

# OBJECTIVE AND SUBJECTIVE ASPECTS IN THE EVALUATION OF EMPLOYEES IN THE COLLECTIVE REDUNDANCY PROCEDURE

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## **Abstract**

*By its nature, dismissal for grounds not related to employee's person in the context of a large collective redundancy must have an objective nature, thus being differentiated from dismissal based on other types of grounds, such as the professional inadequacy. The performance goals appraisal is mandatory for the collective redundancy procedure, but it does not exclude a broader professional appraisal based on a professional competence criterion, agreed with the social partners. The need to organize a selection based on professional criterion with the view to establish the priority for dismissal is considered preferable even by the courts, being known that the recurrent appraisal does not provide a relevant and useful output to a real ranking of employees, apparently all of them meeting the employer's expectations. Within the appraisal procedure for the purpose of selection, a more detailed comparison of competencies is made and a ranking is possible, finally allowing the selection for dismissal. This study aims to unravel aspects of legality and opportunity regarding the use of subjective aspects related to performance and professional competence within the objective context of collective redundancies undertaken for grounds not related to the employee.*

**Keywords:** collective redundancy, performance, goals, criteria, selection, ranking.

**JEL Classification:** K31

## **1. Context**

Collective redundancy consists of a series of redundancies for one or more reasons unrelated to the person of the employee, which affects during a certain period of time (30 calendar days) a certain share of employees (share indicated by Article 68 paragraph (1) of the Labor Code); individual employment contracts are terminated in this case as a result of the jobs positions reduction, according to art. 65 of the Labor Code based on a special procedure detailed in art. 68 et seq. of the Labor Code.

We do not intend to further discuss substantial elements of collective redundancies. However, we would like to mention that, by its nature, this type of dismissal has an objective nature and is triggered by real and serious reasons that are not related to the employee, but are intrinsic to the employer. Such reasons may consist of economic difficulties, technological transformations, reorganization of the activity etc., while "situations declared in written" or "declarative", or simple name amendments<sup>2</sup> that lead to the reduction of the job positions and implicitly to the redundancy of the employee are excluded.

Under such undeniable objectivity, due to the impact of a larger group of employees (a specific share established in art. 68 paragraph (1) of the Labor Code) the appraisal, ranking and selection of the employees among the affected categories it is necessary to perform an analysis of individual activity/performance, with the risk of exposing this process to a certain to subjective aspects to a certain extent.

We could further argue on pros and cons regarding the use of professional appraisal in collective redundancy processes, but this should never refer to the objectivity requirement of redundancy itself. The generic criterion of competence is the umbrella for employers' analysis over performance goals, jointly with a broader assessments on the technical expertise and personal and professional skills, but this cannot and should not be considered a "subjective intellectual criterion", as long as the termination of the employment contract under collective redundancy procedure is operated as a result of the reduction of job positions; this is the one condition that redundancy is not being transformed into a dismissal "for reasons related to the person of the employee". This delimitation is necessary not only for conceptual purposes, but also for a discussion in substance

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<sup>2</sup> Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 4<sup>th</sup> edition, Universul Juridic, Bucharest, 2017, p. 484.

about the grounds of the dismissal; any change related to grounds is likely to lead to the annulment of the dismissal in court, also implying the possibility of reinstating the employee, with the effect of reversing the situation that led to the redundancy.

## **2. The need to select employees. The appraisal, as a way to make the selection of employees**

In the context of collective redundancies, the Labor Code contains references to the appraisal of employees in the section dedicated to the information and consultation of the social partners. According to art. 69 of the Labor Code, the employer has the obligation to provide all relevant information regarding the collective redundancies and to notify it in written to the employees' representatives. One of the key information to be communicated in this way is the selection criteria for establishing the priority when dismissing employees as per the law and/or collective labor agreements. Such criteria will differentiate the employees who will remain with the employer and those who will be dismissed. Art. 69 para. (3) of the Law no. 41/2011 amending and supplementing the Labor Code, introduces a preliminary stage, a mandatory selection procedure consisting in the appraisal of performance goals, before any application of the selection criteria agreed by the social partners (art. 69 para. (2) letter d) of the Labor Code).

Appraising the employee's activity is one of the attributes of the employer, performed via management system. But the management systems can use various methods and techniques relying on specific tools, like: management by goals, management by budgets, management by projects, management by products. Yet, the Labor Code includes some concepts from the management system such as: performance goals, evaluation criteria, evaluation procedure, but in doing so, it wrongly forced employers to resort to several tools that are not in their own business practice.

