THE DETERMINATION AND THE IMPACT OF THE PREFIGURED MODIFY OF ROMANIAN LABOR CODE ON THE LABOR INDIVIDUAL AND COLLECTIVE RELATIONSHIPS

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Abstract

The Romanian Labour Code – Act no 53/2003 – has been modified several times during its application. The most important modifications were aiming at the following aspects: the termination of the labour contract (especially the individual and collective dismissal and the rightful termination of the contract), the individual labour contract for a limited duration, the work time and the rest time. These modifications were punctual and determined by the necessity of assuring a balance between the position of the employees and the one of the employers. A lot of critics have been formulated by the representatives of the employers after the Labour Code got in force. They consider that the actual regulation is too restrictive for them. It is still extremely favourable for the employees, who are protected by the Code even in situations which are not necessary to assure this protection (professional evaluation, individual dismissal, disciplinary procedure and liability). These were the reasons which determined a constant pressure from the employer's trade unions in relation with the Government in order to modify those parts of the Code which are too favourable to the employees. The draft of the modification act includes the following major aspects: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

Keywords: *Labour Code, labour relationship; individual labour contract; dismissal; disciplinary liability; material liability; non-competition clause.*

1. Introduction

One of the most important field of regulation in Romanian law system is the labour legislation. According to art. 1 paragraph 3 of Romanian Constitution, "*Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed*".

The social character of the Romanian state had determined the special protection of the labour – in generally – and of the workers, especially. The art. 41 from the Fundamental Act – suggestively entitled "Labour and social protection of labour" – settle:

"(1) The right to work shall not be restricted. Everyone has a free choice of his/her profession, trade or occupation, as well as work place.

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(2) All employees have the right to measures of social protection. These concern employees' safety and health, working conditions for women and young people, the setting up of a minimum gross salary per economy, weekends, paid rest leave, work performed under difficult and special conditions, as well as other specific conditions, as stipulated by the law.

(3) The normal duration of a working day is of maximum eight hours, on the average.

(4) On equal work with men, women shall get equal wages.

(5) The right to collective labour bargaining and the binding force of collective agreements shall be guaranteed.".

Based on these principles, the Labour Code – Act no. 53/2003[1] – was built and represent the regulatory body of the labour legislation. Since the first period of application, it was obvious that the regulation is not equilibrate. The rights and the social protection of the employees were (and mostly, are) much more represent in the Law then the rights and legal recognition of the employers' interests.

It was the reason why the Labour Code was successively modified[2]. The Romanian Legislative organisms – both Parliament and Government – had tried to determine a necessary equilibrium between the rights and interests of the labour relations parts: employees and employers.

The global financial crisis and its reflection in Romanian economy and social life has shown that the economic productivity and the labour force flexibility are far to law compared to other countries (form European Union and beyond the European Union).

On this background, the social partners – trade unions, employers' representatives and the representatives of the Government – decided to identify the possible modification of the labour legislation, especially of the Labour Code, in order to achieve a higher performance and flexibility of the labour. Of course, the opinions are not convergent, because the trade unions wants to preserve the majority of the actual legal solutions, which assure the "social status" of the employees.

The results of the consultations between the social partners determined few drafts of the Labour Code modifications, but the Government had recently announced that intends to promote a legislative initiative in the Parliament, based on its political responsibility.

We had compared the different forms of the drafts and they include the following major aspects: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

2. A critical examination of the proposed major modification of the Labour Code

a) The written form of the individual labour contract

According to art. 16 of Labour Code, in the actual form:

"*(1) An individual labour contract shall be concluded based on the parties' consent, in writing, in Romanian. The employer has the obligation to conclude the individual labour contract*

[1] Published in the Official Gazette of Romania, part I, no. 72 of 5th February 2003.

