

INTERFERENCE BETWEEN THE INSOLVENCY LAW AND THE LABOUR LAW. CONVERGENCE BETWEEN INTERESTS - INTEGRATIVE VISION

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Abstract

In the present scientific approach, we intend to capture the "collision", many times at the conflict limit, of some rights and interests, and the interaction between the economic sphere and the social sphere, respectively, which characterizes both insolvency, a legal institution that has successfully harmonized in an ethical and moral manner its regulation scope by balancing divergent, polar interests such as those of employees with those of entrepreneurs, those of debtors with those of different categories of creditors, those of consumers with those of professionals, interests and values that become interpenetrated at one point, beyond the economic reality and the barriers to profit, the legislator attempting to tip the balance towards a harmonious, balanced and stable social climate through common sacrifices and the awareness of the need for social responsibility while also favouring the economic development of a company and a society as a whole. In fact, by touching the area of interference between the field of labour law and that of the insolvency law, although we are witnessing some "corseting" of the labour law regulations and not only, by the specific objective of the legal regime of insolvency, we witness, however, a prioritization of social character, due to the national and Union legislators' focusing on measures to guarantee salary and social security rights and the protection of workers' rights in the event of a company transfer, taking into account the fact that insolvency proceedings may involve reductions and reorganisations of the business, the sale of some assets or parts of the enterprise, which inevitably lead to reducing the number of jobs. The core of the research remains an integrated vision, by "intermingling" the economic and social fields, evoking, as a priority, the judicial reorganization as a specific insolvency procedure meant to be a win-win instrument that gives the debtor the chance to remain in business, to creditors the chance to recover more than they would recover in bankruptcy and, last but not least, the chance for employees keep their jobs with the prospect of relaunching and creating other jobs, also taking into account the social part involved by the insolvency itself.

Key words: *insolvency, labour law, interdisciplinarity, guaranteeing employees' claims, protection of the pension right, company transfer, dismissal in the insolvency procedure, judicial reorganization, CJUE jurisprudence, EU directives.*

INSOLVENCY LAW VERSUS LABOUR LAW. INTERDISCIPLINARITY

Starting from accepting and assuming the fact that the law is a social phenomenon reconfigured and reshaped by the permanent and complex changes of society, the interdisciplinarity of scientific research assuring the dynamics of the norms of law in the light of an integrative knowledge so necessary in the postmodern era, we focus our attention on the convergence between a traditional branch of the private law such as the labour law and an insolvency institution that tends to form a special law[1], in its own right, after the repeal of the Commercial Code. Moreover, under the unavoidable influence of Europeanization and globalization, we are increasingly confronted with the transdisciplinary approach, in this context the classical branches of law being redimensioned by acquiring mixed characteristics. We highlight in this respect the expansion of the labour law, which, although it traditionally belongs to the private law branch, has in fact acquired the characteristics of a "mixed law"[2], which leaves the closed, rigid system specific only to the individual labour contract, and to the collective bargaining agreement respectively, reaching the public domain through the mission of targeting the public function as well, vocational training, health and safety at work, labour inspection, etc. That is precisely the reason why we are talking about "de-stiffening" and a "flexibility" of labour law with the changes at European level both in the economic and in the social policy context, the related legislation such as Law on Social Dialogue no. 62/2011, as subsequently amended and supplemented, as well as the Directives and Regulations drafted at the EU as well as the national level and implemented at national level that outline the corollary of the labour law.

In this context of the redimensioning of the traditional branches of law, we invoke the existence and the explosive and quire recent course in the finalization and implementation of the insolvency law, a mixed law. We strengthen this idea by arguing that insolvency law can be considered a result of an interdisciplinary research and an analysis of the branches of economy, sociology, psychology and of the law branches through the interference with other national and international normative acts, such as labour law regulations, the criminal law, the civil law, the civil procedural law, the

administrative law, the public procurement law, etc., which have put their mark on the evolution of the institution of insolvency and created new perspectives of analysis, new legal views, outlining, why not, a new law, a special, particular, individual law, that of insolvency, which has exceeded the boundaries of commercial law and has expanded to natural persons and to administrative-territorial units[3].