## **3. The first stage in the process of selecting employees is the evaluation of fulfillment of performance goals. This evaluation is mandatory by the law**

The mandatory evaluation of performance goals is mentioned by the Labor Code in the section dedicated to collective redundancies, therefore setting goals become an *a priori condition* for each employer, regardless of his own option to use them or not in line with his own management system. For example, the management by budgets involves the use of financial indicators by reference to goals for upper management levels, but they are not further detailed to the lower execution levels where individual financial goals cannot be set. Even in the case of the management by projects it is difficult to define and set goals down to the individuals, as the achievement of goals is usually the result of team effort, hence the difficulty identify and evaluate the individual contribution of employees to a certain goal. In the case of management by budgets or projects, it appears as a logical contradiction to the imperative requirement of the art. 69 para. (3) of the Labor Code to perform an individual evaluation of the goals for each employee.

However, the individual appraisal of the performance goals is essential to achieve a professional ranking of employees for the purpose of their selection within the collective redundancy procedure. By its nature, the dismissal for grounds not related to the employee's person must be objective (even in the context of a large collective redundancy as per art. 65 and art. 66 of the Labor Code), thus being delimited from other grounds for dismissal (e.g. dismissal as per art. 61 of the Labor Code, which is grounded on reasons related to the person of the employee). We believe that by introducing an appraisal stage via paragraph (3) of art. 69 of the Labor Code, the legislator certainly aimed precisely at strengthening the objective characteristic of this type of dismissal by the very use of the performance goals ("objectives").

The consequences of the imperative nature of the individual appraisal of performance goals are the following:

- The requirement to evaluate performance goals before proceeding with any other selection method practically leads to the mandatory establishment of a management system by

objectives for all the employers, to the detriment of other management systems.

This management system may be adopted by the employer only formally, in order to avoid the annulment of a collective redundancy for non-compliance with art. 69 (3) of the Labor Code and can be used *pro-causa* for the scope of dismissal and not as a method of management. The obsolescence of the management by objectives also emerges from recent studies. More and more, reputable authors mentioned in a synthetic paper<sup>3</sup> show exactly opposite trends in management practices and there is even a recommendation to avoid setting performance targets as they have been found responsible for narrowing employee focus, for taking risks and ethical issues, negatively affecting learning processes and even motivation. Or, it is abnormal for labor legislation to interfere with management methods.

However, we bear in mind the legal requirement to use an objective system, which leaves room for the employer to find a proper evaluation system that is as mathematical and transparent as possible.

In the situation of an employer who has not implemented a management system by objectives down to the individual levels, he would be tempted to simulate the appraisal or perform the goals appraisal considering a smaller contribution in the final result. Such an approach may be generated by the use of team performance goals exclusively (goals to which group of employees contribute and where individual contribution cannot be established) or by the rating of individual goals with the same scores. The outcome is that, in both situations, the goals appraisal becomes strictly formal and its mathematical contribution to the restructuring equation is annihilated, despite the intention of the legislator. This creates the premise to circumvent an imperative legal requirement and opens the gate to apply the criteria for selecting employees and to agree upon more or less objective evaluations by means of information and consultation with the employees' representatives.

Goals evaluation in the stage mentioned at art. 69 para. (3) of the Labor Code, does not exclude a broader professional appraisal to be carried out based on a professional competence the criterion of assumed distinctively under art. 69 para. (2) letter d) of the Labor Code.

Moreover, this mix between objective and subjective has led to various court solutions that have highlighted that in collective redundancy procedures there are some oscillations in using the evaluation of goals (recurrent performance appraisal) and professional evaluation (*pro-causa* professional evaluation).

- In this context, as long as criteria that refer to professional competence are used to rank employees, it becomes increasingly difficult to prove a real objective characteristic and the dismissal may become hybrid; it is no longer possible to say that a collective dismissal is not at all related to the employee's person, as long as his own competence is what "recommends" him for dismissal.
- The use performance goals evaluation does not guarantee the application of an objective evaluation system, because one condition for a fair ("objective") evaluation is for the goals to be set SMART. Objectivity can be affected by the very unilateral setting of performance goals, which can be set solely by the employer in line with the business strategy and with the programs and projects that implement this strategy; meanwhile, employees' performance evaluation criteria is subject to negotiation between the parties. Therefore, one should be able to assess how can the appraisal be objective if the goals are totally under employer's control.
- Last but not least, the Romanian legislator should consider the new trends in performance management in line with the organizations' need for agility in the ever-changing context of the business environment. Thus, new digital technologies pressure performance management to adopt real-time feedback policy, corrective actions of the line managers and lifelong learning, to the detriment of the periodic evaluation of performance objectives.