[2] By the: Law No. 480/2003; Law No. 541/2003; Government Emergency Ordinance No. 65/2005; Law No. 241/2005; Law No. 371/2005; Government Emergency Ordinance No. 55/2006; Law No. 94/2007; Government Emergency Ordinance No. 82/2007; Law No. 237/2007; Law No. 202/2008; Government Emergency Ordinance No. 148/2008; Government Emergency Ordinance No. 28/2009; Government Emergency Ordinance No. 37/2009.

in written form. Any employer who is a legal entity, any natural entity authorised to be carry out an independent activity, as well as the family association shall be under the obligation to conclude the individual labour contract, in written form, prior to beginning any labour relationship.

(2) If the individual labour contract has not been concluded in written form, the presumption is that it has been concluded for an unlimited duration, and the parties may make the proof of contract provisions and the work performed by means of any other piece of evidence.

(3) The work performed based on an individual labour contract shall give the employee length of service"[3].

The Government intents to abrogate the second paragraph of the art. 16, correlated to the intention of the legislative to determine the criminal liability of the person – individual or company – who will use labour force without signing a written labour contract. In present, if an employer doesn't conclude a written individual labour contract, only material and/or administrative liability are engaged.

b) The non-competition clause

The regulation of the non-competition clause in the Labour Code are the following:

"*ART. 21*

(1) Upon the conclusion of the individual labour contract or throughout its execution, the parties may negotiate and include in the contract a non-competition clause under which the employee shall be under the obligation, after contract termination, not to perform, for his/her own interest or that of a third party, an activity which is competing with the one performed for his/her employer, in exchange for a monthly non-competition emolument which the employer undertakes to pay for the entire non-competition time period.

(2) The non-competition clause shall only take effect if the individual labour contract clearly stipulates the activities the employee is prohibited from performing from the date of contract termination, the amount of the monthly non-competition emolument, the time period for which the non-competition clause causes its effect, the third parties on behalf of whom the performance of the activity is being prohibited, as well as the geographic area where the employee might be in actual competition with his/her former employer.

(3) The monthly non-competition emolument due to the employee shall not represent wages, shall be negotiated and shall be at least 50% of the average gross wages in the last 6 months prior to the date of termination of the individual labour contract was terminated or, if the duration of the individual labour contract was less than 6 months long, of the average gross monthly wages due to him/her for the contract period.

(4) The non-competition emolument shall represent an expense made by the employer, shall be deductible upon the calculation of the taxable profit, and the tax shall be charged from the beneficiary natural person, under the law.

ART. 22

(1) The non-competition clause may cause effects for a period not exceeding 2 years as from termination date of the individual labour contract.

(2) The provisions of paragraph (1) shall not be applicable when the termination of the individual labour contract has taken place rightfully, except for the cases provided in Article 56 d), f), g), h) and j), or when it has been based on the employer's initiative for reasons which not pertaining to the employee' person.

[3] Ion Traian Ştefănescu, *Tratat teoretic şi practic de dreptul muncii* (Bucharest, Universul Juridic, 2010), p. 252-258; Alexandru Țiclea, *Tratat de dreptul muncii* (Bucharest, Universul Juridic, 2009), p. 412-414

ART. 23

(1) The non-competition clause may not have as effect the employee being absolutely prohibited from exercising his/her profession or specialization.

(2) Based on a notification by the employee or the territorial labour inspectorate, the competent court of law may diminish the effects of the non-competition clause.

ART. 24

In the event of the employee having violated, in ill will, the non-competition clause, he/she may be obliged to return the emolument and, as applicable, pay damages corresponding to the prejudice caused by him/her to the employer"[4].

The principals modifications of the non-competition clause regulation are referring to the possibility of the employer:

- to increase the period of the former employee's interdiction to work for another employer or to work on an individual and independent form in an activity related to the activity of the former employer; the actual period of two years (art. 22 paragraph 1);

- to negotiate the amount which the former employee will receive in change of the respect of the non-competition obligation; in the actual form of the Code, the employer has no possibility to bargain an amount under the minimum value mentioned by the art. 21 paragraph 3 – which is at least 50% of the average gross wages in the last six months prior the date of termination of the individual labour contract was terminated or, if the duration of the individual labour contract was less than six months long, of the average gross monthly wages due to the employee for the contractual period;