In this social and economic reality, it must be noted that the labour law is in a frontal collision with the tendencies of a globalized economy, becoming dependent on the economic dimension, hence the tendency to increase the flexibility of the employment relationship in favour of the employer, the labour law somewhat losing its character that used to be exclusively in favour of employees. Nevertheless, in our opinion, this "rivalry" between rights must be annihilated, because it is erroneously considered that the social policy is an opponent of the economic policy[4], the social dimension must be anchored in the economic reality and vice versa, due to the interdependence of the two sides in an open democratic system. The alleged balance can only be achieved by sacrifices and mutual compromises, through an open and flexible law, the reverse of the legal matrix of rights enshrined through the labour law being the impossibility of economic and social progress. Thus, part of the doctrine considers that "the bow to the fatality of the economic crisis and the solutions promoted under the effect of the economic constraints generated by the crisis, the functioning principles of market, the principles of competitiveness in the era of globalization, the rate of economic growth, budgetary balances represent only a weakening of the legal guarantees granted to employees"[5]. Indeed, the Europe 2020 Strategy - A European strategy for smart, sustainable and inclusive growth and the Euro Plus Pact – a closer coordination of the economic policy for competitiveness and convergence adopted by the European Council in March 2011, had as their primary objective the employment policy, further promoting the policy of combating unemployment, but also flexicurity as an important means of modernizing and stimulating the adaptability of labour markets, considering that "social protection systems and social inclusion policies play the role of automatic economic stabilizers and effective mechanisms to mitigate the social impact of slowing down economic growth and helping people to return into the labour market"[6]. Indeed, we cannot achieve a distortion and weakening of the labour law and, implicitly, the protection of employees by virtue of purely

economic argument, which is the reason why an effective implementation of flexicurity by the social partners within the European Union is not fully possible. For this purpose, the European Commission lays the foundation of a new strategy for 2020-2030, a strategy generically referred to as mobication (mobility and education for workers), which focuses on labour mobility in line with the continuous, complex and in-service training and at a much higher level through the possibility of retraining in all stages of their professional life. Moreover, we should also take into account how far we continue to expose the social dimension and to really weaken the system of rights and values protected by the law that loses ground to the world technological and the industrial revolution, on the occasion of the Davos meeting, held in January 2018, at the World Economic Forum where the ability of companies to adapt to the new and revolutionary challenge to artificial intelligence was brought up for discussion, making it clear that "the fourth industrial revolution will eliminate millions of jobs"[7]. It is a reality that we already live in and which also requires a "simultaneous revolution in formation and education, encouraging innovation and adaptability," while the society has already become acquainted with artificial intelligence robots, such as Sophia, considered already a citizen with full rights as a result of receiving the citizenship of Saudi Arabia[8], Erica, the artificial intelligence robot in Japan[9], able to develop psychological and emotional valences, to evolve and learn to adapt much faster than the human being, with nearly 600 uses of Artificial Intelligence in all major industries, according to analyses carried out by McKinsey Global Institute, and it is estimated that between 400 and 800 million employees will be replaced by such robots by 2030[10]. Although it seems to be a SF film, we live a reality that has reached the stage of an astonishing evolution that does not allow us either to turn time back or to stop it, but the social, ethical, legal and psychological impact can be improved by the effective awareness and preventive substantiation of an effective and robust legal framework for protecting people, and implicitly of rights arising from the labour law, the technological progress and economic prosperity cannot become in this sense the "enemy" of humanity. In this fragile context, the proposal for a Regulation of the European Parliament and of the Council for the establishment of a European Labour Authority (ELA), having the status of a new EU decentralized agency which should become operational in 2019[11], comes as a guarantee and an important step in providing effective and adequate social

protection, ensuring the necessary modernization of the EU rules on the coordination of social security systems and implementing the European Pillar of Social Rights. We highlight the fact that, through Senate Decision no. 65/2018, Romania considered that the establishment of such an entity became necessary to overcome the challenges of improving EU-wide cooperation on cross-border employment and social security[12]. This reality, which is still imperceptibly and unperceivably outlined in everyday life, has become for some time a priority of interdisciplinary analysis and approach in order to "control" new areas of research such as the ecological economy, biotechnology, globalization, intelligence artificial, digital technology, etc., fields that are present in plan of the debates, studies and recommendations of the Organization for Economic Cooperation and Development, [13] the changes and prospects of the 21st century being marked by the speed of global transformations that require an integrative vision of research and approach.

Due to lack of space, given that the debated issue may give rise to interesting, multiple and complex analyses, we will now revert to the interference between the economic field and the social field, in this case the insolvency law and the labour law, in which context we consider that the national, but also the EU, as well as the international law-maker, facing the challenge of identifying a fair balance between the interests of the actors involved, has managed to outline a system of flexible rules that would benefit both the insolvent debtor-employer and at the same time to provide protection to the employees of such an employer, respecting the principle of proportionality of the limitation of the prerogatives of certain rights guaranteed by the labour legislation in view of the effects of insolvency, the internal legislative formula being positively modelled by the new coordinates drawn at EU and international level, essentially outlining a distinctive outlining and reconfiguration of the insolvency law this oriented towards prevention and to giving a second chance while also contributing to the increase of investments and employment opportunities in the single market.

