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6 July 2012

Attn.: the Ministry of Labor, Family and Social Protection

Ref: AmCham Romania Proposals to the Emergency Ordinance Draft for the amendment of Law 62/2011 on social dialogue

Dear Madam, Dear Sir,

Further to the publication of the Emergency Ordinance Draft for the amendment of Law 62/2011 on social dialogue for public consultation purposes, the American Chamber of Commerce in Romania (AmCham Romania) submits bellow its opinions on the most important aspects included in the draft text. Unfortunately, the extremely tight term within which comments on such enactment of large scale and extreme significance for the economic activity in Romania were not provided, did not allow us to make a comprehensive inventory of the matters that this draft raised.

Additionally, please find herein the proposals of AmCham Romania for the amendment of Law 62/2011 on social dialogue, aimed at clarifying certain provisions that pose problems to the actual implementation, as well as the correlation of the Labor Law with the Law on Social Dialogue and with other enactments. Our proposals were submitted to the Ministry of Labor, Family and Social Protection at the beginning of June 2012 and they were formulated in the context of the agreement concluded by Romania with the International Monetary Fund and the European Commission, which stipulates the assessment of the labor law, one year after the amendments adopted in 2011 were implemented.

AmCham Romania considers that any clarifications brought and the further flexibility of work relationships are welcomed, however, if the previous provisions are reenacted (or more restrictive provisions are promoted) this would entail a serious drawback for Romania and it would contribute to the emphasis of the problems faced by employers given the difficult economic context, culminating with a decrease in Romania's competitiveness.

I. The goods and services forming the object of the trade union activity are exempt of VAT.

Motivation/ comment: In the statement of reasons of the draft ordinance for the amendment of Law no. 62/2011 on social dialogue, it was indicated that the amendment would not impact the business environment but the general consolidated budget. However, the VAT exemption of a category of operations has such impact. In addition, such measure unjustifiably favors a category of market players. Last but not least, measures having a fiscal impact, such as the VAT exemption, may be adopted only after the study of their impact on the budget, and the current economic context, characterized by a recent increase in the VAT level, may not allow such measure. Furthermore, such

measure represents a breach of the equal treatment of associative groups, by clearly favoring the unions in detriment of such groups (such as associations, foundations, etc.).
Proposals: the removal of this proposal from the draft text.

II. The movable and immovable assets acquired by a trade union organization under the law and which are necessary for their meetings, library or for the union members' vocational education and training, may not be pursued.

Comment: this provision establishes a preferential treatment applied to any other legal entity that operates on the territory of Romania – employers' organizations, NGOs or companies – which cannot be acceptable. The fact that the assets of the organizations may not be sold/ subject to enforcement proceedings in order to cover their debts puts these entities in a privileged position, causing serious imbalance in their relationships to the other economic operators, even with the state. At the same time, the provision breaches the enforcement rules, actually resulting in the removal of such assets from the civil circuit.
Proposal: the removal of this provision from the draft text.

III. The competent bodies of the State administration according to the law may control the trade union organization only with respect to the payment of taxes due to the State budget.

Motivation/ comment: The existence of certain legal entities whose operations are exempt from the control of the state bodies may be the premise for certain breaches of the law (i.e., money laundering). We consider that the former provisions were balanced, in connection with the fact that the employers' organizations – for an equal treatment – do not benefit from the same treatment. Furthermore, such provision represents a breach of the prerogatives of the institutions governed by the rule of law.
Proposal: maintenance of the current legal texts.

IV. Elimination of the current provisions that prohibit trade union organization to use, for patrimonial purpose, the movable and immovable assets acquired or whose right of use was transferred free of charge by the central or local public authorities.

Motivation/ comment: the right of use over these assets was granted to facilitate the activity carried on by the trade union organizations and not to make profit from the use of these assets.

Proposal: Maintenance of the current legal texts.

V. Eliminating the possibility to rent premises from the properties in the public or private domain of the state or of the administrative-territorial units where trade union federations and confederations legally established and representative according to the law, as well as their county unions, carry on their activity.

