Latest Developments In Romanian Legislation Regarding The Collective Dismissal In The Case Of An Insolvent Employer

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In the context of frequent changes occurring in the legislation relted to business and especially when regulating the state of economic difficulty that might face a company, this study deals with the impact that the economic changes an insolvent employer goes through could have on its employees, the measures that might be taken and relevant regulations pertaining to this matter in terms of promoting domestic legislative changes in order to align Romanian legislation to the European one.

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INSOLVENCY. DEFINITION AND EFFECTS

Economically, insolvency reflects the debtor's inability to meet debt falling due date. Insolvency constitutes the manifest inability to pay debt, so an objective state of the heritage, characterized by a lack of the money available to pay debtor's debts.[1]

In our legislation, insolvency is reflected in the Law no.85 / 2014 where the Article 5 pct.29 defines insolvency as "the state of the debtor's assets which is characterized by insufficient funds available to pay clear and matured debts, so :

a) insolvency of the debtor when it assumed after 60 days of the due date has not paid his debt to the creditor; the presumption is a relative one;

b) insolvency is imminent when it turns out that the borrower can not pay the outstanding liabilities incurred due with available cash funds on the due date;

The current regulation is envisaged as a cause of trigger procedure cessation of payments by the debtor or incapacity to make payments when due. The debtor is unable to cope outstanding commercial debts and its assets - money required by payments are either nonexistent or insufficient, and they have no receivables, so they are unable to pay.

[1] Gheorghe Piperea, *Insolvenţa:legea,regulile,realitatea (Insolvency, the law, the rules and the reality)* ,Ed.Wolters Kluwer Romania, Bucureşti, 2008,p.490;

Therefore, in the legal sense, "financial difficulty" is a deficitary state of the debtor's assets that do not enable the debtors m to honor their financial pecuniary obligations due to unavailability of funds. For example, a simple refusal of payment, based on exceptions that the debtor deems, in good faith based, does not constitute evidence of insolvency. It thus makes a clear distinction between debtor who does not want to pay the respective amounts which he does not consider to be due and the debtor who has the financial resources for payment of the debt.

Debts must be certain, liquid and payable. The claim is uncertain whether its existence is questionable and unquestionable. The claim is payable when the debt is matured and can be claimed, which may be required performance, even foreclosure. The claim is liquid, if the claim whose object is an amount, expressed in lei or foreign currency or in an amount of generic goods.

Proof of lack or insufficient money of the debtor, defining feature of the cessation of payments, lies directly in the conduct of the debtor who can not pay his debts, and indirectly, when the debtor resorts to fraudulent means or ruinous (borrowing, selling at a loss , issuance of bad checks, and others). Therefore, the court is the only one to appreciate the debtor's conduct in its relations with third parties and traders of means but also on the existence of the means needed for the debtor to perform or not the payment and determine if it is in a cash impairment.

The cease of payments is a condition of the debtor, expressing his inability to pay outstanding trade payables due to lack of liquidity.

As soon as it is considered to open the insolvency procedure, priority measures to be taken in the opening of the procedure are numerous, such as: notifying all creditors included in the list submitted by the debtor; all claims are subject to verification procedure stipulated by the law, except debts identified by writs of execution; receiver shall prepare and register with the court a preliminary ranging claims against the debtor's property, specifying wether they are unsecured, secured, priorities conditional or not yet due, showing for each name / name of the creditor, the amount claimed by the creditor and the amount accepted by the receiver; debtor, creditors and any other interested party will be able to file complaints about past claims and preference rights by the judicial administrator / liquidator in the preliminary table of claims; raising the debtor's right to administer property, unless it has not declared its intention of reorganization; right administration will be lifted debtor even if the declared intention of reorganization at the request of creditors, the creditors' committee or representative members or, where applicable, the members / shareholders, if such request is justified by continued losses in the debtor's assets or the improbability of making a rational business plan.

All judicial or extrajudicial actions for recovery of debts (arising prior to the opening of insolvency proceedings) against the debtor or its assets are suspended, unless the creditor holds a claim secured by mortgage, pledge or other security interest or right retention. The statute of limitations is suspended and will resume

its course 30 days after completion of the procedure. The flow of interest and penalties is also suspended.

