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Abstract:

The Republic of Moldova has recently registered a downward trend in the unionization rate and trust in trade unions, phenomena which have led to the need to identify some ways of representing the employees in the negotiation of collective agreements and settlement of collective labour disputes. The Moldovan legislator has responded to these trends by enshrining the legal institution of the elected employees' representatives as an alternative to unions.

In this article the authors have researched the community normative acts and the Moldovan legislation pertaining to the legal status of the elected employees' representatives. In this context, the authors have formulated a definition of the elected employees' representatives and have additionally outlined a series of general conclusions pertaining to the field under consideration such as: the Moldovan law enshrines the monopoly of the primary trade union organizations in the negotiation and conclusion of collective labour agreements and the initiation and resolution of collective labour disputes. However, if there is no primary trade union organization within the entity, the collective rights (the right to entity administration, the right to collective bargaining etc.) may be exercised by the elected employees' representatives.

Keywords:

social partnership in the labour sphere, social dialogue, bipartism, tripartism, social partners, trade unions, employers' organisations, elected employees' representatives

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The slowing down of the trade unions modernization process and decrease in the unionization rate across Europe has led to the need to identify some ways of representing the employees in the negotiation of collective agreements and settlement of collective labor disputes.

The Moldovan legislator has responded to these trends by enshrining the institution of the elected employees' representatives as an alternative to unions. We invoke, in this case, the provisions of Art. 21 para. (2) of the Labour Code of the Republic of Moldova (hereinafter - LC of RM) (Published in: MO al RM, nr. 159-162 din 29.07.2003.), according to which in the entities where trade unions have not been set up, the employees' interests can be defended by their elected representatives. Therefore, the coexistence of these two legal institutions is excluded.

The conclusion that can be drawn from this legal text is the following: the existence of the elected employees' representatives is not mandatory; labor law provides a possibility but not an obligation for employees to elect their representatives.

Analyzing the instruments of the International Labour Organization (hereinafter - ILO), in particular the Recommendation nr. 91/1951 on collective agreements, we conclude that the ILO gives preference to trade unions as part of collective bargaining and refers to non-union workers' representatives only in the absence of such organizations. Consequently, the Trade Union Freedom Committee of the International Labour Office Board noted that: "In such circumstances, a direct negotiation between the management of the company and its staff aimed to ignore the representative organizations may, in some cases, contradict the principle according to which collective bargaining between employers and unions should be encouraged and promoted." (Dimitriu, (2007), : 53).

This situation is different from that of the developed European countries, where more opportunities for democratic representation of employees are enshrined in the legislation, such as: works councils, group of undertakings councils, staff delegates.

Thus, at the European Union level, the right to establish European Works Councils was regulated by Directive 94/45/EC "On the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees" of

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22 September 1994 (Published in: Official Journal of the EU nr. L 254 of 30 September 1994) for undertakings or groups of undertakings with at least 1 000 employees within the Member States of the European Union and other countries of the European Economic Area, with at least 150 employees in at least two Member States.

Considering the evolving legislative, economic and social framework, it was necessary to modernize and reform this legal framework (Moarcas Costea, (2012), : 102). This occurred after the adoption of Directive 2009/38/EC of the European Parliament and of the Council "On the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees" of 6 May, 2009 (Published in: Official Journal of the EU nr. L 122 of 16 May 2009) under which the European Works Councils were set up and have been functioning since 6 June 2011.

Although the Council Directive 2009/38/EC addresses the Member States, it actually refers to Community-scale undertakings, with a labour law goal – of informing and consulting employees (Tofan, M.,. Petrişor, M., B., (2013), : 65). Thus, the stipulations of this Directive shall apply to: a) Community-scale undertakings as defined in Art. 2 of Council Directive 2009/38/EC as undertakings employing at least 1000 employees within the Member States and at least 150 employees in each of at least two different EU Member States; b) Community-scale groups of undertakings, defined as a group of undertakings with the following characteristics: at least 1,000 employees within the Member States; at least two group undertakings in different Member States; and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;

According to Art. 1 para. (1) of Council Directive 2009/38/EC, the purpose of the directive under consideration is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings. To that end, a European Works Council or a procedure for informing and consulting employees is to be established in every Community-scale undertaking and every Community-scale group of undertakings.

Therefore, Council Directive 2009/38/EC includes two ways through which the pursued aim can be achieved: 1) establishment of a

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European Works Council; 2) establishment of a special procedure for social dialogue within Community-scale undertakings.

In order to achieve the objectives set by Council Directive 2009/38/EC, it is required that a special negotiating body, composed as follows, is established (Gidro, (2013), : 319): a) each Member State is free to decide the establishment of a special negotiating body by appointment or election procedure on its territory; b) the appointment or election of members of the special negotiating body is proportional to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together.

