Commentary on the Draft Proposal of the Prevention of Undeclared Work Act

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AmCham

American Chamber of Commerce in Croatia Američka gospodarska komora u Hrvatskoj

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Introduction

On September 29, 2022, the Government of the Republic of Croatia submitted a Proposal of the Prevention of Undeclared Work Act (hereinafter referred to as "the Act") in the legislative procedure of the Croatian Parliament. **The Proposal of the Act contains the provisions of Articles 18 and 19 which the American Chamber of Commerce in Croatia contests and proposes that they be removed.**

Namely, **the provision of Article 18, paragraph 1** stipulates that the contractor is jointly and severally liable for the obligations that their subcontractor as an employer has towards their employees for claims in respect of the due but unpaid salaries for the work performed or the service provided, to which employees are entitled.

Moreover, according to **the provision of Article 19**, the contractor is relieved from liability if they have taken all appropriate actions to request and receive from their subcontractor before the start or during the period of the performance of work or the provision of services:

1. a list of all workers employed for the performance of the contract on the provision of services between the contractor and subcontractor,
2. for each individual worker from point 1 of this Article: identification data of the worker, date of start and end of the performance of work and the provision of services, and information on the worker's salary,
3. for the duration of the contract between the contractor and subcontractor, for each individual worker at least once a month, proof of payment of salary and contributions for compulsory insurance that are paid along with the previous month's salary.

The explanatory memorandum of that Act states: By prescribing the contractor's joint and several liability for the payment of salaries to the subcontractor's workers who perform work to fulfill the contract between the contractor and the subcontractor, it is additionally ensured that the workers' labor will be paid and influences the contractor to enter into subcontracts with responsible employers. A provision of this nature already exists in the Act on the Posting of Workers in the Republic of Croatia and on Cross-Border Enforcement of Fines (Official Gazette, No. 128/20), but only in relation to posted workers performing construction activities. This provision ensures equal treatment of all workers and all business activities.

Issues

AmCham believes this kind of legislation is **unacceptable**, given that it will **adversely affect the entire business sector** and unnecessarily generate additional **tasks and operating expenses in the Republic of Croatia**.

Such a proposal not only imposes **the responsibility for paying salaries to subcontractors' workers** on business entities but also imposes an **administrative burden** in terms of collecting personal data of the subcontractors' workers, which is questionable from the aspect of regulations on the protection of personal data and rules on business confidentiality, and opens up possibilities for **abusive practices by subcontractors** in terms of non-payment of salary and transferring the obligation of payment to another party.

This raises a very serious question about the proportionality of the effect of the obligation from Articles 18 and 19 since disproportionate obligations are being imposed on the contractor to the extent that the contractor, if they did not take **undefined "appropriate actions"** (or if they took actions that they considered appropriate but are evaluated by the court as "inappropriate"), is responsible for the salaries of subcontractors' workers, even though it is ambiguous whether these same workers are in any way linked with the business relationship of the two contracting parties.

Moreover, from the text of the provisions of Articles 18 and 19, it is **neither clear nor understandable** for what reason the contractor is relieved from joint and several liability by collecting personal data from subcontractors.

We wish to emphasize these issues from the aspect of **regulations on the protection of personal data**. The following questions are raised:

- In whose legitimate interest is the exchange of personal data of workers?
- Is the provision of Article 19 of the Act in question sufficient in itself for the proposed processing to take precedence over the rights and freedoms of workers?
- Does the worker have the right to object to such processing and restrict it?
- Does the contractor's legitimate interest take precedence over the fundamental rights and freedoms of workers?

The processing of personal data in the workplace in relation to employment is mostly based on the processing that is necessary for the performance of the employment contract and on the employment law provisions that require such processing from the employer. In cases when the employer must perform specific processing (e.g., to register the worker for compulsory insurance), the worker is clearly and fully informed about such processing.

This means that workers should be informed about the processing of personal data provided for in the provision of Article 19 of the Act. This raises the question of

whether the worker will allow such processing which exculpates the other contracting party from joint and several liability, and if the worker agrees to such processing, whether this violates the worker's right to the confidentiality of salary data as personal data.

We wish to emphasize that the contractors would be required to ensure special protection measures that would enable **adequate storage of such data** and that it is data that is **kept for an unlimited time**, which generates an unjustified cost burden for contractors, with a questionable purpose and goal for the business community.

We would also like to point out that this will cause additional difficulties for business entities/employers who have established a works council or have an appointed commissioner who performs the function of the works council. A **provision of Article 151 of the Labor Act** stipulates that the employer can only make a decision on the collection, processing, use, and provision of employee data to third parties with the prior consent of the works council. Therefore, with this kind of intervention, the legislator **slows down business processes** and **exposes businesses to unnecessary additional obligations**, the purpose of which is not justified, and the basis in the real sector is questionable.

Conclusion

The rationale for adopting the Act states that the consequences resulting from the adoption of the Act will contribute to job security in the Republic of Croatia, the growth of the employment rate, the increase of the pensionable service and the growth of old-age pensions, and at the same time contribute to the prevention of unfair competition of employers from the shadow economy, which by no means stems from the specific contested provisions of Articles 18 and 19 of the Act.

Such provisions, on the contrary, will lead to complicated administrative, legal, and judicial procedures and will not contribute to the prevention of unfair competition but instead encourage it. The inspection of workers' salaries will result in the disclosure of sensitive data to other business entities, which will certainly not positively effect market competition.

Referring to the analogy with the Act on Posting of Workers is unfounded, considering that this encourages a chain of joint and several liability of unimaginable proportions, which has no base in the business itself. The provisions in question open up possibilities for abusive practices of the subcontractor in terms of non-payment of salaries and transfer the obligation of payment to "someone else's account", and creates the issue of non-payment of salaries that is currently practically non-existent in Croatia (except in cases of companies facing business difficulties).

For all of the above reasons, AmCham contests the provisions of Articles 18 and 19 and proposes that they be removed.

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