THE INSOLVENCY CONSEQUENCES ON LABOR RELATIONS

Because some employers are in economic difficulty -and can no longer operate under the same financial conditions because of salary claims which are onerous too, either because of some agreements, such as, collective labor agreements in force at the unit generate excessive costs for the economic problems at cause, are forced to give up wage costs of the numerous staff members (relative to the actual needs of staff related to the volume of activity) and therefore to appeal to the termination of contracts.[2]

To acquire the status of an insolvent employer, it is sufficient that the debtor not complied with the obligation of payment towards its employees. Because this situation often leads to termination of employment, the employer's employees are among the last creditors that would have an interest for the employer to be in a state of insolvency. The termination of the contract under the insolvency may have consequences for the employee more than unfavorable to the termination of individual employment contracts in other ways provided in labor legislation.

A solution for the costs representing salaries which are too onerous is reducing the number of existing employees at the time of the occurrence of insolvency, namely dismissal for reasons not related to the employee. If the employer has to lay off a large number of employees for these reasons the procedure is named "collective redundancies" .

COLLECTIVE REDUNDANCIES. PROTECTION OF EMPLOYEES IN THE EVENT OF COLLECTIVE REDUNDANCIES AT THE LEVEL OF THE INSOLVENT EMPLOYER.

“Collective redundancy” means the dismissal, within a period of 30 calendar days, for one or more reasons not related to the employee, namely a number of:

(i) at least 10 employees if the employer performing dismissal has more than 20 employees and less than 100 employees;

(ii) at least 10% of employees if the employer dismissing employees has at least 100 but less than 300 employees;

(iii) at least 30 employees if the employer has at least lay off 300 employees.

Also, taking into account the employees whose individual employment contracts terminated by the employer of one or more reasons not related to the employee, provided there are at least five redundancies.

[2] Institutul național pentru pregătirea practicienilor în insolvență – Coordonator Stiintific prof. univ. dr Radu Bufan , Tratat practic de insolvență, Editura Hamangiu 2014 (The National Insitute for training insolvency practitioners, scientific coordinator prof.dr. Radu Bufan - "Practical treaty of Insolvency, Hamangia Publishing House 2014)

Dismissal for reasons not related to the individual employee's termination of employment is determined by the abolition of the position held by the employee, for one or more reasons not related to his person.

This matter is regulated at European level by **Directive 98/59 / EC** of **20 July 1998** on the approximation of the laws of the Member States relating to collective redundancies. The Directive, now still in force, defines collective redundancies as dismissals accomplished by an employer for reasons not attributable to individual workers when they concern a minimum number of people over a certain period.
One interpretation aims the concept of collective redundancy which "does not necessarily need an economic reason, dismissal does not have to be a dismissal for economic reasons or because of a crisis, but must be of a" objective" character for the reason for dismissal shall not be charged to the worker. [3]"

In the Romanian law system, the Directive was transposed by **Art. 69 Law 53/2003 - Labor Code,** republished, who took a first faithful impression on the provisions of the Directive regarding collective redundancies. If we aim though for a critical analysis of both the provisions of both the Directive and the Labor Code, and the way they are implemented, we will find that the provisions of the Directive have been transposed almost completely to form, but they may need improvements in substance, especially when we consider the interpretation of CJEU in application in other Member States.

The notion that our legislature system has given to the insolvency matter - **Law no. 85/2014 on insolvency procedures and to prevent insolvency**, decided to be used to highlight the employment relationship in not the specific labor law sphere, but one with its own specific. The law states that "after opening date of the insolvency procedure, the termination of individual employment contracts of the debtor`s staff work will be done by emergency by the judicial administrator / liquidator. The judicial administrator / liquidator will provide personnel fired only the statutory period of notice. Where are applicable the provisions of Law no. 53/2003 - Labor Code, republished, as amended and supplemented, regarding collective dismissal, the terms stipulated by art. 71 and art. 72 para. (1) of Law no. 53/2003, republished, with subsequent modifications, shall be reduced to half".

