# European Union rules in the matter of dismissal of employees

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Most sacred of all courts is the
***"tribunal which the litigants appoint in common for themselves, choosing certain persons by agreement."***[2]

***Abstract***

*So far, the European Union adopted a Directive on firing any individual content to regulate only matters of collective redundancies due to the social implications that occur usually in case of collective dismissals and, simultaneously, their potential conflicts.*

*Directive no. 98/95/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies was adopted by the Council of the European Union since it was necessary to grant greater protection to workers in the event of collective redundancies.*

*The provisions of Directive no. 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies have been transposed into national law by the Romanian Government Emergency Ordinance no. 55/2006 amending and supplementing the Labour Code so that in this case no question of direct application of Community rules, but can not disregard its interpretation by the European Court of Justice.*

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***JEL Classification:*** K31, K33

## 1. Introduction highlights

Regarding the content of EU rules in the dismissal of employees, it must be stressed is this: although the general power to regulate in this area, so far, the European Union adopted a directive on dismissing any individual content to regulate just a matter of collective redundancies. So we think that, given the social implications that occur usually in case of collective dismissals and, simultaneously, their potential conflicts, the European Union has regulated collective redundancies so far only, not on the individual.

The preamble of the Directive no. 98/95/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies details the objectives of the European Union in matters of collective dismissal.

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[2] Plato, *Legile*, Publisher IRI, Bucharest, 1995, p. 181.

## 2. Content of European rules dismissal of employees

According to art. 1 of this Directive, the term "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to choice of the Member States, the number of redundancies is:

(i) for a period of 30 days:

- at least 10 in establishments normally employing more than 20 and less than 100 workers;
- at least 10 % of workers in establishments normally employing at least 100 but not more than 300 workers;
- at least 30 in establishments normally employing at least 300 workers;

(ii) in a period of 90 days, at least 20, regardless of the number of workers normally employed in such establishments.

Definition of the term "workers' representatives" is given the same article, as regards workers' representatives provided for by national laws or practices of Member States.

In order to calculate the number of redundancies provided to the first paragraph of the letter, termination of employment that occurs on the employer for one or more reasons not related to the individual workers is assimilated to redundancies, provided there are at least five redundancies.

Court of Justice of the European Union[3] ruled that art. 1 para. 1 letter a) of the Directive 98/95/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies precludes national legislation which excludes, even temporarily, a group of workers from the calculation of the number of employees redundant collectively referred to in that provision.

In view of the EU legislature, for a dismissal to be classified as collective three conditions must be met[4]: a) be about a number of employees affected by this measure; b) the reason for termination of employment of the concerned person not to take them; c) the period of time that will take place termination of those contracts should not exceed 30 calendar days.

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[3] Second Chamber, judgment of 18 January 2007, the Confederation General du Travail due to against Premier Ministre et ministre de l' Emploi et du from Social Cohesion logement, C- 385-2005, in the ECR 2007, pp. 1-611 to 1-652 (see Teodor Narcis Godeanu, *Politica socială. Apropierea legislațiior. Licențieri colective. Reflectare în practia judiciară a Curții de Justiție a Comunităților Europene [Social policy Approximation of laws collective licensing. Reflection in judicial practice of the European Court of Justice]* in "Dreptul" no. 3/2009, pp. 230-235).

[4] See Alexander Țiclea, *Tratat de dreptul muncii (Treaty of labor law)*, revised fifth edition, Bucharest, Ed. CH Beck, 2011, p. 714.

### 3. The Court of Justice of the European Union

In the spirit of Directive no. 98/59, Court of Justice of the European Union decided[5] that "the concept of collective redundancy includes any termination of contracts of employment that the worker will not be due and therefore without his consent".

The Court also interpreted the concept of "establishment" appearing in the same direction, especially in art. 1 letter a), as designating, depending on the circumstances, the structure in which workers made redundant are assigned to carry out their duties[6]. It is a distinct entity that has a certain permanence and stability, designed to achieve one or more tasks and which has a group of workers, the necessary equipment and some organizational scheme that allows performing those tasks.

This entity is not required to be equipped with autonomous legal or economic, financial, administrative or technological to be classified as a "unit"[7]. Also, specialized Romanian literature was argued that "it is not essential or that this structure has a direction or not they can perform independently redundancy. It is not necessary, however, no geographical separation in relation to other units and facilities of the undertaking"[8].

