEX:12012P/TXT&from=RO.

However, we must emphasize that the lock - out regulation must not pose a threat to the right to strike of employees, but should be of a purely defensive character - a response to an illegal strike of employees.

As stated in the doctrine, we agree that the lock-out should be expressly regulated and possible under the following conditions[7]:

- lock-out should be only defensive as a response of an illegal strike of the employees
- lock-out should be totally, because if we are accepting a partially lock-out will appear a discrimination between the employees.

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Legislation

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3. Law no. 62/2011 (on Social Dialogue).

7 B. Vartolomei, *Dreptul muncii…op. cit.* p. 285..