In conclusion, we believe that the evaluation stage under art. 69 para. (3) of the Labor Code refers to the evaluation of employees' goals set in the performance management system applicable at

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<sup>3</sup> Lisa D. Ordóñez, Maurice E. Schweitzer, Adam D. Galinsky, and Max H. Bazerman, *Goals Gone Wild: The Systematic Side Effects of Over-Prescribing Goal Setting*, Paper work no 09-083, Harvard Business School (2009), <https://www.hbs.edu/faculty/publication%20files/09-083.pdf>, consulted on 1.10.2020.

the employer level and should be treated as a management issue, not as a legal issue. In this sense, we propose *de lege ferenda* the integration of the concept of performance goals under the wider criterion of professional competence reflecting the entire professional activity.

#### **4. The singularity of the goal evaluation or just its preeminence against others? Performance goals evaluation trigger eliminatory effects.**

One of the most heated debates in the judicial practice and in the legal doctrine is if performance goals evaluation are being sufficient in the collective redundancy procedure, as per art. 69 (3) of the Labor Code; those who analyze this matter need to answer whether the evaluation of performance goals can or should be a single step in the process of selecting employees for dismissal/for remaining employed.

While referring to the obligation to evaluate the performance goals and to the possible singularity of this selection criterion, the court highlights on the one hand, that the parties cannot avoid the evaluation of performance goals (art. 69 para. (3) of the Labor Code). On the other hand, courts state that "establishing a single criterion, that of the assessment of professional competencies would suggest there would be no need for other selection criteria, as if it were impossible for those evaluate to get equal results". Thus, it is accepted, on the one hand the obligation to evaluate the performance goals and, on the other hand, the possibility to add a selection criterion related to professional competence - art. 69 para. (2) letter d) of the Labor Code, which is a broader concept that implies a more complex evaluation.

#### **5. Subsequent application of the selection criteria mentioned in art. 69 para. (2) letter d) of the Labor Code**

##### **5.1. Is there necessary to delineate performance appraisal from professional competence appraisal?**

The amendment of the Labor Code by the Law no. 41/2011 as to include performance related concepts within the frame of collective redundancies was receive differently in the legal doctrine. The evaluation of performance goals is considered<sup>4</sup> a genuine "professional evaluation to be carried out in accordance with the provisions of the internal regulations" while "professional competence is at the forefront"; social criteria are to be applied subsequently, therefore irrelevant if certain employees may not have set individual performance goals. It is just to advocated for the formalism imposed by art. 69 para. (3) of the Labor Code considering the mandatory appraisal performance goals, because in its absence arises the nullity of the collective dismissal procedure, as per art. 78 of the Labor Code.

We do not argue with the reasons highlighted by the reputable professor who highlights that professional evaluation within a collective redundancy frame does not change the legal grounds for terminating the employment contract; but we believe that the evaluation is a managerial tool used to rank the employees whose individual employment contract are terminated as a result of the reduction of their job positions, also considering their lower ranking against other employees. A deeper analysis over collective redundancy process points to the fact that evaluation undoubtedly reverses the importance of some processes of the redundancy procedure (evaluation, respectively selection) and may affect the grounds of dismissal. This opinion is not unique<sup>5</sup>.

There is still a contradiction between the objective nature of the dismissal resulting from the reduction of a job position and the subjective methods that lead to the actual identification of the job to be reduced by reference to non-performing employee. This contradiction also results from the fact that the employer has fist a quantitative representation of the job positions to be reduced, as indicated in the two notifications sent to trade union representatives and labor authorities. The effective

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<sup>4</sup> Ion Traian Stefanescu, *op. cit. (Tratat de drept al muncii)*, p. 485.

<sup>5</sup> Alexandru Athanasiu, in Ion Traian Stefanescu, *Codul muncii si legea dialogului social. Comentarii si explicatii*, Universul Juridic, Bucharest, 2017, p. 273.

identification of the position to be reduced takes place only after the employer performs the appraisal and the ranking and applies all selection criteria for employees to be affected by dismissal. This staged process shows that, in fact, the position to be reduced is pointed out by the very information concerning the employee (performance and social situation).