Qualification shown above is valid in terms of a "holding production", as long as its elements, namely the number of personnel, equipment, management and operation are able to confer the character required by the Community definition of the concept of unity. Even if national legislation uses the term "holding" it is irrelevant and, in any case can not lead to the exclusion of certain categories of workers from the protection afforded by Directive 98/59/EEC[9].

Worth mentioning is the fact that the directive excludes from its scope collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place before the expiry date or completion of such contracts; workers in public administration or public institutions (or, in Member States where this concept is unknown, by equivalent bodies); crews of ships.

Under Article 2 of the Directive, the employer is required to initiate and timely for the purposes of the agreement, consultations with workers' representatives. These consultations shall cover at least the possibilities of avoiding collective redundancies or reducing the number of workers affected, and of

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[5] Decision of 12 October 2004, Case C -55 /02 Commission v Portugal, published in the *Official Journal of the European Union* C 300 of 14 December 2004.

[6] Judgment of 7 December 1995, Case C - 449/93, Rockfon against Denmark, published in the *Official Journal of the European Union* C 31 of February 3, 1997.

[7] September 7, 2006 Case C- 187 /05, C -190 /05, Agorastoudis against Greece, published in the *Official Journal of the European Union* C 171 of 09 July 2005.

[8] See Alexander Ţiclea, *op.cit*., p. 714.

[9] Judgment of 15 February 2007, Case C -270 /05, Athinaiki Chartopoiia against Greece, published in the *Official Journal of the European Union* C 82 of April 14, 2007.

mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

Court of Justice of the European Union also held that[10] "article 2 of Directive 98/59 must be interpreted as precluding national legislation which reduces the obligations of an employer who intends to proceed with collective redundancies those mentioned in Article 2. In applying law, the national court must, in accordance with the principle of conforming interpretation of national law to consider all its rules and interpret them as far as possible in light of the wording and purpose of Directive 98/59 is to achieve the result envisaged by it. It has thus, the obligation to ensure within its powers, that the obligations of such employer are not reduced below those specified in Article 2 of that directive".

Everything in its case, Court of Justice of the European Union has decided that[11] "art. 2 para. 1 of Directive 98/59/C must be interpreted as adoption, where a group of undertakings, of strategic decisions or amending activities which compel the employer to provide or plan for collective redundancies, the employer determines the birth in the burden of the obligation to consult workers' representatives".

It was also noted that art. 2 para. 1 in conjunction with para. 4 of the same article shall be interpreted as meaning that, where a group of undertakings consisting of a parent and one or more subsidiaries, the obligation to consult with workers' representatives subsidiary task arises that the employer is only when it is identified that subsidiary in which collective redundancies may be made. However, the texts cited to be interpreted that if a group of undertakings, the consultation procedure must be concluded by the subsidiary affected by collective redundancies before it terminate, possibly the direct order of the parent company, contracts for workers affected by redundancies.

Article 3 of Directive no. 98/59/EEC establishes the employer must notify the competent public authority in writing of any projected collective redundancies. However, Member States may provide that, in the case of collective redundancies arising from termination of activity of a company following a court decision, the employer shall be obliged to notify the competent public authority in writing only upon request. This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in article 2, and in particular the reasons for the redundancies, the number of workers to be laid off, the number of workers normally employed and the period over which they have the redundancies.

Employers must submit workers 'representatives a copy of the notification referred to in paragraph 1. The workers' representatives may send any comments competent public authority.

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[10] Judgment of 16 July 2009, Case C -12 /08 Mono Car Styling SA against Belgium, published in the *Official Journal of the European Union* C 79 of 29 March 2010.

[11] Judgment of 10 September 2009, Case C -44 /08, Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy, published in the *Official Journal of the European Union* C 107 of 26 April 2008.

Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days following the notification referred to in article 3, paragraph 1, without prejudice to provisions governing individual rights with regard to notice of dismissal. Member States may grant the competent public authority the opportunity to reduce the period referred to in the previous paragraph.

Competent public authority uses the term referred to in paragraph 1 to seek solutions to the problems raised by the projected collective redundancies.

If the initial period provided for in paragraph 1 is less than 60 days, Member States may grant the competent public authority the opportunity to extend the initial period to 60 days from the notification, in cases where there is a risk not to find solutions to the problems raised by collective redundancies within the initial period. Member States may grant the competent public authority the possibility of extension.

The employer must be informed of the extension and the reasons for it before expiry of the initial period provided in paragraph 1.

Member States need not apply this article to collective redundancies arising from termination of activity of a company following a court ruling.