Comment: the maintenance in the draft law of one single possibility to acquire the use of these premises – through the commodatum agreement – shall force the state not to collect rents for these premises, which shall have an impact on the general consolidated budget.
Proposal: Maintenance of the current legal texts.

VI. Employer's obligation to retain the trade union contribution on the payroll, further to a written notice submitted by the trade union that represents a writ of execution.

Comment: The obligation to pay these contributions does not rest with the employer, but with the employee – trade union member. The legal situation created by this draft has no precedent – the perspective of the forced execution mechanism proposed is legally unacceptable – no private organization can issue documents that should be writs of execution. Furthermore, the employees that shall not want for this contribution to be withheld do not have the possibility to fight this action. We want the courts to be able to verify whether the obligation is due before any enforcement proceedings are initiated.

Proposal: Maintenance of the current legal texts.

VII. Amendment of the parties to the collective labor bargaining agreement – elimination of employees as party to the collective labor bargaining agreement and the inclusion of the trade union organization or of the employees' representatives.

Comment: The trade union organizations/ the employees' representatives are, by definition, the employees' authorized representatives. They cannot be a party to the agreement, but only a signatory party, in the name of the employees, the latter being the titleholders of the rights and obligations provided by the collective labor bargaining agreement. In practice, to establish that the trade union organizations are a party to the collective labor bargaining agreement makes the subsequent negotiation of the amendments / extension of the agreement impossible, negotiation that should be initiated by another trade union organization that became in the meantime representative, according to the law.

Proposal: Maintenance of the current legal texts.

VIII. Granting the trade union organizations the right to undertake any action provided by the law, inclusively to bring legal actions in court in the name of their members, without an express power from the persons in question, having the standing to sue.

Granting the trade union organizations the right to file a criminal complaint for the employee whose rights were breached.

Comment: Starting from the traditional role of the trade unions to represent its members in the relationship with the employer, as representative of the employees, the trade union must act as an agent based on a power of attorney. Under the circumstances, we consider excessive to grant the standing to sue and the right to file a preliminary complaint instead of the employee in cases when the criminal action is initiated upon the preliminary complaint filed by the aggrieved person, i.e., the employee, and not the trade union organization based on a power of attorney. Furthermore, it is questionable whether the employee may waive the claim initiated by the trade union organization. Also, the draft does not specify who are the parties to the criminal claim and whether the employee who did not initiate such action may end the claim by way of amicable resolution or it is necessary for the trade union organization that filed the claim to participate to the amicable resolution.

In fact, the provision represents a return to the provision stipulated by the former trade union law, Law 54/2003. Starting from the intuitu personae nature of the individual employment agreement, the employee's claim has a personal nature. The proposed amendment removes the personal nature of the

claim requiring the legal representation through trade unions, in contrast with the availability principle applicable to any dispute. Furthermore, by the absence of any provisions to this effect in this Draft, we consider that the employee cannot interfere in the dispute already initiated by the trade union nor it can waive it. In fact, the provisions from the former law applicable to trade unions were not fully reenacted, the reference to the possibility that the claim shall not be filed or carried on by the trade union, if the employee opposes it or waives the legal actions no longer existing.

We consider that in the absence of a power of attorney from the employee, the trade union has the possibility to bring legal actions against the employer at any time, in practice, this situation being able to lead to potential abuses.

Proposal: Maintenance of the current legal texts.

IX. Shortening the summoning term from 5 to 1 day, as well as the fact that all evidence shall be brought during the first hearing day, otherwise the claim shall be rejected.

Comment: this measure seems excessive in the context in which the deadlines in the labor law disputes are shorter than the deadlines resulting from the generally applicable law. In addition, the proceeding seems an exception from the Civil Procedure Code that stipulates that the court approves the evidence. Therefore, under the circumstances, the court lacks this attribute. The 1-day deadline can result in the violation of the right to defense, being almost impossible for the defense to be prepared on such short notice.