This objective/subjective contradiction exists both in the situation of restructuring and in the situation of reorganization. It is even more clear in the case of the reorganization resulting in a new organizational structure where the new positions have new tasks and responsibilities, thus triggering a professional evaluation similar to a recruitment process. In this situation, the evaluation necessarily refers to performance goals (in the first stage) and is then followed by a recruitment stage implying a more complex evaluation of the professional competence, as to allow the selection of employees according to the specific criteria set for the new positions resulting from reorganization.

A bold interpretation is presented in a doctoral thesis<sup>6</sup> which highlights terminological and substance differentiations between performance appraisal and professional evaluation of employees. The author thinks are necessary to approach differently the criteria for professional evaluation and the criteria for evaluating performance goals, highlighting that while the criteria for professional evaluation are bilateral, the criteria for evaluating performance goals are unilateral.

What is the nature of the criteria for professional evaluation of employees?

According to art. 17 para. (3) letter e) of the Labor Code, the criteria for the professional evaluation have a general applicability at the level of the employer as being set by the internal regulation in line with art. 242 of the Labor Code. The general applicability of the criteria for the professional evaluation of employees explains why this type of information is one of the mandatory clauses of the individual employment contract. By this means, though, strangely, it becomes a subject for negotiation among the parties. On the other hand, as per art. 40 para. (1) letter f) of the Labor Code, the performance goals are set unilaterally by the employer, as well as the criteria for evaluating the performance goals. The opinion expressed in the mentioned doctoral thesis is that such criteria for evaluating the goals could differ substantially from those referred to in art. 17 para. (3) of the Labor Code. We consider the substantive opinion insufficiently explained.

In substance, there is a need for clarifications due to the importance of the fairness of the appraisal as the main process influencing the ranking of employees and finally the selection of those remaining in the organization and of those dismissed due to the reduction of their job positions. Not only the failure to apply this evaluation stage affects the efficiency of the collective redundancy, as the author claimed<sup>7</sup>, but the very inconsistency of the evaluation in the collective redundancy may distort the ranking of the employees, thus affecting the legality and the grounding of the dismissal.

We agree there is a conceptual differentiation between the evaluation of performance goals and the evaluation of professional performance, but this is not only conceptual and does not have its origins in the bilateral aspect of the professional evaluation criteria, respectively in the unilateral aspect of performance goals, as described in art. 17 and art. 40 of the Labor Code. The main arguments separating the evaluation of the performance goals and of professional competence are based on the actual separation of the two concepts in two distinct provisions - paragraph (3) and paragraph (2) letter d) of art. 69 of the Labor Code. In performance management, the goals evaluation and competence evaluation relate to each other as part to whole, so, there is no total delimitation among them. Performance is considered as a special result, while professional competence a prerequisite for successfully performing the activity as per the job description, according to the author of the above doctoral thesis. We do not fully embrace this opinion and we argue that in the context of collective redundancies not only the high performers should be entitled to a position in the employer's organization.

That is why, we believe that the provisions from para. (3) and from para. (2) letter d) of art. 69 from the Labor Code should be joined in a single provision by a future amendment of the Labor Code. For these arguments, in the context of collective redundancies performance goals concept

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<sup>6</sup> Ștefania Stanciu, doctoral study „*Concedierea salariaților pentru necorespondere profesională*”, Titu Maiorescu University, Bucharest, 2017.

<sup>7</sup> Ion Traian Ștefănescu, *op. cit. (Tratat de drept al muncii)*, p. 454.

should use by their common meaning - concrete quality targets<sup>8</sup> to be achieved and not as an exclusive "place" for the best of the employees, like in performance and reward management.

We believe that the performance goals under art. 69 para. (3) of the Labor Code are those works or products included by the employee in his planned activity within a certain timeframe in order to contribute individually to the programs dedicated to sustain the strategies of the organization. This definition also covers recurrent operational activities, such as those dedicated to ensuring compliance or prevention, where performance goals can be actually set by reference to a "zero incidents". Also, the accomplishment of performance goals is intrinsically linked to the manifestation of a certain level of professional competence, which makes the evaluation of objectives to be part of the whole that can be measured by professional evaluation.

## 5.2. The selection criteria may refer to professional competence criterion

Consistent with the imperative norm from paragraph (3) of art. 69 of the Labor Code and also considering letter d) para. (2) of art. 69 of the Labor Code, other possible criteria applied for the selection of employees may be referring to professional competence or social criteria. Furthermore, the employer may "raise the stake" by applying the criterion of professional performance when selecting employees<sup>9</sup> due to the fact that the Law "did not establish as a legal criterion for establishing the priority in collective redundancy, but gave the employer the opportunity to establish such a criterion following the mandatory evaluation of employees' performance goals".