Article 6 of Directive 98/59 provides that Member States shall ensure that workers and workers representatives' administrative and judicial procedures to enable compliance with the requirements of this Directive.

Court of Justice of the European Union held the preliminary ruling[12] of 16 July 2009 that "article 6 of Directive 98/59/EEC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies conjunction with article 2, to be interpreted as not precluding national legislation which establishes procedures intended to permit both workers and the latter as individuals to control compliance with the requirements of this Directive but which limit the individual right of action of workers in the objections which may be raised and it determines the requirement that objections have been raised prior to the employer's workers' representatives , and prior communication by the employer , the worker concerned of the fact that it dispute that information procedure and consultation has been observed".

Analyzing national regulations through these international rules that procedural rules, such as the content of the dismissal decision, the deadline may be contested, trial procedure, the system of remedies or possible enforcement of a judgment given in proceedings labor law, etc., are regulated by law, no provision of international norms.

We appreciate the fact that should be included in our legislation, assuming ratification of Convention 158/1982, the matters listed as prohibitions on dismissal by this international instrument.

The aspect emphasized is that the doctrine was shown that "Directive 98/59 / EEC relating to collective redundancies, consistent in its essential regulations

[12] Judgment of 16 July 2009, Case C -12 /08 Mono Car Styling SA against Belgium, published in the *Official Journal of the European Union* C 79 of 29 March 2010.

with Part III, entitled << Supplementary provisions relating to licensing for economic reasons , technological, structural or similar >> ILO Convention no. 158/1982 - art. 13-14 "[13].

In conclusion, we must show that while employer authority or public institution may terminate the individual employment contract by unilateral act only in situations, conditions and limitations imposed by law, mutatis mutandis, the employee may do so at any time, the sole obligation under its charge, which is to observe the period of notice stipulated in favor of the employer, an exception to this requirement by non-performance of contractual obligations by the employer, employee circumstances they do not have to comply with the notice period.

## 4. National judicial practice

*Collective dismissal.*
*Applicability of Directive 98/59 / EC into national law detriment*

*The provisions of Directive no. 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies have been transposed into national law by the Romanian Government Emergency Ordinance no. 55/2006 amending and supplementing the Labour Code so that in this case no question of direct application of Community rules, but can not disregard its interpretation by the European Court of Justice.*

*Art. 2 para. 1 and par. 2 of the Directive 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies provides that: "Where an employer is contemplating collective redundancies, he shall begin timely consultations with workers to reach an agreement.*

*These consultations shall cover at least the possibilities of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant". The provisions of this article have been translated into Romanian legislation through art. 69 para. 1 of the Labour Code.*

Court of Appeal Timişoara, Department of labor disputes and social insurance, in civil decision nr. 2689/R/13/11/2013

The civil sentence no. 1405/04.25.2013 issued in case no. 11823/30/2012, County Court dismissed the application as unfounded lawsuit filed by the applicant, against defendant SN International Airport "Traian Vuia" Timisoara.

To give this ruling, the court first held that the applicant was hired defendant Deputy Technical Director until 5/11/2012, when it was dismissed under

[13] See Ion Traian Stefanescu, *Tratat teoretic şi practic de drept al muncii (Theoretical and practical treaty of employment law), third edition, revised and enlarged*, Legal Universe Publishing, Bucharest, 2014, p.402.

the provisions of art. 65 para. 1 of the Labour Code by Decision no. 209 / 11.05.2012.

The reason for the dismissal was that the defendants unit reorganization under Board Decision no. 4/07.08.2012, which was based decision memorandum no. 5385/02.08.2012, which was proposed eliminating posts and changing organizational structure and functions of the state of the defendant company, taking into account the income and expenditure budget approved for AIT- TV 2012 by GD 736/2012.

Court held that the defendant was in the company carried out a reorganization, taking the decision to liquidate positions within the unit, including that of the applicant, as the Board of Directors issued Decision no. 4/07.08.2012 according to which the new organization to be placed in the parameters set by Government Decision no. 736/2012 on the income and expenses for 2012.

The analysis of the contested decision, the trial court found that it was issued in compliance with the obligation imposed by art. 65 of the Labour Code, respected the right of notice provided by art. 75 of the Labour Code and containing all the entries set, under penalty of nullity, by art. 76 Labour Code.

Supporting the applicant that in reality there was a collective redundancy can not be appropriated by the court because under art. 68 para. 1 and 2 of the Labor Code, the collective redundancy means the dismissal, within a period of 30 calendar days in one or more reasons not related to the employee, a number of: b) at least 10 % of employees if the employer has at least 100 redundant employees, but fewer than 300 employees.