Proposal: Maintenance of the current legal texts.

X. Supplementation of the category of trade union leaders who are granted protection against dismissal: adding the persons appointed in the trade union management bodies. Additionally, the supplementation of the protection period with 2 years after the expiry of the mandate.

Comment: the persons chosen directly by the employees in the trade union management bodies must be protected. Such persons, by the mandate granted by the employees – trade union members, are the persons who represent them and therefore they must enjoy stability in the exercise of the union activity. On the other hand, the provision must be balanced and it should not generate abuses from the trade union – all the more so as only the internal statutes of the unions regulate the "appointment" process, such documents not being public. We do not consider the extension of the protection to the persons appointed to be justified, and it can result in actual abuses. It is normal for the union leaders to be protected during the mandate against the dismissal on grounds related to the exercise of the mandate. On the other hand, an additional protection creates discrimination between the former union leaders and the other employees.

In addition to the Code provision, according to the Draft, the employers cannot amend the individual employment agreements, and the prohibitions to amend and/ or terminate the agreements concerns the union members as well.

Proposal: Maintenance of the current legal texts.

XI. The absence of information provided to the employer with respect to the trade union established at its level as well as with respect to obtaining the representativity. The unions obtain legal personality or representativity as of the date the court decision remains final.

Comment: in order to be able to meet the legal obligations and to undertake the actions required it is necessary for the employer to be summoned in the procedure for the establishment or for obtaining the representativity of the union existing at the level of that employer. Furthermore, in order to maintain the symmetry with the provisions applicable to the employers' organizations, we consider necessary that the court decisions remained irrevocable in order for the trade union to have legal personality/ be representative.

XII. Granting incentives to the trade union organizations for the conduct of the trade union activity, such as free days (the proposal is 5 cumulative days), the access to the premises, offices, IT equipment and furniture, etc.

Comment: the draft proposes the restoration of the previous provision from the Trade Union Law no. 54/2003, which provided however that the number of days cumulated and the number of the days from which they could benefit was established under the collective labor bargaining agreement and not by decision of the trade union management body. Actually, according to the Draft, the number of persons and the number of days for each of them must be decided by the trade union. It is not mandatory for the employer to pay for the days related to the trade union activities, compared to the previous law, which allowed the reduction of the work schedule without affecting the salary rights (this provision being declared unconstitutional under Decision 874/2010). However, it is stipulated that the payment method is established under the collective labor bargaining agreement. Therefore, it shall actually be a point of negotiation significant for the trade union, on which they shall insist.

Given that these incentives entail costs for the employer, they should be subject to bilateral negotiation between the two parties, according to the necessities of each union as well as to the employer's financial possibilities. Ordering all employers on the market to accept that more employees shall be exempt from the enforcement of the office duties over a 60-calendar day-term (3 calendar months in one year) seems excessive.

Furthermore, the access of the trade union leaders to different companies, but having the same profile (if we consider that they are part of the same business field) may mean the access to business confidential information, as well as the potential implications in terms of competition.

Proposal: Maintenance of the current legal texts.

XIII. Elimination of the mandatory stage for the conciliation of labor disputes, before the strike

According to the current provisions, i.e., art 166 – 174 of Law 62/2011, the conciliation is a mandatory stage before a strike starts.

We propose the maintenance of these provisions, in order to have a predictable framework for the companies in Romania. The start of a strike within 48 hours from the annulment, without having the possibility to discuss the requests of the trade unions in the presence of an impartial conciliator – the

state representative – may result in serious consequences both for the employer and for the Romanian economy in general.

