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**Article**

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## FLEXIBILIZING THE TERMINATION OF THE EMPLOYMENT CONTRACT: PROS AND CONS

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### ABSTRACT

*The changes in the Romanian Labour Code appear to be a way of implementing the concept of flexicurity in our system of law. And among all institutions changed by the new law, probably the one related to termination of employment has the most dramatic effect within labour relations and the very application of the principle of workers' protection. Indeed, after eight years in force, the Labour Code has been changed, aiming at re-balancing the powers of the parties over the issue of the termination of the employment. These changes may lead to a new content of the concept of job security, and also to a new approach of the idea of career. The Government's goal was to offer the possibility for the employers to dismiss and employ personnel more easily, allowing him/her to select best employees at a time of economic crisis. However, as a result of an analysis of how the flexicurity principles were applied in other states (especially in case of the new member states) one may be very much afraid that flexicurity cannot be obtained by just un-protect the employees and simplify the dismissal procedure. This is why the changes in the Labour Code, particularly with the intention to render more flexible the labour market and the contractual arrangements were received by trade unions, and by the entire society with deep concerns and skepticism. From the perspective of trade unions, if the implementation of the flexicurity concept seems to be successful in some of the European states, since it guarantees a certain level of protection, in Romania such a process would be disadvantageous for employees in terms of the special job stability they enjoyed. Flexicurity itself demands to be flexibly adapted – from case to case, from one state to another. One can even say that there are 27 ways of applying the concept of flexicurity within European Union... Which is the Romanian way, especially when it comes to the termination of the employment contract? The paper aims to put into light the advantages and disadvantages of the very recent changes in the Labour Code, and to configure a possible perspective in this regard.*



*Labour law, employment contract, dismissal, flexicurity*

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## INTRODUCTION

Although the tendency is to be gradually diminished, the role of the state within the perimeter of the Romanian labour law is still significant. This is manifested, on one hand, through its specialized bodies especially Labour Inspection, for controlling the manners of application of the legal provisions. Moreover, for a long time, the state has intervened by subsidizing certain inefficient industries, in order to avoid the massive reduction of the work places; for the moment, it has renounced to such a policy.

On the other hand, the state's intervention in labour relations is manifested through the detailed regulation of the work relations, which are left to the collective negotiation to a lesser extent than in other law systems. And this is why one of the main issues of the current controversy regarding the modification of the Labour Code was related to the way in which an employment contract should end. The Labour Code has been modified through Law no. 40/2011, published in the Official Monitor of Romania no. 225 from 31 March 2011.

How far should the legislator intervene in order to leave the employer's decision free, but still to protect the employee against potential abuses? This is obviously a question each of the social partners should answer in his own way: the trade unions by revealing the importance of labour protection and the fact the very reason of existing labour law is to take care of employees, and the employers' organisations by insisting that the employer actually created the working places, so he should normally be allowed to decide what to do with them and with the employment contracts.

The point here is that a law, even a perfect one, can never protect against its own breaching. In other words, the problem that many employers behave abusively and disrespect the law cannot be solved by changing the law itself. It is the tools of applying the legal regulations which have to become stronger, i.e. Labour Inspection.

In order to fully understand the meaning of changing the Labour Code in respect with the termination of labour contracts, as well as its responses within Romanian society, one should first have a look at the evolution of Romanian law in this regards.

The previous Labour Code of 1972 was adopted at the time of a regime in which, within the labour legal relations, the employer was practically always a state enterprise. Protecting the employee in relation to the employer meant, in fact, protecting the individual from the state. This is one of the reasons the jurists were unanimous in restrictively configuring the regime of dismissal.

On the other hand, the communist labour legislation did not even allow the individual to freely move from one state enterprise to another. Though formally stipulated by law, resignation was rare, being considered rather reprehensible and leading to the loss of certain rights, as a consequence of 'discontinuing the length of service'. Unemployment was out of the question and each person had a certain guaranteed job.

The graduates of higher education were obliged to receive employment in the enterprises assigned to them, most often far away from home.