- to unilaterally denounce the non-competition clause, during the period of its application, in order to stop the payment of the former employee; in the actual regulation, if the former employee notify the former employer (the debtor of the payment of the non-competition emolument) its position of entire respect of the non-competition obligations, the former employee has to pay the non-competition emolument all the period negotiated with the employee (maximum two years), even the employer has no or limited interest in respect by the former employee of the non-competition obligation. It is possible to have such positions because the non-competition clause is negotiated at the conclusion of the individual labour contract and produce its specific effects only after the termination of the contract. Between the two mentioned moments it is possible that the initial interest of the employer to assure that the employee will respect the non-competition obligation could vanish.

c) The trial period

One of the most sensitive modification of the Labour Code implies the modification of the norms having object the trial period. In the actual settlement, the norms are the following:

"*ART. 31*

1) In order to check the abilities of the employee, on the conclusion of the individual labour contract, a trial period not exceeding 30 calendar days may be established for executive positions, and not exceeding 90 calendar days for management positions.

(2) The check of professional abilities when employing disabled persons shall be based only on a trial period of not exceeding 30 calendar days.

3) As far as unskilled workers are concerned, the trial period shall be exceptional and shall not exceed 5 workdays.

4) Graduates of higher-education institutions shall be employed, at the beginning of the employment in their profession, based on a trial period not exceeding 6 months.

[4] Ion Traian Ştefănescu, *op. cit.*, p. 312; Alexandru Ţiclea, *op. cit.*, p. 405-409

4^1) Throughout the trial period or at the end of it, the individual labour contract may only be terminated, based on a written notice, following the initiative of either party.

5) During the trial period, the employee shall enjoy all the rights and have all the obligations stipulated in the labour legislation, the applicable collective labour contract, the internal regulations, as well as the individual labour contract.

ART. 32

1) During the progression of an individual labour contract, there may only be one trial period.

2) As an exception, an employee may be subject to a new trial period if he/she starts up in a new position or profession with the same employer, or is to perform his/her activity in a work place under difficult, harmful, or dangerous conditions.

(3) The failure to inform the employee, before the conclusion or amendment of the individual labour contract, about the trial period, within the term set under Article 17 (4), causes the employer to lose the right of checking the employee's abilities by such means.

4) The trial period shall represent length of service.

ART. 33

It is prohibited to successively employ more than three persons for trial periods for the same position".

The modification aim at the following results:

- the Government intends to increase the trial period for all employees' positions categories (executive positions, management positions) from 30 calendar days up to 90 calendar days for the executive positions and from 90 calendar days up to 180 calendar days for the management positions; the interest of the Government is here related to the interest of the employers representatives, because throughout the all trial period or at the end of it, the individual labour contract may only by unilaterally and unconditioned terminated by the employee, based on only a written notice (without the respect of all formal and material conditions asked by the law related to the dismissal of the employee) – art. 31 paragraph 4^1;

- the Government wants to abrogate the stipulation of art. 33 – which obliges the employers not to hire more than three persons for trial periods for the same position; if the legal provision will be abrogated, the employers will have the legal permission to conclude more than three individual labour contracts for the same position, determining the termination of each one based on the written notice addressed to the employee at the end of the each trial period; in this way, it is possible to have an undetermined number of employees hired successively on the same position with the permission of the employer to fire them without the respect of the dismissal's conditions.

d) The individual dismissal

In the actual regulation of the individual dismissal – an unilaterally way of termination of the individual labour contract – the employer could determine the end of the labour relation only if is in one of the hypotheses which are settle by art. 61 and art. 65 from the Labour Code:

"*ART. 61*

The employer may order the dismissal for reasons pertaining to an employee's person under the following circumstances:

a) if that employee has perpetrated a serious departure or repeated departures from the work discipline regulations or those set by the individual labour contract, the applicable collective labour contract, or the internal regulations, as a disciplinary sanction;

b) if the employee has been placed under police custody for a period exceeding 60 days, under the terms of the Criminal procedure code;

c) if, following a decision of the competent medical examination authorities, physical and/or mental incapacity of that employee has been found, which prevents the latter from accomplishing the duties related to his/her current work place;

d) if the employee should not be professionally fit for his/her current position;

ART. 65

(1) The dismissal for reasons not pertaining to the employee's person shall represent the termination of the individual labour contract, caused by the suppression of that employee's position, for one or several reasons not related to the employee".