Furthermore, we propose to fully remove article 228, par. 2 as well as the non-conformity notion, for the following reasons:
- the "non-conformity" notion was invented on the occasion of this legislative change, and it was not correctly defined.
- with respect to the reasons for "non-conformity", the effects are very weak – starting a strike for other reasons than such based on which the conflict was started do not result to unlawfulness but only to non-conformity, i.e., to the obligation that the trade union "remedies" the "error" within a certain deadline.
- according to the lawmaker, the unlawfulness is not determined by the breach of the law, but by the breach of the statute belonging to the trade union organization
- the reason for lawfulness cannot be controlled by the employer because it does not have the trade union statute, in order to be able to verify whether the start of the strike complies with the trade union statute, and in addition, the trade union can amend its own statute in order o facilitate the strike.
However, the most serious aspect is that the failure to comply with the condition that the strike should be started provided that half plus 1 of the employees agree, is not specifically sanctioned by the law in any way whatsoever.
Proposal: Maintenance of the current legal texts.

XIV. Reasons to start labor disputes

We propose the elimination of references to the failure to start annual negotiations and to the failure of annual negotiations from the reasons to start labor disputes considering on the one hand that there was no obligation for annual negotiations and on the other hand that the parties to the collective labor bargaining agreement are entitled to determine its duration.

We propose the elimination of this reason to start the labor disputes, as provided by art. 175 e) of the draft, for the following reasons:
- only the court finds for the failure to grant certain rights. In the absence of a court decision, the trade union would substitute the court;
- there is no mechanism meant to prevent trade union abuses, no delimitation of the rights of the employees protected by this article existing;
- there is no correlation between the other provisions regarding labor disputes and strikes and this newly introduced reason.

XV. Representativity of trade union organizations; the representation of employees in collective negotiations

Ref art 147 b) and art 137, 2), a)

The following result from the text of these legal provisions:
- at unit level, the trade unions that have 35% of the employees are representative;

- the trade unions negotiate the CLA and only if there are no trade unions (regardless whether they are representative or not), the employees' representative may negotiate;
- federations may negotiate at unit level whether they are representative at the level of activity sector or group of units and comprise a trade union from the unit that is in that activity sector or group of units.

It would result from the above that if there was a trade union non representative and not affiliated to a representative federation, the negotiation of the CLA may not occur, although the employer has the obligation to negotiate.

At the same time, if there is a trade union in the unit with only a few members (even 0.1% of the total number of employees), which is affiliated to the representative federation, the employer shall negotiate with it and with the CLA federation at unit level, the representatives of the majority of employees not being able to participate in negotiations.

We consider that this provision seriously breaches the representativity principle. CLA at unit level should be negotiated by the representative trade unions (that have at least 35% of the employees) and in the absence of the representative trade unions, by the employees' representatives.

XVI. The necessary number of employees to create a trade union

In order to establish a trade union organization, at least 15 employees from an employing unit or from different employing units of the same activity sector are necessary. Actually, this means a return to the solution adopted before Law 62/2011, which allowed for a trade union organization to have, as members, persons having different employers.
We propose to maintain the provisions set forth by the current law

XVII. Mandatory invitation of the representative trade union to the meetings of the Board of Directors

According to the current provisions of Law 62/2011, employers do not have the obligation but only the option to invite the trade union representatives to the boards of directors. However, according to the current provisions of the same law (art. 30 par. 3 of Law 62/2011), employers have the obligation to communicate in writing to the trade union the decisions of the board of directors or of other similar bodies regarding matters of professional, economic and social interest, within 2 business days from the meeting. This disclosure obligation remains the same, except for the deadline (within 48 hours from the meeting), which is abusive. These obligations should also be corroborated with the obligations that result from Law 467/2006 on establishing the general framework for the disclosure to and consultation of employees, for example Art. 7, par. 2 of Law 467/2006 stipulates that "the employer does not have the obligation to disclose information or organize consultations, if they are likely to seriously prejudice the company's officers or affect their interests ».
We consider that the presence of the trade union representatives may have effects related to competition (starting from the premise that the representatives may be the representatives of a federation or confederation, therefore the employees of a competitor), confidentiality, etc.