As compared to the full guarantee of the working place that the communist laws ensured, the Labour Code of 2003 could not bring about a complete flexibilisation, since the workers kept expecting or demanding the same level of stability. On the contrary, under the pressure of trade unions, but also of the general public opinion, whose expectations continued to stay high, the present Code maintained a whole series of restrictions concerning dismissals, as well as the complete and express regulation of the reasons for which an employee could be dismissed.

However, after eight years in force, the Labour Code has been changed, aiming at re-balancing the powers of the parties over the issue of the termination of the employment. These changes may lead to a new content of the concept of job security, and also to a new approach of the idea of career.

## 1. TERMINATION BY LAW

The employment contract is concluded *intuitu personae*, which makes its effects cease automatically when the employee dies. Indeed, a contract is said to be *intuitu personae* when it is entered into in the consideration of the person of the co-contracting party, i.e. where such consideration is essential for the contract. The very substance of the employment contract depends on the workers' personal qualities; if he dies, the contract is automatically terminated. The same regulation may be found in case of disappearance of the natural person; the law stipulates the procedure of legally declaring death.

The employment contract also terminates *de jure* in case the employee is declared legally incompetent. Indeed, according to art. 13, para. 4 of the Labour Code, 'it is forbidden to employ persons that have been declared legally incompetent'. Normally, if the legal declaration of incompetence occurs during the fulfilment of the contract, it will automatically trigger the termination of the contract, as the labour contract presupposes the employee's full discernment.

However, the symmetrical hypothesis, namely the death of the employer - natural person, respectively the dissolution of the employer - legal person, did not represent a case of the *de jure* termination of the employment contract. In such a case, the employees had to be dismissed, for reasons independent of them.

This was the result of a change in the Labour Code, made in 2006, with the purpose to allow these employees whose enterprises have been dissolved to benefit from the protection measures related to collective dismissal, while other requirements are complied with as well.

Such a strange asymmetry led to many difficulties in practice. The employment contracts could not be legally terminated in case the employer disappeared; the firm

has been dissolved or even the employer - natural person died. Many authors repeatedly suggested that this cases should be included among the ones in which a contract is automatically terminated (Ticlea, 2009: 516)

This is why the new law attained to include among the reasons for termination by law not only the case where the employee disappears or dies, but also the case where the same happens with the employer – natural person, or if the employer – legal person dissolves.

An unsolved problem remains thou. The dissolution procedure takes time, and meanwhile, some of the employees are still needed, in order perform the liquidation stage, making the payments to the creditors and organising the process of winding up. However, the employment contracts are terminated, with no exceptions, so the employer should re-hire some of the employee in order to run the process of liquidation. Those new contracts would be concluded for a fix term contract, but this case is not provided under art. 81 of the Labour Code, among the cases where a fixed-term contract can be concluded.

Another reason for termination of an employment contract under the law is the case of retirement of the employee. The new law solved a major problem resulted from the modification of the Labour Code through Law no. 49/2010.

Until 2010, the contract was considered as ended on the date when the decision for age limit retirement, anticipatory retirement or invalidity retirement has been communicated by the Pension Authority. If the employee did not request retirement, although he fulfilled the standard requirements for age limit and pension contributions, the employer could dismiss him, according to art. 61, letter e) of the Labour Code.

The Law 49/2010 changed this rule, provided that the moment when the employment contract was considered as ended is not the one when the Pension Authority communicated the decision, but the very moment when the employee fulfilled the standard age requirements and the level of pension contributions. The only problem here was that the new law completely forgot about the case of invalidity retirement.

Invalidity retirement occurs when the total or at least half of the working abilities are lost due to labour accidents, occupational diseases, TB, common diseases or accidents that are not related to work. According to the requirements of the working place and the level of the reduced working ability, invalidity is:

- first degree, characterised by the total loss of the working abilities, the self-service, self-control or spatial orientation abilities, the invalid needing care or permanent supervision by another person;
- second degree, characterised by the total loss of the working abilities, the invalid having still the capacity of self-service, self-control and spatial orientation, without needing help from another person;

- third degree, characterised by the loss of at least half of the working abilities, the invalid being unable to perform any professional activity.