The insolvent employer is bound by the provisions laid down in **art. 5 of Law no. 467/2006**, law transposing the Directive of the European Parliament and the Council no. **2002/14 / EC** that information and consultation of employees through their representatives takes place on the recent and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular when there is a threat to jobs. This procedure being followed, the

[3] Miguel Rodríguez-Piñero, Bravo-Ferrer, „*La noción comunitaria de despido y el momento oportuno de la consulta*" („*Noţiunea comunitară de concediere şi momentul oportun pentru consultare*"), Revista Relaciones Laborales, Nº 22, Sección Editorial, Año XXV, pág. 97, tomo 2, Editorial La Ley

employees knowingly can take timely protective measures within the meaning of another job search.

Under current law, the judicial administrator / liquidator may terminate with urgency the individual employment contracts of the staff will be required to follow statutory period of notice. Thus, the provisions regarding the collective redundancies of Law 53/2003 - Labor Code, republished are respected but the deadlines stipulated by this law are halved. Individual employment contracts termination becomes effective pursuant to the decision of dismissal issued by the judicial administrator / liquidator. The requirements of the legality of the dismissal decision concerning the necessity of drawing up written decision, the insolvency practitioner is obliged to provide its content and length of notice under the law which was the basis of issue. The employee may appeal the decision to the competent court on grounds of form or substance.

In the case of collective redundancies deadlines laid down by art. 71 and 72 paragraph (1) of Law 53/2003 they are reduced by half. This regulation follows the solution delivered by the Court of Justice of the European Union in Case **Claes and others - C235 / 10 C- 238/10**[4] regarding compensation duties in the case of collective redundancies. The Court held that art. 1-3 of Directive 98/59 / EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies **must be interpreted** as applying to an institution following a **court ruling** ordering the dissolution or liquidation for insolvency, even if such a termination, national legislation provides for the termination with immediate effect of the contracts of the workers. Luxembourg legislation is considered to be in compliance with Directive whereas a legislative provision in 1993 was introduced in national legislation that rules on collective redundancies applies if the unit ceased operations as a result of a court decision. However, it was necessary that the European Court of Justice to rule again that in all cases of collective redundancies following the closure of an institution, even when it stems from a court, the employer has the obligation to inform and consult workers.

Luxembourg Labor Code provisions under which the individual employment contracts terminate with immediate effect in the event of closure following the declaration of the bankruptcy of the employer are not in accordance with the Directive, this aspect was emphasized by the ECJ which stipulated that *" until definitive cessation of legal personality of an institution on ordering dissolution and liquidation must be met obligations under Articles 2 and 3 of Directive 98/59. The obligations of the employer under these articles to be executed by the management of the institution concerned, as long as it remains in office, even with limited powers in terms of managing the institution, or the liquidator thereof, insofar as the administration of that institution is seized totally liquid. "*

Prior to the enactment of Law 85/2014, the insolvent companies are exempted from the obligation to apply the collective dismissal procedure. Art. 86 paragraph

[4] Conecced cases C-235/10-C-239/10*, David Claes and others agaainst Landsbank Luxembourg SA,* paragraph

(6) of the Law provides that "Notwithstanding the provisions of Law no. 53/2003 - Labour Code, as amended and supplemented, the simplified procedure and if the general procedure of entry into bankruptcy, termination of individual employment staff emergency debtor will be made by the liquidator, without requiring completion of the collective dismissal procedure. **The liquidator shall give notice to personnel fired only prior 15 days. "**

Therefore, immediately loosen the individual employment contracts of the employees, only giving a notice of 15 working days. However, following numerous issues occurred in practice and **in the light of European legislation** mandating the contrary, on 02.24.2015, by **Decision No. 64 published in the Official Journal of Romania no. 286 / 04.28.2015, the Romanian Constitutional Court admitted the exception of unconstitutionality of art. 86 para. (6)** first sentence of Law no. 85/2006. Except admitting Court has held that this exemption the legislature of insolvency law does not respect the right to information and consultation of employees provided for by art. 41 paragraph 2 of the Constitution and the failure to harmonize the Romanian legislation with European art provided. 148 (2) and (4) of the Romanian Constitution (Implemented by art. 2 of Directive no. 98/59 / EC).