The Government representatives, including the Prime-Minister, affirmed that the restrictive way of the dismissal regulations is an factor which contributes to a low degree of efficiency of the employers activity, both in the public and private sectors of activity. This is the reason why the future solutions are in order to increase the flexibility of the labour relations and the accent in this matter to be put not on the social protection of the employees, but on the professionalism and efficiency of their activity.

The employer is suppose to have the legal permission to evaluate the activity of the employees and to determine the termination of the labour relation for the ones who do not fully respond to its economical interests.

The trade unions representatives affirmed that a such solution will determine an so called "salary slavery", because the employees will depends of the simple will of the employers: when an employee shall not be necessary anymore for the employer, the last one will denounce the contract without the possibility for the employee to defence.

e) The individual labour contract for a limited duration

The principle stipulated by the Labour Code in the matter of the individual labour contract's duration is that this contract should be concluded by its parts on an unlimited duration (art. 12 paragraph 1). The exception is the limited duration of the contract. Art. 80 regulates:

"*(1) As an exception to the rule stipulated under Article 12 (1), the employers may be permitted to employ, for the purpose and under the terms of the present code, personnel based on individual labour contracts for a limited duration.*

(2) An individual labour contract for a limited duration may only be concluded in a written form, expressly stating the duration it is being concluded for.

(3) An individual labour contract for a limited duration may be extended even after the expiry of the original delay, based on the parties' written consent, but only within the delay stipulated under Article 82 and no more than two times consecutively.

(4) No more than 3 successive individual labour contracts for a limited period may be concluded between the same parties, and only within the delay stipulated under Article 82.

(5) Individual labour contracts for a limited period concluded within 3 months from the termination of a prior labour contract for a limited period shall be deemed as successive contracts".

The situations which allow the employers to propose to the future employee a limited duration of the individual labour contract are settled by the art. 81. They are the following:

- replacement of an employee in the event his/her labour contract is suspended, except when that employee participates in a strike;
- a temporary increase in the employer's activity;
- progression of some seasonal activities;
- if it is concluded based on some lawful provisions issued with a view to temporarily favouring certain categories of unemployed persons;

- hiring a person who, within 5 years from the hiring date, meets the terms of retirement for age limit;

- occupying an eligible position within the trade, employers' or non-government organizations, for the duration of the term of office;

- the hiring the retired persons who, under the law, may cumulate the pension and the wages;

- in other instances expressly stipulated by special laws or for the progression of works, projects, programs, under the terms set forth by the national and/or branch collective labour contract.

According to art. 82 paragraph 1, an individual labour contract for a limited duration may not be concluded for a period exceeding 24 months. If an individual labour contract for a limited duration is concluded with a view to replacing an employee whose individual labour contract has been suspended, the contract duration shall expire when the reasons having caused the suspension of the individual labour contract of the full employee have ceased to exist (paragraph 2 of the art. 82).

The Government intends to prolong the actual limit of 24 month up to 36 month, which represents an increase with 33% of the duration.

f) The duration of the work time

Art. 111 in its actual form regulate the maximum duration of the work time:

"*(1) The maximum lawful length of the work time shall not exceed 48 hours/week, including extra hours.*

(2) As an exception, the length of the work time, including the overtime work, may be extended over 48 hours/week, provided the average number of work hours, as calculated for a reference period of 3 calendar months, does not exceed 48 hours per week.

(2^1) For certain sectors of activity, units, or professions listed in the national sole collective labour contract, under applicable collective labour contract at the level of branch of activity, reference periods that exceed 3 months may be negotiated, without, however, exceeding 12 months.

(2^2) When establishing the reference periods stipulated under paragraphs (2) and (2^1), the length of one's annual rest leave and the instances when the individual labour contract is being suspended shall not be taken into account.