Of three degrees of invalidity, the first two lead to incompatibility between the status of a pensioner and that of an employee. Only in case of the third degree invalidity pensioner is allowed to cumulate his pension with the salary, continuing his activity either in the same working place, or in another.

However, no mention regarding the moment of ending the employment contract of persons who are retired for invalidity was left in the Labour Code during 2010, and this situation created many problems. In practice, employees preferred to resign, in order not to lose the right to the invalidity pension.

The recent modification of the Labour Code by Law no. 40/2011 refers both to the age retirement and to the invalid retirement, redressing the provision on termination by law. According to the Labour Code, the employment also ends *de jure* when the demand of reinstatement in the position hold by a person unlawfully or groundlessly dismissed has been admitted, from the date of the final reinstatement judgment.

This is the situation of an employee illegally dismissed, who brought an action in court not only for cancelling the dismissal, but also for reinstatement in the previous position. If on that particular position another worker was in the mean time hired, his employment will be automatically terminated. This text practically represents an application of the nullity theory. Indeed, the nullity of the decision to dismiss the first employee represents the cause of termination the employment contract of the second one.

However, for a long period of time doctrine and practice faced a very specific difficulty here: how will be ended the employment of an employee who did not request reinstatement in court? It may be the case of an employee who found an alternative job, so he/she wouldn't have to comeback into the same position. But Labour Code contained no solution on how the original employment should end. It wouldn't be a dismissal, since the dismissal decision has been annulled by the court, nor it would be a resignation, since the employee didn't formally resigned, and it wouldn't be a termination by mutual consent (even thou both parties did want to end the contract) since the parties were in fact in a dispute.

The modification of the Labour code includes this case among the cases of termination under the law, which is one of *de lege ferenda* proposals made by most of the authors lately.

Indeed, according to art. 78 para. 3 recently introduced in the Labour Code, in case the employee does not appeal in court for re-instatement in the job he had prior to the dismissal, his/her employment will end under the law from the moment when the court decision is final. This will mean that, even thou the dismissal has been cancelled

in court, the contract would be still considered as ended, but on another ground, namely the ground of law itself.

Another new regulation is provided by the law changing the Labour Cod in respect with the withdrawal of official recognition and legal authorisations.

In certain cases, the employment contract can only be fulfilled by persons who received official recognition, authorisation or attestation for carrying out the respective activity. For instance, Law no. 333/2003 on guarding objectives, goods, values and on the person's protection, stipulates that: 'Employment of the personnel with guarding duties or as bodyguards is made on the basis of the attestation issued by the police, of the certificate attesting the graduation of the professional training course, of the certificate of criminal record and, according to case, of the police gun permit'.

Similarly, according to Law no. 126/1995 on the regime of explosives, the conclusion of the labour contracts for employees working as artificers depends on their professional authorisation issued by the administrative bodies.

Withdrawal of authorisation, permit or attestation will automatically lead to termination of the employment contract.

The new regulation here includes the case in which the authorisations have not been withdrawn, but they expired. Until this new change of the Labour Code there have been no solutions for this case, so one couldn't say how such a contract would end. As a result of changing the Labour Code, the employment will be considered as terminated by law from the moment when the period for which the official recognition and legal authorisations expired. However, the employee still has 6 months in which he may renew the authorisations requested to do the profession.

In case the authorisations or official recognitions have not been withdrawn, but suspended, a new case of suspension of the employment occurs - recently regulated by the new changes in the Labour Code. Indeed, according to art. 52 para. 1 f), the contract is suspended by law during the suspension, by the competent authorities, of the authorisation, permit or attestation requested for exercising of the profession. The employee has no right to salary during this suspension, but he will remain bound by the rest of contractual rights and obligations, e.g. by the fidelity obligation.