In determining the actual number of employees laid off staff, according to par. (1) shall take into account those employees who have individual employment contracts terminated by the employer, for one or more reasons not related to the employee, provided there are at least five redundancies.

From the above statutory provisions, the court held that, to operate collective redundancy is required, within a period of 30 calendar days to be fired from one or more reasons not related to the employee, a number at least 10 % of employees.

Against this sentence appealed applicant, appeal that the grounds relied upon, the evidence adduced in the case and the provisions of art. 304 pt. 8 and 9 in conjunction with art. $304^1$ of the Code of Civil Procedure, the Court found that it is justified for the following reasons:

In fact, on 30.06.2012, in S. N. "International Airport Traian Vuia" SA were 271 employees with individual employment contracts active and 3 employees with individual employment contracts suspended, with a total of 274 employees, as shown in the documents submitted.

By memorandum no. 5835/02.08.2012, issued by the working team formed to redesign the organizational structure of the defendant proposed the abolition of 38 posts and firing their holders, the Annex to the memo, to recover approximately 350,000 lei, or 50 % of the deficit salary budget, and will remain a total of 242 posts. At position 1 of the Annex to statement specifying the post of deputy

general director. It was also proposed the establishment of three new directorates, will be eight directions covering 242 number of positions as follows: Compartment support – 13 posts Operational Directorate – 109 posts Economic Department – 12 posts Technical Direction - 25 posts, Development and Investment Department – 6 positions, Marketing and Public Relations – 7 positions, Commercial Director and rates – 11 posts, managing director – 21 posts Security Division – 38 posts.

This statement was approved without amendment by Decision no. 4/08.07.2012 of the Board of Directors of the defendant , being state approved new organization and new functions of SN "International Airport Traian Vuia" SA in the form provided in memo no. 5835/02.08.2012. The 38 positions approved for demolition by Decision no. 4/08.07.2012 of the Board of Directors of the defendant based on the memo no. 5835/02.08.2012, issued by the working team formed to redesign the organizational structure of the defendant, representing over 10% of the total number of employees of the defendant to the date of that decision. Between 30.08.2012-14.09.2012, respondent issued and communicated to employees a total of 31 information notice under registered addresses Territorial Labor Inspectorate County no. 3644/19.09.2012 and no. 3557/09.11.2012 and the situation presented by the defendant. In those addresses, stated that by the decision of the Board of Directors no. 4/08.07.2012, is canceled due to financial and economic difficulties, which involves reorganization of jobs for employees ' point. In fact, the decision to dismiss the applicant, having no. 209/11.05.2012, indicate Decision 4/08.07.2012 of the Board of Directors of the defendant and memorandum no. 5835/02.08.2012, issued by the working team formed to redesign the organizational structure of the defendant, as documentary evidence of the dissolution of his workplace.

Given that fact and the reasons given by the applicant in support of required verification that the employer's obligation to follow the procedure established by art. 69 - art. 72 of the Labour Code, the conditions under which it considers that it should follow that procedure, since qualification as a collective dismissal is given by art. 68 of the Labour Code and the requirements are not met the legal rules in question, which was acquired and interpreted by the first court. Thus, the court noted that the condition is not mandatory dismissal of at least 10% of the employees of the institution for a period of 30 days over the total number of jobs of the employer in this case has not ordered a collective dismissal in meaning of the art. 68 of the Labour Code, but an individual dismissal, so did not analyze the procedure provided for by art. 69 – art. 72 of the Labour Code, considering that there is mishap.

The Court finds that the mandatory procedure established by art. 69 of the Labour Code, should be performed prior to the issuance of the dismissal decisions. In order to reach an agreement, the defendant, who was doing the firing of more than 10% of its employees, according to Decision no. 4/07.08.2012 of the Board of Directors of the unit, be required to undertake consultations in a timely manner, with the union or, failing that, the employees' representatives, on the ways and means of avoiding or reducing the number of employees affected dismissal, i.e. dismissal mitigating social measures. Such an interpretation is given that art. 69 of

the Labour Code provides that duty above the employer intends to make collective redundancies prior to materialize this intention, and not after the dismissals of employees were issued layoff intention materialized collective effective measure.

The provisions of Directive no. 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies have been transposed into national law by the Romanian Government Emergency Ordinance no. 55/2006 amending and supplementing the Labour Code so that in this case no question of direct application of Community rules, but can not disregard its interpretation by the European Court of Justice.