Therefore, in the current legal provisions, the professional competence assessment is to be applied subsequently and not jointly with the evaluation of the performance goals. This means that the assessment of professional competence is an additional way of ranking employees who obtained equal results in the stage of evaluating performance goal.

Thus, a court<sup>10</sup> highlights that "the employer decided to apply the criterion of professional competence in the collective redundancy as the main criterion to establish the order of priority for dismissals; the competence was assessed in a three-stage selection process: activity report presented by each participant, a grid test and a standard interview". At the same time, the criterion of professional competence was also accompanied by the social criteria provided in the collective labor contract concluded at the level of the company and applied for equal scores among employees. Thus, the employer complied with the obligations set by art. 69 of the Labor Code, as the legal norm allows subsequent application of a professional competence criterion and of social criterion, both applicable after the evaluation of performance goals.

Another court case points out that the social dialogue partners established the application *pro causa* evaluation process by a adopting a staff selection regulation for the respective collective redundancy process. It was agreed that the first criterion used for ranking employees (art. 69 paragraph (2) letter d) of the Labor Code) was the evaluation of professional performance, applied by specific interview and testing, followed by social criteria. The above criteria were applied after the preliminary stage of evaluating the objectives.

The courts seem to fully accept other types of evaluations, than the one related to performance goals, but the wrong application of these additional forms of evaluation may lead to the breach of the imperative characteristic of this norm and of the priority of the performance goal evaluation over the entire selection process. Thus, there is a risk to weaken the impact of performance objectives (the sustainable performance) to the overall evaluation performed in the redundancy procedure. There is also a risk that technical/practical tests proving a conjunctural professional competence to be applied not subsequently, but simultaneously with the evaluation of the performance goals. We do not claim the usefulness of these evaluation methods, but they do not reflect the philosophy of the Law no. 41/2011.

Such an interpretation and application of the law would be inconsistent with the will of the

<sup>8</sup> Răzvan Gabriel Cristescu & Cristina Cristescu, *Codul muncii modificat și republicat în 2011*, Hamangiu, Bucharest, 2012.

<sup>9</sup> Court Decision no. 3129/09.06.2016 of Bucharest Court of Appeal.

<sup>10</sup> Decision no. 58/26.01. 2016 of Bucharest Court of Appeal.

legislator expressed in the two different rules: a binding and a non-binding legal provision (para (3) versus para. (2) letter d) of art. 69 from the Labor Code). Due to this, a legislative revision is required. These trends resulting from the analysis of judicial practice show that by negotiating in the collective redundancy process, performance can become the sole criterion for selecting employees, whether it refers to objectives or to behaviors/skills; a merger into a unitary concept is therefore necessary together with a revision of par. (3) and para. (2) letter d) of art. 69 of the Labor Code.

### **5.3. The social criteria for the selection of employees are applied subsequently to the evaluation of employees**

After the evaluation of the performance goals, other criteria set via consultations between the social partners can be applied to select employees for the collective dismissal. The Romanian legislator does not provide specific information on the diversity/heterogeneity of the selection criteria to be agreed by the parties in the consultation process concerning collective redundancies, thus the social partners should establish the number and content of criteria for dismissal, depending on the organizational culture. One of these criteria may concern professional competence, as the law does not prohibit such an approach, which seems to be even consistent with the assessment of performance goals. In practice, some organizations choose to strengthen the performance criterion by evaluating the goals followed by the evaluation of competencies (soft skills); others choose to apply social criteria after evaluating the performance targets.

Under the conditions of the Law. no. 41/2011 and of the paradigm shift created by the formal integration of performance and professional competence in labor regulations a contradiction arised between the application of performance criteria and the survival of social criteria in the context of collective redundancies. How do the social partners mediate this contradiction?

The increasing appetite of the employees 'representatives to apply the social criteria in the employees' section process, to the detriment of performance, is very well known. This appetite is based on a "historic" collective bargaining agreement work frame, after December 1989. The last mention *erga omnes* application of the social criteria for the selection of employees for collective redundancy is provided by art. 81 of the last collective agreement at national level applicable until the end of 2010. Based on this, following the mandatory phase of reducing vacancies, the dismissal of employees was to be applied with priority if the said employee held two or more positions, if he benefited from both pension and salary and if he met retirement conditions. In establishing the priority for dismissal by ranking spouses, the following persons were to be protected: the husband with the higher salary (of the two spouses working in same unit, whose position is targeted by the restructuring); those having dependent persons, in front of those who are not in this situation, lastly being affected women who were caring for children, widowed or divorced men who were caring for children, sole wage earners - men or women, or those who were less than 3 years before their retirement by own request.