THE INFORMATION AND CONSULTATION OF TRADE UNIONS OR EMPLOYEE REPRESENTATIVES

The information and consultation of trade union or employee representatives for collective dismissal provisions in Directive 98/59 / EC were generally correctly and completely transposed into national law by art. 69 of the Labor Code.

If the employer intends to make collective redundancies he shall initiate timely and aimed at reaching settlement consultations with trade union or employee representatives, of at least:

(i) the methods and means of avoiding collective redundancies or reducing the number of employees to be made redundant and

(ii) mitigating the consequences of redundancy through the use of social measures aimed, inter alia, support for retraining or retraining of dismissed employees.[5]

To enable trade union or employee representatives to make proposals in due time, the period during which consultations take place, the employer is required to provide all relevant information and notify them in writing.

Information and consultation obligations remain whether the dismissal collective decision is taken by the employer or an undertaking controlling the employer. If the decision determining the collective redundancies is taken by an undertaking which controls the employer, it cannot rely, if not strictly meet the information

[5] I.T. Stefanescu, EM[LOYEES' DISMISSAL FOR REASONS NOT RELATEDF TO THEIR INDIVIDUAL OR COLLECTIV PERSON,in I the Romanian revue of Law nr. 3/2006, pages. 13-26

and consultation obligations referred to above provided by art. 69 para. (1) and (2) of the Labor Code, that undertaking has not provided the necessary information.

Regarding this aspect, we note that transposing the provisions of the art. 2 para. (4) the second sentence was made incomplete. According to this text, regarding violations of the information, consultation and notification requirements of the Directive, the employer cannot claim that the necessary information has not been provided by the undertaking which took the decision leading to collective redundancies to justify any violation of all the information, consultation and notification requirements of the Directive. Transposing into Romanian legislation is incomplete since it refers only to the situation in breach of obligations under paragraphs (1) and (2) of art. 69 of the Labor Code and not in any breach of any obligations relating to information and consultation.

The provisions of the Labor Code reproduce almost exactly the provisions of the Directive respecting the principles laid down by it to ensure employees collectively, through their representatives, determined according to the provisions of national law, access to the necessary information and relevant timely so enabling them to formulate relevant proposals for the dismissal project concerned and are sufficiently relevant as to converge an agreement with the employer on the draft collective redundancy.
Regarding the phrase "timely" as the Labor Code makes no statement about the minimum time that must be respected by employers to initiate collective redundancies for her performance we relate both to the practice of the ECJ and the the purpose for which the provisions of the Directive have been adopted and to enable a dialogue between the parties in order to reduce the negative effects of dismissal, to find solutions for maintaining and protecting the retraining of employees depending on the specific case. Like the provisions of the Directive which determine the point in time of the birth of the obligation to initiate the information and consultation "when the employer is considering making collective redundancies" and Labor Code refers all at birth intentions of the employer accordingly in good time before a decision on collective redundancies has been taken so that it can carry information and consultation process. This interpretation is confirmed by the ECJ in practice was that, if the employer 'envisages' collective redundancies and has drawn up a 'project' in this sense corresponds to a situation in which there was still no decision taken. The terms used by the Community legislature indicate that the obligations of consultation of employees or union representatives and notification to the competent authorities appear before any decision be taken by the employer to terminate individual employment contracts. Achieving the very purpose of the Directive would be jeopardized if the consultation of workers' representatives would further the employer's decision.

The employer has the obligation to initiate information sufficient time before the time scheduled for termination of individual employment contracts, to allow real consultation on the need to conduct good faith in order to reach agreement. How

the employer fulfills this obligation is subject to review by the court, at the request of employees' representatives, if they appreciate that they have provided all relevant or if it considers that not see properly, and at the request measure individual employees affected by the dismissal who can ask the court annul the decision of dismissal if it considers that it was issued without compliance with legal procedures, including the information and consultation. From this point of view, art. 6 of Directive 98/59 / EC which established the obligation for Member States to ensure that employees and their representatives have administrative or judicial procedures to make the legal provisions in the matter of collective redundancies are fully implemented.