The administrative decision to withdraw or to suspend an authorisation may be contested in court, according to Law no. 554/2004, on administrative disputes. In case the court considers that withdraw or suspension was not decided according to the law, we consider that the employee will have the right to re-instatement, with the payment of the due salary owed for the period he was deprived of this right. However, not the employer will pay but the authority whose decision has been successfully contested.

A change which led to many controversies was the one regarding the relation between termination of employment and suspension of the employment. In fact, we consider

this has not been a real change, because the jurisprudential solution was the same even before this new law. According to art. 49 para.5 and 6, each time when during the time of suspension of the employment a reason for termination by law occurs, the cause of termination will prevail. In case of suspension of the labour contract, all terms related to conclusion, modification or termination of the employment contract will be correspondently suspended, except those related to the termination of the employment by law.

This is just an explanation of how the relation between termination and suspension works; it is not really a new rule. For instance, even before this changed, if at the moment when a fixed-term contract expired, the employee was in medical leave, the employment still ended. The employee had the right to proper indemnity for incapacity to work, but the employment ended inexorable.

However, trade unions argue that because of this new article, the employee is less protected than he/she was before.

## **2. DISMISSAL**

### **2.1. Protection of the Employee**

The ‘separation’ between labour law and civil law was based on the legislator’s often vigorous intervention in regulating relations between the parties. Their legal equality ceases with the conclusion of the labour contract. From then onwards, one of the parties is subordinate to the other and even enters a relation of dependence towards the other. Though still considered as belonging to private law, labour law has many imperative provisions, norms of public order meant to re-balance the relation between the two parties.

In Romanian legislation, art. 6 of the L.C. stipulates the principle of employees’ protection in the context of the provision regarding the prohibition of any discrimination in exercising rights granted by law. The text must be understood in relation to the provisions of art. 41, paragraph 2 of the Romanian Constitution, according to which ‘employees have the right to social protection measures. These refer to the employees’ safety and health, women’s and youth working conditions, the setting up of minimum national gross wages, weekly rest, paid leave, the carrying out of the activity in special conditions, professional formation, as well as other specific situations, established by law’.

As a result, the protection of employees is one of the main principles of labour law. When it comes to the regulation of dismissal, such protection is even stronger, being ensured, among others, by the following:

- The employer shall make use of all possible reasonable means to avoid dismissal;
- Strict procedures shall be enforced so that non-compliance with these procedures shall incur annulment of the dismissal;



- The dismissal decision shall be issued in a written form;
- The elements of the dismissal decision shall be imposed under the law. Absence of any of these elements shall entail annulment of the dismissal;
- Dismissal shall be forbidden for any other reasons except for the 5 reasons accepted expressly by the law;
- Dismissal of certain categories of employees who are during special periods, shall be forbidden;
- The dismissed employee shall have the right to go to court; the burden of proof shall lie with the employer;
- The employer shall have the obligation to submit the evidence from the very first day of the trial;
- The employee shall have the right to obtain reintegration and damages in court, if the dismissal has been annulled.

Moreover, under the Labour Code, employees shall not be dismissed while they are in one of the following cases:

- during the time of temporary incapacity of work, ascertained by medical certificate;
- during quarantine leave;
- during the period of pregnancy, as long as the employer is informed about this fact, prior to issuing the decision of dismissal;
- during maternity leave;
- during childrearing and care giving leave until the child reaches the age of two or, in the case of a disabled child, until he becomes three;
- during the care giving leave for a sick child up to the age of seven or, in the case of a disabled child, until he reaches the age of 18;
- while holding an eligible position in a trade union, except for the situation when dismissal is ordered due for disciplinary reasons;
- while on holiday;
- during the maternal risk leave, as well as during the leave granted to those employees who have recently given birth or who are breastfeeding. The interdiction of dismissal can be extended only once, for up to six months, from the date the employee has returned to work within the enterprise.