THE PREFERENTIAL REGIME OF SALARY CLAIMS AL IN THE EMPLOYER'S INSOLVENCY PROCEDURE. GUARANTEES

At national legislative level, the employees of employers who become insolvent enjoy a preferential legal regime, their salary claims reflecting a strong social component. Thus, the preferential regime of salary claims is outlined by the manner in which the insolvency procedure itself is regulated - Law no. 85/2014, which provides for special provisions designed to protect employees in competition with the other categories of creditors, substantiated as follows: the ex officio registration of salary rights in the debt table by the judicial administrator/liquidator based on the employer's accounting records, the employees' dispensation of the obligation to file a debt claim, being automatically entered in the debt table, unlike the other creditors who, in the event of failing to submit such a claim, lose their right to participate in the insolvency proceedings, the right to request the opening of the insolvency proceedings if the receivables due and unpaid exceed the equivalent of six gross average salaries per employee, unlike the other creditors who have to hold a minimum claim of 40,000 lei, the fact that the salary claims are not subject to the verification procedure by the judicial administrator/liquidator, as well as the degree of priority of making payments in the procedure, given that, according to art. 161 item 3 of Law no. 85/2014, claims arising from employment relationships are in the third position. Moreover, according to art. 5 item 18 of Law no. 85/2014 of the Insolvency Code, salary claims include, in addition to salaries unpaid by the employer, any other pecuniary claims arising from the legal employment relationship and similar relationships, such as rights due under copyright or inventor rights, industrial property, etc., except for compulsory social contributions which fall into the category of budgetary claims[14].

In addition to the preferential regime of salary claims, Law no. 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, as subsequently amended and supplemented, which substantiated art. 172 of the Labour Code - Law no. 53/2003, republished ("The establishment and use of the guarantee fund for the payment of salaries will be regulated by a special law"), and which also harmonized, at the same time, the Community legislation through the "excerpting of the core content" from Council Directive no. 80/987/EEC on the approximation of the laws of the Member States in relation to the protection of employees in the event of the insolvency of their employer, subsequently codified for the sake of clarity and transparency in EU

law by Directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the employer's insolvency[15].

The European legislator has left it to the discretion of the Member States to set the ceiling for guaranteeing the payment of patrimonial rights unpaid to employees by the employer against whom a final decision to open insolvency proceedings has been given and against whom the measure of total or partial removal of the administration right was taken, imposing in this respect only a minimum level of the amount, regardless of the number of employees of the employer, i.e. the equivalent of 3 average national gross salaries, but also a minimum period covering salary rights. Consequently, salary claims as defined by art. 13 of Law no. 200/2006 shall be borne for a period of three calendar months, a reference period established in relation to the date of the opening of the procedure, namely 3 months before or after that moment, an aspect recently clarified by the High Court of Cassation and Justice which had led to interpretations and different applications, by a Decision issued on 5 March, 2018 [16]. Without being meant to be an exhaustive presentation of the legal regime for the protection of employees' claims in the employer's insolvency procedure, we believe, nevertheless, that under this "umbrella" of rights and guarantees, there is in reality a vicious circle, and that, from the legislative point of view, it is appropriate to make an upgrade based on the equity and proportionality principle, but also by strengthening this social dimension in a globalized economy. What we would like to point out in this context is that the resources of the guarantee fund established for social protection concerns for employees are not always a viable solution to economic recovery, unemployment and increase in the job dynamics, as they must be returned later by the insolvent employer either following a successful reorganization, within 6 months from the date of the decision to close the insolvency, cases quite rarely found at national level, or in the bankruptcy procedure by selling the assets. However, these minimum measures, we are referring to them as being minimum because the national legislator has transposed the above-mentioned Directives by ensuring the minimum framework imposed by the European legislator, do not benefit the employer very much, who is only temporarily exempted from the payment of these claims, given that the guarantee fund is also established based on its regular contributions as well, or the employees who lose their jobs in a society and in an economic context where an increasing number of debtors