PERSPECTIVE:

It`s a fact that no one can stop an employer to organize the commercial activity but by where it leads this exclusive prerogative of the employer ? Thus , in terms of theory, not only our laws but also of the other EU Member States or even other non-EU countries were in constant change in addressing this issue , which is why theorizing not only the concept of collective redundancy , but also its methodology and its implications in terms of business of the employer , that the interference with the rights of employees - to be thorough in this regard need to safeguard the right to work of an employee , whether it is a collective dismissal the employer wishing to reorganization / streamline the work , or an employer in economic difficulty .

CONCLUSIONS :

ARE SOMEHOW CONTRARY TO THE CURRENT PROVISIONS OF LAW NO. 85/2014 WITH THE PROVISIONS OF THE DIRECTIVE 98/59 / EC ON COLLECTIVE REDUNDANCIES? DOES IT VIOLATE THE RIGHT TO INFORMATION AND CONSULTATION UNDER THE LAW AND DIRECTIVE BY REDUCING THE DEADLINE?

To answer this question, it is noted that before the entry into force of Law no. 85/2014, the collective dismissal procedure in case of employer insolvency was found in one simplistic, safe condition imposed in the compliance of the notice period (This period was one reduced and the Romanian Constitutional Court ruled that those provisions related to the reduction of the notice period, even in the context of the pronouncement by the High Court of Cassation and Justice, Decision no. 8/2014 in an appeal on points of law was one according to the fundamental Law), and not following the procedure governed by art. 69 of the Labor Code, in particular the provisions related to information and consultation.

Thus, before the entry into force of Law no. 85/2014, the employer was in this special situation, basing its individual labor contract termination on provisions of

the art 86 paragraph (6) | Law. 85/2006[6], not respecting what the fundamental law protects and guarantees, does not respect the right to information and consultation.

In this context it should be noted however that under the new legal provisions, collective dismissal procedure governed by the common law applies. So the problem that would occur is the answer to the question if the termination of a labor contract under the influence of the new legislation would not respect this fundamental right, but if the procedure carried in this manner violates European provisions, namely those concerning the available time in which the employer must to initiate consultations with workers representatives to reach agreement. More technical, the question is whether the new provisions violate Art. 148 (2) of the Romanian Constitution (which refers to Directive no. 59/98 / EC) and so, if the new provisions are constitutional in this measure.

Without inciting a definite answer, we mention that the technical and legal point of view, applying shorter deadlines in which to take place informing and consulting employees, do not identify with the employee's *breach of this right*. Must be considered until after the fact that these provisions are special ones that the principle of the well-known regulations derogate from the provisions of the Labor Code, precisely because the legislature has thought of a special situation for an employer in the same situation, protecting in the same time the interests of workers.

Specifically, if we consider the aspects which arise in practice related to the formalism (from the point of view of the employer) of these terms as they enter into consultation, the employer is ultimately the only entitled to initiate this procedure, we might rally to the view that that reduced term does not affect in any way the fundamental right of employees to information and consultation under EU law.

A particularly important aspect in supporting this view would be that, in terms of time, the consultations could not last forever - in common conditions - (see also the difficulties in initiating such proceedings following the refusal of the syndicate to have a constructive social dialogue), especially for an employer who is having financial difficulties and must act rapidly to sort out the company`s financial difficulty, so shorter deadlines are from this point of view in the benefit of the employer.

Therefore, we conclude by rallying to the view that the new provisions do not contravene the ones imposed by the legislation, given the nature of the special provisions of Law no. 85/2014 which derogate from the Labor Code and considering the protection of the fundamental rights of the employee, could not

[6] Legea nr. 85/2006 privind procedura insolvenţei - abrogată la 28-iun-2014 de Art. 344, litera A. din titlul V din Legea 85/2014 privind procedurile de prevenire a insolvenţei şi de insolvenţă)

reach, as in the old legislation where it fully derogated from art. 69 Labor Code, a lack in terms of technical and legal rules for the protection of this right.

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