They were inserted as information that the employers had to provide to trade unions, information regarding the creation and use of funds dedicated to the improvement of work conditions, of the health and safety and work and of the social utilities, social securities and protection. Please consider the comment above regarding the provisions of Law 467/2006.
A novelty to Law 62/2011 is also the introduction of the matters of cultural and sports interest.
Proposal: we consider that the current relevant regulatory provisions must be maintained.

XVIII. The rights recognized to the employer's organizations within the content of the Draft are not similar to the rights recognized to the trade union organizations

For example, we mention the provision comprised by the Draft according to which any trade union and not just the trade union confederation having national representativity may address legislative proposals in the trade union field, compared to the provision from art. 69 of the Draft, according to which, only the representative employer's organization at national level may address legislative proposals in the specific fields of interest.
Proposal: we generally consider that the rights recognized by the law both to trade union organizations and to the employer's organizations must be balanced.

XIX. The difference of legal treatment between the employers' organizations and the trade union organization with respect to the documents to be submitted in order to obtain representativity.

For example, in case of the employers' organizations, the written sworn declaration shall be requested from each company with respect to the affiliation to one high ranked employers' organization, while for a trade union confederation the cumulative situation signed by the confederation representative comprising the list of trade union federations and the total number of members suffices.
Proposal: we generally consider that the rights recognized by the law to the trade union organizations and to the employers' organizations must be balanced.

XX. The mandatory provision of information during the collective negotiation

As an element of novelty, it is necessary that the employer provides the trade union information on the development of the financial-economic situation related to the following contractual period. We consider that the employer must have the freedom to establish the business strategy.
Proposal: we consider as justified the proposal of eliminating this provision from the Draft text.

XXI. The negotiation of other potential agreements regarding protection in collective labor bargaining agreements.

In connection to the provisions of Law 62/2011 (art. 12) and to the proposal to amend this article (art. 13 of the Draft), this provision has a mandatory nature. Therefore, there is a lack of correlation between the provisions of art. 13 and art. 129 par. 3 of the Draft.
Proposal: we consider necessary to correlate these contradicting legislative proposals.

XXII. Establishments according to lines of business.

The Trade Registry has new attributions. Thus, at the registration of any new establishment or upon the change in the main scope of business of an establishment, the Trade Registry shall also

communicate it the line of business, according to the registration of the main scope of business in the NACE code.
Proposal: similar provisions regarding a certain line of business existed at that time (i.e. the Government Decision no. 1260/2011), therefore, we consider that it would be advisable to remove this provision)

XXIII. The collective labor bargaining agreements applicable to non-signatory parties.
Employers' organization and/ or the representative trade union organization according to this law, that are the signatories of a collective labor bargaining agreement concluded at their levels of representation, by a written notice addressed to the Ministry, where they acknowledge the agreement, become parties to it. Please note that the employees are parties to the collective labor bargaining agreement and not the trade unions, such unions having only the capacity of employees' - representatives. Furthermore, we do not understand how a written notice addressed to the Ministry may amend a legal relationship, the agents becoming parties.
Proposal: we consider that this provision must be removed.

XXIV. Territorial jurisdiction to settle labor disputes:
The proposal of a special territorial jurisdiction for trade unions (i.e. the requests filed by the trade union organizations, in the name of their members, should be addressed to the court in whose territorial jurisdiction the trade union organization is based) is not justified, in consideration of the fact that the trade unions act in the name of and for employees, and an alternative territorial jurisdiction is regulated by Law 62/2011 (i.e. the competent court where the employee resides).
Proposal: we consider that this provision must be removed.

We hereby express our openness and availability to participate to a meeting with the representatives of the Ministry of Labor, Family and Social Protection in order to discuss the above-mentioned proposals and the attached proposals, the amendments that the Government takes into account, as well as the way AmCham Romania may contribute with the expertise of its members to identify the best solutions for Romania in terms of labor law.

In order to set the meeting, we kindly ask your cabinet to use the following contact details: Lavinia Dragomirescu, ldragomirescu@amcham.ro, 0743 63 79 26, 021 312 48 34.

Best regards,

Sorin Mindrutescu
President
AmCham Romania