in difficulty are forced by purely administrative, legislative and social circumstances, such as the stigma associated to bankruptcy, to choose the bankruptcy method. De lege ferenda, in the substantiation of the new vision on insolvency, so intensely promoted in the EU and international context, coordinated by the normative instruments at European Union and also at global level, we consider that it is appropriate to re-evaluate Law no. 200/2006 within the meaning of art. 11 of Directive 2008/94 which allows Member Countries to apply or introduce more favourable legal provisions for employees and to expand the period of guarantee. A special nuance of these guarantees also intervenes in the manner of assessing the regulatory framework of Law no. 200/2006. Thus, from 01.01.2018, Emergency Ordinance no. 95/2017 amended art. 4 para. (1) letter a), defining the employer as "the natural person or the legal entity who can employ labour based on an individual labour agreement, or an employment relationship, in compliance with the law", renouncing the previously established exceptions, respectively the public institutions defined according to Law no. 500/2002 on public finance and Law no. 273/2006 on local public finance. Consequently, we understand to construe this legislative amendment as being an extension of the regulatory framework, on the one hand, to public sector employees, which was required with the entry into force of the law on the insolvency of the administrative-territorial units, but also, on the other part, we also raise the issue of natural persons as consumers, with the entry into force of Law no. 151/2015 on the insolvency of natural persons, i.e. 1 January 2018, according to Government Ordinance no. 6/2017, persons who, in compliance with the labour law, may conclude an individual labour agreement as employer. In this latter case, we refer more specifically to domestic helping staff employed by a natural person, the Directive in question allowing for an express derogation from this category, the same way it had also allowed in relation to civil servants and which the Romanian legislator initially used, while, in the situation of the domestic staff, the law did not make any mention, which is why we consider that these persons may also benefit from these guarantees under the conditions of being an employee of an employer who is a natural person who becomes insolvent according to Law no. 151/2015, interpreting the appointment of the administrator of a procedure, a measure specific to the insolvency of natural persons, as being the equivalent to the partial elimination of the right of administration, in order to comply with

the provisions of Art. 2 of Law no. 200/2006, according to which " the salary claims resulting from the individual labour agreements and from the collective labour agreements concluded by the employees with the employers against whom final decisions have been issued for insolvency proceedings and against whom the measure of total or partial removal of the administration right was taken, hereinafter referred to as "insolvent employers" shall be paid from the Guarantee Fund".

In fact, the law does not distinguish between the insolvent employer regulated by Law no. 85/2014, and the other insolvent employers covered by the other regulations, and *ubi lex non distinguit nec nos distinguere debemus*. Unfortunately, at national level, many categories of debtors are exempt from the insolvency procedure, as is the case with the liberal professions, which in their turn involve hundreds of thousands of employees. Moreover, these categories of people are also excluded from the application of Law no. 151/2015 on the insolvency of natural persons. Of course, in this context of legislative amalgamation that currently describes insolvency and which has taken over not only the private sector but also the public sector, many clarifications and internal legislative developments are necessary, as Romania has not addressed yet and has not taken into account many of the issues envisaged at EU level, such as the exception allowed by art. (12) of Directive 2008/94 to exclude from the guarantee workers who have owned a substantial part of the company in question and who are responsible for the company's insolvency and, in this respect, the CJEU decision of 10 February 2011 - C-30/10 in *Lotta Andersson v. Genome State ...* [17]. Being still in the process of legislative harmonization, the integrative vision of the area of interference between the labour law and the insolvency law in guaranteeing salary claims is primarily focused on the wide jurisprudence of the Court of Justice of the European Union, which provides the framework for the interpretation and guidance legislation in a transparent and interdisciplinary way, in situations of limited juxtaposition. [18].

PROTECTION OF THE PENSION RIGHTS IN THE INSOLVENCY PROCEEDINGS

According to art. 13 para. (2) of Law no. 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, as amended and supplemented, "the social security contributions due by insolvent employers are not covered by the

Guarantee Fund", these compulsory social contributions being included in the category of budgetary salary claims which also benefit from a privileged chirographic position, voting the plan as a separate category of creditors, as in the case of the salary claims, and being ranked 5th in the order of the recovery of bankruptcy claims, indeed after the salary claims placed on the third place. Moreover, we cannot consider that these rights could be affected by their inclusion in the category of budgetary claims following the possibility of applying the private creditor test and approving the measure of reducing the budgetary claims, the budget creditor approving the reorganization plan, such a situation only on the basis of strict criteria which imply an optimal way of recovering the unsecured budgetary claims, as compared to the situation of the debtor's bankruptcy. Moreover, by virtue of this privileged regime held by the state in the recovery of tax/budgetary receivables, Government Emergency Ordinance no. 88/2018 amending and supplementing certain normative acts in the field of insolvency and other normative acts, published in the Official Journal of Romania no. 840 of October 2, 2018, which proposes, among the strategic objectives, the creation of the "premises for the viable business recovery and the faster recovery of the debts, including the budgetary ones, being consistent with both the budgetary interest and the general economic and social interest of Romania" , thus establishing much stricter rules for the recovery of budgetary claims.