These criteria still survive in some collective agreements applicable at unit level. Some of them have not persisted over time, are integrated into good collective redundancy practices.

How are social criteria integrated into the modern approach on selection within the redundancy work frame?

A straight answer could be, to apply the rule of subsidiarity. As we have mentioned in this section, in order not to contradict the paradigm shift in 2011, in the first stage, the performance goals evaluations have to be performed, followed in the second stage consisting in the application of the selection criteria agreed by the social partners.

In judicial practice<sup>11</sup>, questions have been raised on how and when to apply social criteria; the appellant claimed that he was affected by the approval of a number of new job positions as per the agreement with the social partners during the consultation process, these job positions being added after the end of the "selection process" to the number of positions resulting from the reorganization. The employee's claim was that the separate positions created to increase the number of positions

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<sup>11</sup> Decision no. 264/29.01.2015 of Bucharest Court of Appeal.

resulting from reorganization/evaluation have deprived him from the opportunity to occupy one of the positions added by the employer to extend the ranking list resulting from the evaluation process.

The Court rightly ruled that for the number of occupants of the additional positions created after the completion of the evaluation process, the employer "did nothing but to give priority to social criteria to the detriment of those of individual performance, contrary to the provisions of art. 69 para. (3) of the Labor Code; these aspects revealed the lack of serious grounds for the reduction of appellant-plaintiff's job position, arising from the defective and contradictory way of carrying out the collective redundancy procedures".

The following additional aspects should be mentioned about the criterion for selection of employees under paragraph (3) against the one under paragraph (2) letter d) of art. 69 of the Labor Code:

- "The Romanian legislator imposes only the information and consultation of the employees' representatives with regard to the conventional criteria to determine priority when dismissing the employees; this negotiation process is carried out with a view to reach an agreement, which allow a *pro causa* agreement by the social partners for the fair the evaluation and ranking of employees in collective redundancy processes"<sup>12</sup>;

- The Labor Code does not contain any indications on the nature of these conventional criteria to set priority for dismissing employees, which does not exclude an agreement of the parties to apply a criterion related to professional performance, but also other criteria that may concern social aspects<sup>13</sup>;

- There is a clear delimitation between: the assessment of the past concrete activity of the employee by evaluation of performance goals, which is the steady and fixed part of the process and should observe the performance management system; the dynamic element of the performance (knowledge and skill related) under the criterion of professional competence, which applies subsequently to goals evaluation and aims to provide feedback under collective redundancy procedure. We believe that only the latter can be carried out *pro causa* and can be the result of a negotiation between the social partners in the context of collective redundancies, by specific methodology subject to a dedicated regulation applicable for the purpose of the redundancy project.

## 6. Conclusions

Achieving performance goals is an initial and mandatory stage in the selection process of employees for collective redundancies, which followed by subsequent application of selection criteria agreed by the social partners.

The selection criteria considered by the social partners are not determined qualitatively and quantitatively by the legislator and their setting remains at the discretion of the social partners, in compliance with the principles of the Labor Code, as amended by Law no. 41/2011.

This does not deny from the start the entitlement of the employer to consider a more global approach over employees' performance by extending the scope of the assessment beyond performance goals. Moreover, the achievement of performance goals is intrinsically linked to the manifestation of a certain professional competence, which makes the evaluation of goals just a part of a whole, that can be measured by professional evaluation within the collective redundancy procedure.

Any case, in order to observe the will of the legislator in 2011, the criterion of professional competence should prevail over social criteria.

The provisions of the Labor Code addressing performance issues within the collective redundancies work frame require a consistent revision, based on a thorough analysis from a performance management perspective. In order to provide consistency and accountability, even this analysis should take into account the real needs of all employers in terms of clarity and simplicity of

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<sup>12</sup> Ioana Cristina Cristescu, *Performance and Collective Dismissals – an Evaluation of the Legal, Practice on the Subject Matter*, in Kristine Strada-Rozenberga, Maria do Rosário Anjos (eds.), *Current Issues in Business Law*, ADJURIS – International Academic Publisher, Bucharest 2018, p. 184, 185.

<sup>13</sup> Ibid, p. 185.



the evaluation and ranking of employees. To this end, the trends set by the lobby of large corporations should not neglect the needs of employees in small enterprises profoundly affected by this era of continuous transformation.

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