The collective labour contracts can include other periods of time when dismissal may be forbidden. For instance, some of them stipulate dismissal of women who returned from the child-rearing leave during the first 6 months from the date they returned of work, for reasons of lack of professional standards.

The collective labour contracts also stipulate compensation pays owed to the employees dismissed for reasons that are not related to them.

Besides these protective rules, the recent change of labour legislation aims to allow the employer to freely organise the working force and to dismiss employees more easily than before.

As a result, the interdictions to dismiss are subject to change. They will be not applicable in case of dissolution of the company, a case not taken into account by the legislation prior this change. Of, course, in fact, the interdictions couldn't be applied in such case, continuing the employment being practically impossible, but until now there has been no regulation in this respect.

More importantly, the interdictions to dismiss in case of trade unions' leaders and employees' representatives are tremendously diminished. Until now, they couldn't be dismissed for the entire period of the mandate, and for another 2 years afterwards. The dismissal was allowed not even for incompetence. The union leader's protection was considered in itself an element of union freedom (Dimitriu, 2007: 18).

Indeed, if the union leader is not adequately protected from pressure exerted by the employer or a third party, the union organisation or union freedom of its members can be endangered. This explained the meaning of many decisions taken by the Romanian Constitutional Court, regarding the legal differentiation between union leaders and other employees. The question was: is it normal that the law creates a special legal system for a certain category of employees whilst excluding others? The prohibition against dismissing union leaders was considered by the Constitutional Court not to constitute a privilege, but a measure of protection ensuring equal treatment of the trade union on the one hand, and the trading company on the other, as parties to the collective labour contract. The employee representatives elected to the leading trade union bodies are in different situation than other categories of employees. Consequently, they cannot be treated in the same way.

However, according to the recent change of the Labour Code, the trade union's leaders and the employees' representatives can be dismissed immediately after the end of their mandate, and for any kind of reasons, including incompetence. It is no surprise that trade unions were deeply unsatisfied with this new regulation, in our opinion this being one of the major concerns of the trade unions, a ground for a negative reaction to the enforcing of the new law.

## **2.2. Dismissal for lack of professional standards**

Another element of the new legislation is related to the dismissal for incompetence. According to art. 61, letter d) of the L.C., the employer can order the dismissal of an employee in case he is professionally unfit for the job position he holds. Among the grounds for dismissal provided by art. 61 of the L.C., dismissal for professional inadequacy represents the ground closest to common law.

Indeed, the circumstance that the employee 'is not professionally fit for the job position he holds' represents nothing else than the failure to fulfil the contractual duties by one of the parties, a typical case for termination for breach of the contract in the common law. Practically, professional inadequacy represents (or should represent) the most frequently invoked ground for dismissal: the employer is not content about his employee's work.

The grounds wherefore a person might be considered professionally unfit have been most often divided into objective circumstances (related to the non-fulfilment of the requirements for studies or training), and subjective (related to the employee's skills or abilities).

According to art. 63 para. 2 – new inserted into the law - dismissing an employee on that ground can be decided only after a prerequisite evaluation of the employee, according to a procedure established by the collective agreement or by internal regulations.

The employee has to be informed about the criteria for this evaluation for the very moment he is hired. This is an application, into Romanian labour law, of a general principle regarding the workers' right to information and consultation. There is now a broad legislation of the European Community on employees' information and consultation in both individual and collective relations. The EC Law prescribes that specific information and consultation takes place in cases of mass dismissal or the transfer of an undertaking. And the Directive on the European Works Council provides for a duty of information also in general questions, but it only applies to large undertakings that are involved in cross-border activities. Moreover, in many Member States the statutes nowadays establish that the employer has to give information to the employees in questions of general importance (Rebhahn, 2004: 123).

Also before this recent change of Labour Code the employer had the right to examine the competence of the employee, according to some criteria established either by the employer himself, or by a contract concluded with the trade union. This right of the employer is today expressly provided, so it wouldn't be possible anymore for a trade union to request or expect to be consulted in this regard.

We have to point out here that this is – again – not a completely new solution.