Consequently, the minimum level of protection of employees and rights resulting from a company-level social security system set up by the employer in the event of its insolvency is supposed to be covered with the mention not all the rules laid down by the above-mentioned Directive 2008/94 have been used internally, namely the situation of employees' rights deriving from supplementary social security schemes, 8: "Member States shall ensure that the necessary measures are taken to protect the interests of employees and persons who have already left the enterprise at the time of the insolvency of the enterprise, in relation to the rights acquired or to be acquired, retirement pensions, survivors' pensions, under a supplementary social security scheme at the level of an enterprise or of a group of enterprises". In this respect, we also take into account the clarifications of the CJUE in the interpretation of Article 8, in particular the Decision *Robins and Others*, of 25 January 2007, the Member States being aware that the correct transposition of Article 8 of the Directive requires, in the context of that duty of protection,

that a worker, in the event of his employer's insolvency, should collect at least 50% of the due retirement pension. Moreover, the British Court has recently made a preliminary reference asking CJUE questions for the clarification of the interpretation of Art. 8 of the Directive, the Advocate General proposing that the answer to the preliminary questions should be whether "Article 8 of Directive 2008/94 contains an obligation on the Member States which is unconditional and sufficiently precise as to the content so that an individual may rely on it directly against a body such as the Pension Protection Fund" (The guarantee body in the United Kingdom – n. n. E.S.) [19]. Mention should be made of the fact that the Directive allows (art. 6) Member States not to ensure the establishment of the Guarantee Fund and in relation to the contributions due under statutory national social security schemes or supplementary schemes at the level of an enterprise or a group of enterprises outside the national mandatory social security schemes which the Romanian State has also made use of, which is exactly why the current measures to ensure the minimum level of protection of social security rights in the case of the employer's insolvency differ according to the social security legislation adopted at the level of each state.

PROTECTION OF THE EMPLOYEES IN THE CASE OF COMPANY TRANSFER MADE IN THE CONTEXT OF THE ASSIGNOR'S INSOLVENCY

The business transfer is increasingly being promoted as a strategy for judicial reorganization, being viewed, at the level of the European Union, as a way of economic support, the creation of the premises for development and, at the same time, preservation of jobs, which can be achieved by means of highly diverse legal transactions such as the succession, sale or transfer of assets, the transfer or sale of the goodwill, the transfer of business, the assignment of business, the transfer of the enterprise, the contribution to the share capital, the merger, the division, the transfer of the patrimony or through the transfer of fiduciary property through a fiduciary contract[20]. In the case of a transfer of an enterprise, however, the problem of the protection of employees' rights is raised in the special situation of the transferor who becomes subject to insolvency proceedings and enjoys a special legal regime, by virtue of the principle of governance, with the priority of maximizing the capitalization of the assets and coverage of receivables, but also the

provision of a second chance through a successful reorganization plan, wherever possible. The current internal legislation, which has many gaps and is disseminated in many pieces of legislation that ultimately creates legal parallels and erroneous interpretations in this very poorly developed field and doctrine, does not offer very many legislative solutions, Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[21] being transposed in a truncated way, if we can refer it as such, with the mention that the provisions may, however, be customized and interpreted coherently by reference to the CJEU case law. Thus, we are taking into account, on the one hand, the provisions of the Labour Code, which establish in general terms in the art. 173-174 of Chapter V entitled "Protection of employees' rights in case of transfer of the enterprise, of the unit or parts of it" the rights and the guaranteed protection of the employees under such circumstance, and on the other hand, Law no. 67/2006 on the protection of the employees' rights in case of transfer of the enterprise, of the unit or parts thereof, as subsequently amended and supplemented, which transposes, as we have already mentioned, the provisions of Directive 2001/23/EC. This law particularizes the special situation of the insolvent transferor, establishing in art. (1) The rights and obligations of the transferor arising from the individual employment agreements and of the applicable collective labour agreement existing at the date of the transfer shall be transferred to the transferee in full. (2) The provisions of paragraph (1) do not apply if the transferor is subject to the judicial reorganization or bankruptcy proceedings, according to the law. "By this exception, the Romanian legislator used the possibility granted by the Directive to the Member States, which stipulates in art. 5 par. (1) that 'Articles 3 and 4 shall not apply to the transfer of an undertaking in which the transferor is the subject of bankruptcy or other similar insolvency proceedings instituted for the disposal of the assets of the transferor and which is under the control of an competent public authority, unless the Member States provide otherwise", stating that Art. (3) of the Directive ensures the transfer to the transferee of the rights and obligations arising from an employment contract or an employment relationship existing on the date of the transfer and the maintenance of the same working conditions, of course within certain limits and