Once the special negotiating body has been appointed, at the initiative of central management, a written agreement will be reached with the purpose to create a European Works Council which duty is to inform and consult employees.

The central management convenes at least once a year, a meeting with the European Works Council in order to inform and consult on the development of Community-scale undertaking or Community -scale group of undertakings and its prospects.

Showing no interest in the advanced experience of Western countries on more possibilities of employees' representation, the Moldovan legislator puts more emphasis on representing and defending employees' rights and interests through unions, giving them duties which are fulfilled by other structures that represent employees in other countries.

In this context, we note that the Republic of Moldova has the difficult task to adjust the labour legislation pertaining to social dialogue to Community acquis requirements, a mission that has its foundation in Art. 37 of the Association Agreement between the EU and Moldova (http://gov.md/public/files/2013/ianuarie_2014/ACORD_RM-UE_1.pdf). Moreover, Chapter 4 of Title IV of the Agreement under consideration is dedicated to cooperation in the sphere of employment, social policy and ensuring equal opportunities. Thus, in accordance with Art. 31 of the Association Agreement, the parties shall strengthen their dialogue and cooperation on promoting decent work agenda, employment

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policy, health and safety at work, social dialogue, social protection, social inclusion, gender equality and anti-discrimination and social rights, and thereby contribute to the promotion of more and better jobs, poverty reduction, enhanced social cohesion, sustainable development and improved quality of life. Moreover, among the issues that may be subject of cooperation between the EU and the Republic of Moldova, there are also those focusing on *enhancing the participation of social partners and promoting social dialogue, including through strengthening the capacity of all relevant stakeholders.* (Art. 32 let. h) of the Association Agreement).

Analyzing the list of Community instruments to be translated into the Moldovan legislation (this list is presented in Annex III to the Association Agreement), we note that the parties, exposing a lot of EU directives in the field of non-discrimination and workplace safety, have omitted some Community normative acts in the field of social dialogue (with the exception of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (Published in: Official Journal of the EU nr. L 80 of 23.03.2002). We are of the opinion that the following Community acts relating to social dialogue issues have to be transposed into the legislation of the Republic of Moldova:

Table 1.
The harmonization process of the legislation of the Republic of Moldova in the field of social partnership (dialogue) with the Community *acquis*

Community normative act proposed for transposition	The national normative act proposed for adoption (amendment, supplementation)	Time frame
Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community	a) amending and supplementing the Labour Code of the Republic of Moldova; b) amending and supplementing the Law No.1129-XIV/2000 on Trade Unions and Law No. 976-XIV/2000 on Employers' Organisations.	The provisions of the Directive under consideration shall be implemented within three years after the entry into force of the Association Agreement.

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Commission Decision 98/500/EC of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level	a) amending and supplementing the Law No.1129-XIV/2000 on Trade Unions and Law No. 976-XIV/2000 on Employers' Organisations. b) amending and supplementing the Law on the organization and functioning of the National Commission for consultation and collective bargaining and of commissions for consultation and collective bargaining at sectoral and territorial level (no. 245-XVI/2006).	This Community instrument cannot be found in Annex III of the Association Agreement and, therefore, it is not possible to identify any official timetable for its implementation
Directive 2009/38/EC of the European Parliament and of the Council "On the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees" of 6 May, 2009	Draft law on the establishment of works councils or of a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.	This Directive cannot be found in Annex III of the Association Agreement and, therefore, it is not possible to identify any official timetable for its implementation

Thus, the Moldovan legislator has to align the national legislation to the standards of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, enshrining, at the same time, a new regulation on the institution of the elected employees' representatives.

Having as a fundamental objective the establishment of a general framework that sets out minimum requirements for the right to

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information and consultation of employees in undertakings and establishments within the Community, Council Directive 2002/14/EC guarantees (Voiculescu, (2005), :158): a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation; (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment; (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations.

As the Romanian author Nicolae Voiculescu noted (Voiculescu, (2005), :158), transparency, in terms of social partners' access to economic information, is considered, within the community area, as essential in the process of restructuring and adapting to the new conditions of economic globalization.

Taking into account the provisions of Art. 21 of the LC of RM, employees' representatives are elected within the general assembly meeting (conference) of the employees, with the vote of at least half of the total number of the entity employees (delegates). The empowerments of the elected employees' representatives, manner of their performance, as well as the duration and limits of their mandate, is established by the general assembly meeting (conference) of employees in a normative act at entity level.