Art. 2 para. 1 and par. 2 of the Directive 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies provides that: "Where an employer is contemplating collective redundancies, he shall begin timely consultations with workers to reach an agreement. These consultations shall cover at least the possibilities of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant". The provisions of this article have been translated into Romanian legislation through art. 69 para. 1 of the Labour Code.

By judgment of 27 January 2005, issued by European Court of Justice in Case C -188 / 031 on the counter Wolfgang Junk Irntraud Kuhne, it was shown that art. 2 of the Directive must be interpreted as meaning that the adoption, within a group of undertakings, of strategic decisions or amending activities which compel the employer to provide or plan for collective redundancies, the employer determines the birth in the burden of obligation consultation workers' representatives. The obligation of the employer to the union after consultation procedure arises when the manifestation of will of the employer for the purposes of planning and availability has more than 10% of its employees so that, from this point of view, not relevant when that can determine the outcome of dismissal, as it is governed by art. 68 of the Labour Code.

Given the timing of initiation, in this case, the dismissal of 38 employees, the Court finds that the first court erroneously reported in art. 68 of the Labour Code to check for a redundancy, given that this text covers that point in time, the situation after the triggering dismissal procedure and its actual result. In this case, it was necessary to verify to what extent the employer has complied with the legal obligation to initiate timely consultation with the trade union or, as appropriate, with representatives of the employees and to provide them with all relevant information in relation to redundancies was to have a view to formulating proposals from them.

In conclusion, the Court notes that the obligation to make consulting employees governed by art. 69 of the Labour Code and other duties provided for by art. 70 - art. 72 of the Labour Code, is related to the intent of the employer to make collective redundancies, intent which was materialized in question by issuing

notices and communication, within 30 calendar days, for more than 10 % of employees defendants unit.

Given that the intention of the employer for collective redundancies, including mandatory elements instituted by art. 69 para. 2 of the Labor Code, was not communicated to the trade union or representatives of his employees, they were unable to propose measures to avoid redundancies employer or to reduce the number of employees affected and to mitigate the consequences of collective redundancies, thus disregarded legal guarantees of labor rights established by art. 69 - art. 72 of the Labour Code, as that can not be restricted under art. 41 para. 1 of the Constitution and the decision no. 24/2003 of the Constitutional Court.

Failure of one or more of the employer's obligations under the collective dismissal procedure shall be sanctioned by absolute nullity of subsequent measures, namely the decision to dismiss the employee, according to art. 78 of the Labour Code. Given that the decision to dismiss the applicant is null and void, according to the foregoing, no longer requires an examination by the court of appeal of the other grounds of appeal relating to the legality and validity thereof.

**Commentary**

Duty to consult the employees governed by art. 69 of the Labour Code and other duties provided for by art. 70 - art. 72 of the Labour Code subsists from the time the employer decides redundancy operation, based on art. 65 Labour Code, for more than 10 % of the employees in the unit defendants.

The solution adopted by the superior court is correct, failure to lack of consultation leading to the possibility of union or employee representatives to propose measures to avoid redundancies employer or to reduce the number of employees affected; proceeding in this way, the employer has emptied the entire contents of collective dismissal procedure whose steps were strictly regulated by the legislature.

## 5. Conclusions

Currently the art. 65 of the Labour Code regulates the institution of individual dismissal for reasons not related to the employee. These provisions shall, therefore, the legal framework in Romania, at present, individual dismissal for reasons not attributable to the employee.

According to art. 65 Labour Code, "dismissal for reasons not related to the employee is the individual employment termination due to dissolution of the position held by the employee, for one or more reasons not related to his person". Abolishing the workplace must be effective and have a real and serious cause.

Text legally described above shall require two conditions to operate legally, an individual who does not take redundancy to the employee:

a) to hold an effective demolition job;

b) there is a real and serious cause of this abolition.

As far as living conditions discussed above and provided by art. 65 Labour Code are met, then the employee is legal dismissal and the employer will issue the dismissal decision under Art. 65 Labour Code.

The provisions of Directive no. 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies have been transposed into national law by the Romanian Government Emergency Ordinance no. 55/2006 amending and supplementing the Labour Code so that in this case no question of direct application of Community rules, but can not disregard its interpretation by the European Court of Justice.

Consultations required by art. 2 para. 1 and par. 2 of the Directive 98/59/EC shall cover at least the possibilities of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers redundant". The provisions of this article have been translated into Romanian legislation through art. 69 para. 1 of the Labour Code.

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