exceptions established by the law, while art. 4 ensures the protection of employees against dismissal due to the transfer of an enterprise. By means of internal regulation, we conclude that the legislator has only pursued the exclusion from the application of art. 3 of the Directive all the other guarantees, including the impossibility of dismissal on the grounds of the transfer of the business, generating effects in favour of the employees, these being restricted only by a possible incompatibility with Law no. 85/2014.

As can be inferred from the interpretation of the CJEU, the Ordinance of 28 January 2015 issued in Case C-688/13 - Gimnasio Deportivo San Andres SL, in which the question was raised in relation to the assessment of the debts which the transferee could be authorized not to bear following the transfer [22], Directive 2001/23/EC must be interpreted as meaning that in such a special situation of transfer of an undertaking, it is allowed that the assignments at the transfer date or at the date when the insolvency proceedings are opened resulting from employment agreements or employment relationships, including those relating to the statutory social security scheme, should not be transferred to the transferee, provided that an insurance is established for workers which at least equivalent to those laid down in Directive 80/987/EEC, mentioned in the sections above and which provides for the establishment of the Salary Guarantee Fund. However, when we return to the internal transposition rules of this Directive, namely Law no. 200/006, we note that it involves a guarantee fund only for the payment of salary claims without providing for the protection of other rights, and implicitly the social security, with the mention of the obligation to repay such amounts secured by the guarantee institution in the situation a recovery. Therefore, on the internal level, we understand that the transfer of an undertaking does not involve the payment of these outstanding amounts by the new employer (the transferee), and a Member State cannot be prevented from requiring such obligations to be borne by the transferee even in the situation of the insolvency of the transferor, as CJEU completed in its interpretation in the abovementioned case, all the more so of the contributions to the statutory social security scheme of the transferor, since such an obligation results from employment contracts which create obligations for the transferor. Consequently, in our opinion, the transposing legislation envisages the only exception to the application of the protection afforded to employees in the event of a transfer of a business by a transferor in insolvency, the

possibility of changing the working conditions by way of convention so as to guarantee employment, keeping jobs and the survival of the enterprise. Interference in insolvency becomes very delicate and nuanced since it involves many legal, economic and social consequences, for example, considering the existence of a reorganization plan that may involve such a business transfer and which can clearly influence the staffing structure and automatically the redefinition of rights and obligations which eventually, through a typical insolvency sacrifice, leads to greater job-saving potential at the expense of bankruptcy which in turn triggers the increase in the number of unemployed.

THE LEGAL REGIME OF EMPLOYEE DISMISSAL IN THE INSOLVENCY PROCEEDINGS. CONFLICTS, INTERESTS, SACRIFICES

This regulatory interference between the insolvency law and the labour law concerning the special legal regime of the dismissal of employees in an insolvency proceeding remains an extremely sensitive and delicate subject that has raised the interest of doctrinal opinions and has been the subject of Constitutional Court Decisions, the jurisprudence of the CJEU having a key role to play in identifying a rational balance between the interests of the insolvent employer and the interests of employees who, by virtue of the social protection of labour, enjoys a "legal barrier" to measures ordered under a special law such as the Insolvency Code. In this regard, we are considering, on the one hand, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [23], as amended by Parliament's Directive (EU) 2015/1794 European Council and the Council of 6 October 2015 and, on the other hand, the provisions of the Labour Code, in particular Chapter V "Termination of the individual labour agreement, Section 5 - Collective redundancy. Information, consultation of employees and collective redundancies", transposing the provisions of the aforementioned Directive, a legislative tool which has somewhat embedded "the provisions of the insolvency law and has imposed a legislative redimensioning in order to be included in this line of social measures, 123 of Law no. 85/2014, which states the status of the contracts in progress and the possibility of their termination, implicitly also of the individual labour contracts, giving rise to antithetical interpretations [24]. Thus, initially the previous Regulatory Law no. 85/2006 on the insolvency procedure established

according to art. 86 para. (6) the fact that "by way of derogation from the provisions of Law no. 53/2003 - Labour Code, after the opening of the procedure, the termination of the individual labour agreements of the debtor's personnel will be done urgently by the judicial administrator/liquidator without the need for the collective redundancy procedure, the administrator/liquidator handing the dismissed personnel only the 15 working-day notice".