However, the recent change in Labour Code does bring a new approach in this regard. In order to understand the new element, we should first look over the way the dismissal for incompetence was regulated in the recent past in our Labour Code.

Though dismissal due to professional inadequacy should represent the 'specific ground' for dismissal, in relation with which all the other grounds for dismissal would rather seemed as exceptions, the legal procedure for dismissal due to professional

inadequacy was so cumbersome and difficult to comply with, that in reality the employers avoided to order dismissal on this ground, trying to terminate the labour relations by invoking other grounds.

Indeed, according to Art. 63, paragraph 2 of the Labour Code, the employee's dismissal due to professional inadequacy could be ordered only after the employee's preliminary evaluation, in accordance with the evaluation procedure established by the applicable collective labour contract, concluded at national level, branch of activity or group of enterprises, as well as by the internal regulations.

Yet, the Collective contract concluded at the national level for 2007 - 2010 had not provided an evaluation procedure, but one of preliminary investigation, similar to the compulsory investigation in the case of disciplinary dismissal. As such, before the recent modifications of Labour Code, dismissal due to professional inadequacy was conditioned by carrying out both procedures, regular evaluation, as well as preliminary investigation. Even if a procedure of the employees' regular evaluation could be inserted in the collective labour contracts concluded at branch or company level, preliminary investigation still remained compulsory for everybody, because it was provided in the Collective labour contract concluded at the national level. Thus, an employee couldn't be automatically dismissed for professional inadequacy, only on the basis of the poor results of the evaluation.

Investigation prior to dismissal for professional inadequacy was carried out according to the procedure provided by Art. 77 of the Collective labour contract concluded at the national level. According to it, the investigation of the employee for professional inadequacy was made by a commission appointed by the employer. The commission summoned the employee and conveyed to him in writing the following, at least 15 days in advance: the date (exact time and place when the commission meets) and the manner in which the investigation will be carried out.

This entire procedure is no longer in force. Currently in Romania there is no Collective contract concluded at the national level, because the one concluded for 2007 – 2010 expired, and a new contract, thou negotiated between social partners at the national level, never entered into force because it wasn't registered at the Ministry of Labour.

As a result, today the law is directly applicable in the labour relations. And in the law there is no preliminary procedure provided in order to dismiss an employee for incompetence. The only condition is that such an evaluation should be provided, and the Labour Code, recently modified, enlarged the possibility of the employer to apply his own criteria in evaluating the employee.

In fact, the change intervened in the Labour Code is more important than it appeared at the first view, because it has to be connected with the lack of a Collective contract concluded at the national level. Therefore, today, in case of dismissal for lack of

professional standards, the employer shall do a prior assessment of the employees, under criteria that should be known by the employees from the date when they are hired. The assessment can be done also to select employees that are to be dismissed for economic reasons.

### 2.3. Dismissal for economic reasons

The Labour Code, modified by Law no. 40/2011, stipulates some gradual measures that the employer can take in case of economic difficulties, prior to dismissal. He shall therefore do the following:

- Reduce the working days. According to the changes in the Labour Code introduced in March 2011, in case of temporary reduction of the activity, for economic reasons that exceed 30 days, the employer can reduce the working days to 4 days per week and can reduce the salary correspondingly, until the situation is remedied;
- Suspend the labour contracts of the employees, and pay them 75% of their salaries;
- As a last resort / *ultima ratio*, lay them off.

The employer shall give the employee the chance to be transferred to another job corresponding to the employee's training and skills, and if the employer has no such vacancies, the employer shall inform the local Employment Agency about the employee laid off, so that the agency could identify an available job, dismissal cannot be annulled for the reason that the employer has not ensured re-training (professional reconversion) of the employee.

The employer shall offer the employee a job corresponding to his current competences, not to his potential competences.

The rule of proportionality shall not apply, and the court shall assess the legality of the dismissal exclusively against the way in which the employer has fulfilled his prior obligations stipulated either by the law or in the collective labour contract.

