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THE EMPLOYER OR THE REFUSAL TO ANSWER
TO THE OBLIGATORY REQUEST STATED BY
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DOES IT REPRESENT A CONTRAVENTION THE UNINITIATION OF THE COLLECTIVE NEGOTIATION AT ORGANIZATION LEVEL BY THE EMPLOYER OR THE REFUSAL TO ANSWER TO THE OBLIGATORY REQUEST STATED BY THE LABOR UNION SUBSIDIARILY?

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Abstract

While in the previous legislation (Law no. 130/1996 regarding the collective labor contract, republished, rescinded by the Law of the social dialogue no. 62/2011, applicable to this day) it represented a contravention, according to art. 5, both the employer's act as to not initiate the negotiation and his refusal regarding the obligatory request stated, subsidiarily, by the labor union or the employees representatives, to the same effect, the new provisions, in effect, of the art. 217 paragraph (1) letter b) of the Law no. 62/2011 specifies that it represents a contravention only "the refusal of the employer to begin the negotiation of the collective labor contract".

Nevertheless, in practice, confusions are being made between the two situations, probably from the inertia of the interpretation according to the old interpretations (rescinded), and the employers are forced to appeal the contravention because of this situation, or they don't know they have this possibility.

Therefore, we consider to be necessary, of lege ferenda, clarifications for that purpose.

Keywords:

collective negotiation, initiative, refusal, contravention, social partners.

1. The regulation of the negotiation compulsoriness and not that of the closure of the collective labor contract

According to art. 128 paragraph (1) of the Social Dialogue Law no. 62/2011², "the collective contracts can be negotiated at organization level, groups of organizations and activity departments".

Although the phrase "can be negotiated" expresses a meaning for each and everyone of the three levels of negotiation, from the systematic interpretation [considering the provisions that follow – those of the art. 129

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² Republished in the Official Romanian Gazette, Part 1, no. 625 dated 31st of August 2012, modified subsequently.

paragraph (1)³] it results that, nonetheless, for the union's level the collective negotiation is compulsory if the number of employees is of minimum 21 employees.

Sure enough the obligation of negotiation is one of diligence, because the parties, even though they negotiate, they may or may not reach the conclusion of the collective labor contract.

Furthermore, on the strength of the principle of freedom of the will, the parties can decide unitedly not to enter into a collective labor contract⁴ and even to not negotiate. (A. Țiclea, L. Georgescu, A. Ștefănescu, C. Bențe, (2015), : 62).

Concurrently, one may negotiate and close a collective contract even in organizations with less than 21 employees, if the parties reach this sort of agreement (A. Țiclea, (2011), : 44).

2. Discussions and stipulations affined to the employer's initiative regarding the negotiation and the refusal to answer to the obligatory request, subsidiarily, stated by the labor union

Whereas in the previous legislation (Law no. 130/1996 regarding the collective labor contract, republished, rescinded by the Social Dialogue Law no. 62/2011, applicable to this day) it represents a contravention, according to art. 5, both the employer's act of not initiating the negotiation and that of refusal regarding the obligatory request stated, subsidiarily, by the labor union or the employees representatives, to the same effect, the new provisions, in effect, of the art. 217 paragraph (1) letter b) of Law no. 62/2011 specifies that it represents a contravention only "the employer's refusal to start the negotiation of the collective labor contract".

Thereby, according to the methods of grammatical, historical and systematical interpretation, derives the idea that it represents a contravention the refusal of negotiating the collective labor contract at an organization level with a minimum of 21 employees when this has been requested by the labor union or the employees representatives, subsidiarily, - meaning if the employer did not have the initiative for that purpose.

For the observations accuracy, we give the provisions of paragraphs (2)-(4) of the art. 129 from Law no. 62/2011:

³ The same foresees art. 229 paragraph (2) of the Labor Code – Labor Code – Law no. 53/2003 republished in the Official Romanian Gazette, Part 1, no. 345 dated 18th of May 2011 modified subsequently.

⁴ The Court of Appeal Bucharest, Section VII for labor conflicts and social insurance, civil issue no. 3856/R/2007 (<http://portal.just.ro>).

- “The initiative of negotiation belongs to the employer or patronal union” (paragraph 2);
- “The employer or the patronal union initiates the collective negotiation with at least 45 calendar days before the collective labor contracts come up for renewal or before the expiration of the applicability period of the provisions stipulated in the addendum of collective labor contracts” (paragraph 3);
- “In the event of the employer or the patronal union failing to initiate negotiation, the latter will begin at the written request of the labor union or the employees representatives within the time limit of 10 calendar days from the communication of the request” (paragraph 4).

We consider that this is the only possible solution. Ad absurdum, the lack of initiative could be sanctioned, or even the initiative cannot be confused with the refusal. And for the refusal to intervene, there has to exist a request that has been denied, that is another act than the one that regards an initiative.

De lege ferenda

Considering the fact that in practice confusions are being made between the two situations, probably from the inertia of interpretation according to the old provisions (rescinded), and the employers are forced to appeal the contravention sanction because of this situation, or they don't know to have this possibility, we consider that it is mandatory, *de lege ferenda*, for clarity, the restatement of art. 217 paragraph (1) letter b) of the Law no. 62/2011, thusly: "It constitutes as contraventions the following acts and are sanctioned in this manner: (...) b) the inexecution by the patron of the obligations stated in the art. 129 paragraph (4) of the mentioned law".

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Legislation:

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