Subsequently, however, the European legislator imposed mechanisms for the protection of employees by the interpretation given by the CJEU in the judgment of 3 March 2011, following the connection of Cases C-235/10 to C-239/10, David Claes and Others [25], in the sense that the provisions on employee information and time limits in collective redundancy proceedings as provided by Directive 98/59/EC also apply to the termination of an employer's business as a result of a decision for opening an insolvency proceeding, which has also become the solution of Law no. 85/2014, the current Insolvency Code, which provides in Art. 123 para. (8): "(...) Where the provisions of Law no. 53/2003 - Labour Code regarding the collective redundancy are applicable, the terms provided by art. 71 and art. 72 para. (1) are reduced by half". Moreover, the Constitutional Court ruled through Decision no. 64/24.02.2015 [26] on the unconstitutionality of art. 86 par. (6) of Law no. 85/2006, stipulating that it is necessary to guarantee, at internal legislative level, at least the same level of labour social protection as stipulated in the binding acts of the European Union. Mention should also be made of the fact that the current regulation regarding the reduction of the terms provided by art. 71 and 72 of the Labour Code fall within the scope of the derogations provided by art. 4 para. (2) of the Directive, with the current rules of the Insolvency Code being harmonized with the EU law. We consider that the derogations provided by the Insolvency Code and the limitations of the rights guaranteed by the Labour Code to employees are minimal and, at the same time, necessary, taking into account the special nature of the insolvency law. Furthermore, the doctrine [27] recently found that the insolvency procedure has, in addition to the characters expressly mentioned in the law (judicial, collective and concurrent, unitary and general, egalitarian, remedy or forced execution), a "sacrificial" one. It is essential that insolvency sacrifices certain rights and interests in a very small proportion, with little impact on the much higher endpoints that can bring significant

benefits at a macroeconomic level in the event of a possible maintenance of the debtor in the economic circuit, the benefits also influencing employees who have the chance to keep their jobs in a reorganization process. We are also considering the Constitutional Court's Decision no. 23/2013, according to which "the basis for the dismissal must be the balance between the two parties who have concluded the individual labour agreement, on the one hand, the need to ensure the employer's freedom to dispose in relation to certain job redundancies, at the moment when economic considerations require such dismissals, and, on the other hand, the need to protect the employee from a possible abusive attitude of the employer "[28].

What are, however, the prospects for employees in such situations, which are increasingly common in Romania and not only? We know very well that theory does not always ensure the implementation of effective enforcement measures. What actual opportunities and what administrative, legal and economic measures can annihilate the effect of insolvency on the social level, given that more than 6,000 companies with approximately 64,000 employees are currently insolvent during the surveillance period? Indeed, the regulations on early notice in the event of dismissal, consultations with the trade union or employee representatives on the methods and means of avoiding collective redundancies or reducing the number of employees to be made redundant, the possibility of resorting to social measures (see, to that effect, Case C-4/08 Akavan Eriytyisalojen Keskuslitto AEK and Others [2009] ECR), concerning inter alia the support for the professional reconversion or retraining employees who are made redundant, and the information of the employees regarding the intention to maintain or terminate the employment agreement, regarding the economic and financial situation of the unit, so that the employees should be able to take protective measures in good time, as also the application of Law no. 467/2006 regarding the establishment of the general framework for information and consultation of employees, obligations assumed otherwise by the administrator/liquidator in case of withdrawal of the insolvent employer's administration right, as well as the regulations on the possibility of filing an action for damages under art. 123 para. (4) of the Insolvency Code by the employee whose employment agreement has been terminated or the creation of the Guarantee Fund as we have analysed in the above sections represent guarantees that can only mitigate the consequences of losing a job.

In our opinion, the recovery of companies and their maintenance in the economic circuit becomes the main tool that offers employees the real and actual chance of having a job with the prospect of relaunching and creating other jobs. Moreover, *de lege ferenda*, in order to expand the range of rights on the social protection of employees dismissed in such circumstances, the possibility of regulation in the content of the Insolvency Code could be considered, implementing provisions guaranteeing a right preferably for the re-occupation of a position in the case of the success of a reorganization plan and of a new expansion of the former employer's structure, of course within certain limits and conditions explicitly regulated at the legislative level.