(3) The provisions of paragraphs (1), (2) and (2^1) shall not apply to young people who have not turned 18 years of age".

The Government doesn't intend to increase the maximum duration of the weekly work time – 48 hours – but wants to modify the second paragraph of art. 111, in order to prolong the reference period from the actual solution (three month) up to four month.

g) The collective bargaining and the collective labour contracts

The actual principle regulation of the labour bargaining and collective labour contracts is find on the art. 236-247 of the Labour Code.

"*ART. 236*

(1) The collective labour contract shall be the agreement concluded in a written form between the employer or the employers' organization, on the one hand, and the employees, represented by their trade unions or in any other manner stipulated by the law, on the other hand, in which clauses are set up concerning the work conditions, the wages, as well as other rights and liabilities deriving from the labour relationships.

(2) Collective negotiation shall be mandatory, except when the employer has less than 21 employees.

(3) When negotiating the clauses and concluding the collective labour contracts, the parties shall be equal and free.

(4) The collective labour contracts, concluded in compliance with the provisions of the law, shall constitute the law of the parties.

ART. 237

The parties, their representation, and the procedure for negotiating and concluding the collective labour contracts, shall be established under the law.

ART. 238

(1) The collective labour contracts shall not contain clauses which set up rights at a lower level than the one set up in the collective labour contracts concluded at a higher level.

(2) The individual labour contracts shall not contain clauses setting up rights at a lower level than the one set up in the collective labour contracts.

(3) When concluding a collective labour contract, the provisions of the law concerning the employees' rights shall constitute a minimum standard.

ART. 239

The provisions of the collective labour contract shall cause effects for all employees, irrespective of their date of employment or affiliation to a trade union.

ART. 240

(1) The collective labour contracts may be concluded at the level of the employers, branches of activity, or at a national level.

(2) The collective labour contracts may also be concluded at the level of groups of employers, hereinafter called groups of employers.

ART. 241

(1) The clauses of the collective labour contracts shall cause effects as follows:

a) for all employees of an employer, in the case of the collective labour contracts concluded at such level;

b) for all employees hired by employers that belong to the group of employers for which the collective labour contract has been concluded at such level;

c) for all employees hired by all the employers in the branch of activity for which the collective labour contract has been concluded at such level;

d) for all employees hired by all the employers in the country, in the case of the collective labour contract at national level.

(2) At each of the levels stipulated under Article 240, a single collective labour contract shall be concluded".

The modification prefigured by the Government are in order to:

- increase the number of employees of the employers who are obliged to bargain from 21 up to 50;
- renounce at the mandatory provisions of the collective labour contract at national level.

In the actual form, the Labour Code determines a mandatory solution even for the employers who were not represented at the negotiation of the collective labour contract at national level. They have to respect all the content of the collective labour contract, without having the possibility to determine this content. The employers claimed that it is a excessive solution, and proposed to be abrogated. The Government representatives affirmed that the collective labour contract concluded at the branch level will become the rule in this matter. Each branch of activity will have its specific labour relations regulations.

h) The labour jurisdiction

An important modification of the rules of labour jurisdiction was already operated by the Act no. 202/2010, which modified the composition of the labour specialized panels: in the composition enters only one judge, not two, how was settled before the entered in force of the Act no. 202/2010.

An other modification which is prefigured is referring to the provisions of art. 287 from the Labour Code:

"*The employer shall be responsible for providing evidence in labour conflicts, being obliged to submit evidence in his defence by the first day of trial*".

The Government intends to renounce at this solution, in order to determine the application of common solution in a civil trial (art. 1169 Civil Code – the claimant shall be responsible for providing the evidences).

Conclusions

The modification of the Labour Code is a difficult and risky task for every part which is implicated in this process. One thing is certain: the modification is necessary in order to establish a functional regulatory settlement in the field of labour relations.

In this framework, the most important institutions which need to be modify are: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

In the future, depending on the final form of these modifications, the specialists will be able to affirm their utility or, *a contraire*, the fact that one or more modification were useless or even had determined difficulties in application.

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