In the case of collective dismissal, according to the new regulation, the employer will be allowed to give priority to performance criteria (not to social criteria, as it currently happens). Today, prior to any social criterion of establishing the order of priority in cases of collective dismissals, the employer is free to evaluate the employees' performances. The criteria related to the professional performances of the employees will prevail upon the social criteria.

With respect to selection or ranking criteria, international labour standards guidance is provided by Article 23 of the Termination of Employment Recommendation (No. 166) which stipulates that the selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural

or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers. In comparative practice, the criteria most often applied relate to occupational skills, length of service, family circumstances, with preference sometimes being given to a particular criterion such as the protection of a vulnerable category of workers or the difficulty of finding alternative employment. The determination of the selection and/or ranking criteria should be guided by the specificities of each national labour market, including the existence of active labour market policies and institutions to support redundant workers. It is, however, of particular importance to ensure that, as a result of the preference given to some criteria, certain protected workers, such as workers' representatives, are not dismissed in an arbitrary manner on the pretext of a collective termination of employment (International Labour Organisation, 2011).

The rules regarding the collective dismissal are no longer applicable to public employees (workers employed by public administrative bodies). Until now, the Romanian legislation has not excluded them from the rules of collective dismissal, even though the Directive 98/59/EC was not applicable to these employees.

Until now, if the employer re-launched the activities whose interruption have led to massive dismissals before the 9 month-term ended, the employees who have been dismissed had the right to be re-employed in the same job positions they previously held, without any examination, job competition or probation time. According to Law no. 40/2011, this term has been reduced to just 45 days. After this short period the employer will be allowed to re-establish the jobs, employing other persons that the ones dismissed. Not surprisingly, the trade unions declared their dissatisfaction regarding this change in the law.

#### **2.4. The notice**

According to the Labour Code, the employees dismissed for non-imputable reasons shall be given a prior notice. The term stipulated in the notice does not depend on the years worked by the employee in the company or any other criteria. Under the law, the term stipulated in the notice shall be at least 15 working days. The collective labour contracts include derogations that are advantageous to the employees by stipulating longer terms. The employees on probation period shall not be given prior notices.

The term of notice is suspended if the employment contract is also suspended. Moreover, the collective labour contracts provide that during the term of the notice the employees are allowed to shorten their working time by 4 hours, as compared to the working schedule of the enterprise, in order to look for another working place, without their wages and other rights being restricted because of that.

During the term of the notice, the employee has all the rights and obligations resulting from the employment contract: he still has the duty to carry out work, to refrain from any act of disloyal competition, as well as from any act of indiscipline. If he does not comply with all these duties, he will be dismissed on disciplinary grounds, without being necessary to wait for the end of the notice term.

The Law no. 40/2011 prolonged the notice period; it is now 20 days. This is because the prior version of Labour Code provided 15 working days as a notice term mandatory in case of dismissal, but the collective contract concluded at the national level for 2007-2010 provided 20 days. At present, since the previous contract concluded at the national level expired, and no other contract has been registered with the Ministry of Labour, the legal provision would be directly applicable. The change in the Labour Code could also mean that the legislator assures that even in the case no other collective contract at the national level will ever enter into force, the minimum period of notice will still be 20 days.

### 3. RESIGNATION

According to art. 79 para. 2 of Labour Code, as it was recently modified, the employer is obliged to register the employee's resignation, otherwise the latter being allowed to prove the resignation by any means. The new element here is that the employer will be sanctioned, if he fails to register the resignation, with a fine from 1,500 to 3,000 lei.

This change was made as a result of many cases when the tendency of the employers not to register employees' resignation can be noticed, since no fine has been provided for this behaviour (Stefanescu, 2010: 464)

When it comes to resignation, the major issue here is the way in which notice in case of resignation is regulated. It is prolonged to 20 working days in case of executive functions and 45 working days in case of managerial positions.

Labour Code priory provided only 15 calendar days for executive positions and 30 days for managerial positions. Therefore, the length of the notice has been changed.