THE HARMONIZATION OF THE ECONOMIC DIMENSION SPECIFIC TO THE INSOLVENCY LAW WITH THE SOCIAL DIMENSION AS A “COROLLARY” OF THE LABOUR LAW. INTERFERENCE EU PERSPECTIVES – A NEW EUROPEAN DIRECTIVE

Recently, the foundations were laid for a proposal for a Directive[29] on Preventive Restructuring Frameworks, the second chance and measures to increase the efficiency of restructuring, insolvency and debt relief procedures, which aims to give a prioritization of the social dimension in the regulation of insolvency, with the European Commission playing an important role in developing a "rescue culture" at the expense of a "culture of liquidation," stating that preventive restructuring and second chance for debtors contribute to the increase in investments and employment opportunities of the Single Market.

We are mentioning that the original draft Directive has undergone numerous amendments precisely in the idea of focusing on social protection and on the identification of a balance of interests, and in this respect, the opinion of the Committee on Employment and Social Affairs, also suggests amendments, by prioritizing objectives such as: "Recognizing the social responsibility of the company, providing workers and their representatives with the opportunity to receive a warning about a worrying economic situation, as well as the focus on cases where retirees from a company threatened with bankruptcy are potentially affected (business saving plans, funds of pensions)".

In fact, the most important amendments to the Directive contained in the European Parliament's report of 21 August 2018 [30], which we have identified as being appropriate in substantiating the much invoked balance, come to convey the interference between the economic dimension and the social one, namely: "Notwithstanding the fundamental rights and freedoms of workers, this Directive will ensure that undertakings from an economic point of view will have access to effective preventive restructuring frameworks at national level enabling them to pursue their business (...) These rapid preventive frameworks should prevent job suppression and loss of know-how and skills and optimize the total amount for creditors compared to what they would have received in the case of the liquidation of company assets, as well as for the owners and the economy as a whole (...) During the preventive restructuring procedure (...) Given the need to ensure an adequate level of protection for workers, Member States should be required to exempt unpaid claims employees of any suspension of enforcement, regardless of whether these claims are generated before or after the suspension has been granted. Such suspension should be authorized only for the amounts and the period for which the payment of such claims is effectively provided at a similar level by other means by virtue of national law (...) In order to guarantee the continuity of production and employment and to fight better against tactical or fraudulent practices of the management, employees should also be informed and consulted at the initial stage of the restructuring, insolvency and rehabilitation procedures ... Entrepreneurs who violate the right to work or the right to competition are excluded from full debt repayment."

We are mentioning that in a press release [31] dated 11.10.2018 the Council of the European Union expressed its position on the Directive, considering that it offers a second chance to insolvent entrepreneurs but with a good reputation and introduces measures to increase the effectiveness of restructuring, insolvency and debt relief procedures, the objective of the three institutions, the European Commission, the EU Council and the European Parliament, being to reach a political agreement before the European elections of 2019. We hope that the proposed Directive will be transposed in the same way as it is possible for it to be adopted under Romania's presidency of the EU Council, this first mandate of Romania having a positive impact on the level of the Romanian society as a whole [32].

CONCLUSIONS

Having an overview of the interference between the economic dimension, specific to the insolvency law, and the social dimension, specific to the labour law, the interference that tends in its evolution, as we have seen, towards perfection, rational balance and coherent legislative harmonization, we consider it appropriate to conclude by invoking the need to eliminate the stigma of bankruptcy, to streamline insolvency procedures, to prioritize early restructuring measures, and to develop a "rescue culture" involving judicial reorganization at the expense of bankruptcy by creating an economy that respects justice social. Consequently, only by removing the legislative, administrative but also common obstacles to restructuring, the effective reorganization of viable enterprises in financial distress can minimize job losses, avoiding a dramatic increase in the number of exposed persons the risk of poverty or social and professional exclusion, which jeopardizes the social and economic capacity of the society as a whole. Finally, we should not forget that behind each case of insolvency proceedings "life is throbbing", there are dreams, hopes, which imply and reflect the financial and psychological efforts and impact both on the insolvent debtor and on its own employees, as well as on the other creditors, with chain effects that are triggered. Moreover, the social component should not target only employees but should also refer to the honest insolvent debtor.

Finally, we believe it is appropriate to sound the alarm concerning the dissemination in too many normative acts of the provisions on guaranteeing employees' rights in the case of an insolvent employer, normative acts transposing EU law, which are, in their turn full of loopholes and implemented in a truncated manner, while for actual legislative solutions, the CJEU jurisprudence is reviewed. In this context there are many situations in which employees do not know their own rights and the way of application and interpretation becomes ambiguous, and it is a good idea for a legislative coherence to prefer a single regulatory instrument.

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