Interpreting the aforementioned legal provisions, we conclude that the term "elected employees' representatives" refers to employees elected within the general assembly meeting (conference) of employees in the entities where trade unions have not been set up for promoting and defending employees' rights.

Regarding the organization of the elected employees' representatives, their number is determined by the same general assembly meeting (conference) of employees, taking into account the number of staff in the entity. Furthermore, according to the Art. 21 para. (5) of the LC of RM, the empowerments of the elected employees' representatives, manner of their performance, as well as the duration and limits of their mandate, shall be established by the general assembly meeting (conference) of employees *in a normative act at entity level.*

In our view, the syntagm "in a normative act at entity level" conveys an imperfect character to this legal provision, giving ground for

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different interpretations. Why does the legislator consider that the empowerments of the elected employees' representatives, manner of their performance and other important aspects are to be established in a local normative act? This legal provision is difficult to understand, especially if we consider the provisions of Art. 10 para. (1) let. e) of the LC of RM based on which the issuance of normative acts at the entity level lies in the exclusive competence of the employer.

Therefore, the analysis of the provisions of Art. 21 para. (5), Art. 10 para. (1) let. e) of the LC of RM shows that the employer is the one who ultimately drafts the empowerments of the elected employees' representatives, establishes the manner of their performance, and decides on other important aspects pertaining to the legal status of the other social partner.

Also, it is not clear why the activity of a social partner having the status of an *ad hoc* body is subject to regulations comprised in a local normative act. We are of the opinion that it would be enough to register the empowerments of the elected employees' representatives in a minute or in another document of the general assembly meeting (conference) of employees.

The above-mentioned legal provisions lead us to the conclusion that, unlike trade unions, the elected employees' representatives are not entirely independent in relationship to employer when it comes to organisational aspects.

Unlike union leaders, the elected employees' representatives do not benefit from the legal guarantees established in Art. 387-388 in the LC of RM. With regard to the matter of collective bargaining, the provisions of Art. 29 para. (3) of the LC of RM shall be applied to them, according to which the employees' representatives who participate in collective bargaining, during the time the negotiations are carried on, cannot be subject to disciplinary sanctions, transferred to another work or dismissed without prior consent of the body which empowered them, with the exception of the dismissal cases stipulated by the LC of RM for committing some disciplinary breaches.

We reiterate the idea that trade unions are legal persons of private law, representing a collective subject of law, with all the rights and obligations that the legislation of the RM provides for these subjects of law. In contrast, the employees' elected representatives do not enjoy legal personality and, therefore, cannot be patrimony holders, cannot conclude various contracts or agreements with other natural or legal persons (with

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the exception, of course, of the possibility to negotiate and conclude collective agreements) and cannot act as a plaintiff or defendant in courts of law. (Moarcas, C.,A., Popoviciu, A., C., (2013), : 55-59)

Regarding the duties of the elected employees' representatives, we note that they target not only the issue of collective bargaining, but have a rather general nature. The elected employees' representatives may initiate and also participate in the resolution of collective labour disputes.

Such a conclusion is based on the provisions of Art. 358 para. (1) and Art. 359 para. (2), (4) of the LC of RM, in which the legislator refers to the generic term of "employees' representatives". In addition, we note that the legislation of the RM admits the (wildcat) strikes in an entity where there are no trade unions.

We note that in other legal systems (e.g. in Belgium) the conflict of interests involving non-union employees can be appropriated and continued by the union (Dimitriu, (2007), :50).

Also, if we refer to the existing normative framework on the legal status of the elected employees' representatives, we observe that the Moldovan legislator has a reticent attitude towards the requirements imposed on these representatives. In this context, we advocate for a legislative solution that that would give employees the possibility to elect as their representatives only those employees who have full legal capacity, i.e. those employees who have reached the age of 18. On the contrary, minor employees should exercise the right to freedom of association under the same conditions as adult employees, they being able to become union members without the written consent of parents or legal guardians (Moarcas Costea, Popoviciu, (2012), : 56).

Generalizing the aforementioned issues, we note that our legal system enshrines the monopoly of primary trade union organizations in collective bargaining and conclusion of collective agreements, as well as in the initiation and resolution of collective labor disputes. However, if there is no primary trade union organization within the entity, the collective rights (the right to entity administration, the right to collective bargaining etc.) may be exercised by the employees' elected representatives.

Thus, the Moldovan legislator has made an important step towards the generalization of social partnership (dialogue) by harmonizing the national legislation with the principles and norms of international labor law.

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In this regard, we note that, according to Art. 3 of the *ILO Convention no. 135/1971 on the Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking*, workers' representatives are the persons, recognized as such under national law or practice, whether they are: a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or b) *elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.*

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