But the real problem here is that the law provides a minimum period of notice. The parties may convene through the individual or collective contract a longer period of notice, which cannot be shorter than the legal one. This rule is not only disadvantageous for the employee, but also it breaches the major principle according to which the parties may only convene in the advantage of the employees. It is the only provision in the entire Labour Code in which the parties are obliged to convene *in pejus*, so the employees may only have a worst situation than the one provided in law. From a juridical point of view, such a provision is completely wrong, especially in respect with the general rules of labour law.

## CONCLUSIONS

The European Union is trying to find its own way in the attempt to increase competitiveness while maintaining, at the same time, a high level of social protection within the Social European Model. On the theoretical level, in the new member states, one of the effects of joining the European Union is the reception of the concept of flexicurity and the debate surrounding this issue.

One of the starting points of the debate is that the idea that “one size fits all” may still be a dangerous approach – when it comes to the concept of flexicurity. On the contrary, the experience of the new member states may lead to new nuances when debating the flexicurity concept.

Furthermore, the existing research on flexicurity shows that neither flexibility nor security is an unambiguous concept.

If **flexibility** is seen as the opposite of rigidity, then without any doubt its occurrence in an economy on the move appears as desirable. Flexibility is considered to be an inherent feature of labour demand and supply. Both being driven by individual interest, they tend to become flexible in order to meet each other as none of them can survive independently (Ghinararu, 2010: 77).

If, on the contrary, the flexibility of labour relations implies deregulation and the removal of restrictions on contractual freedom, then it may create even more problems, rather than solve them. As already said before, ‘between the strong and the weak, between the rich and the poor, it is freedom that oppresses and the law that sets free.’ These are, in fact, the circumstances wherein the labour law has emerged and defined itself as a protective law.

If **security** is not concerned with the certainty of a working place, but with the security of a career or, to put it more generally, with the socio-economic security, focusing on protecting the more vulnerable groups, then it may ensure the necessary balance between insiders and outsiders.

But if it only aims at maintaining the existing job security, without the appropriate absorption of the outsiders on the labour market (an idea that sometimes creeps in the very discourse of trade unions, as the main representatives of the existing employees), imbalances on the labor market may grow deeper, instead of becoming less visible.

The simultaneous protection of insiders and outsiders implies their uniform treatment, not as two distinct categories of persons, but as one single class of persons able to work, whether they are carrying out an employment contract or not, at that precise moment. Theoretically, the excessive protection of the employment contracts leads to lack of protection granted to the outsiders, who find themselves facing an insurmountable wall when it comes to getting access to a job. Moreover, the



employer's competitiveness suffers from this situation, as long as he is not in the position to permanently select the most suitable workers in a continuously changing economy.

„Getting more people into good jobs” is an objective, while flexicurity is (or may be) one method. The extent to which the application of the method leads to reaching this aim is still an open question. Flexicurity itself demands to be flexibly adapted – from case to case, from one state to another.

Some authors consider flexicurity a political strategy rather than a scientific concept. The policy of flexicurity is, in most cases, qualified as a „win – win” type of policy, considered to be a somehow hypocritical qualification by certain market analysts in the new member states, because beyond theory, it seems that in practice workers are losing rather than gaining something out of it.

*From the perspective of trade unions, if the implementation of the flexicurity concept seems to be successful in some of the European states, since it guarantees a certain level of protection, in Romania such a process would be disadvantageous for employees in terms of the special job stability they enjoyed, in the context of the Labour Code. The changes in the Labour Code, particularly with the intention to render more flexible the labour market and the contractual arrangements were received by trade unions, and by the entire society with deep concerns and scepticism.*

*A segmentation of labour market is a common European trend. Many authors suggested not to enhance but rather to circumvent the protective legislation on individual dismissals that exists in all European countries by resorting to atypical contracts that fall outside the sphere of protection (Veneziani, 2009: 127). In the same view, the Romanian law – maker may focus not as much on protection of the workers in case of dismissal than on extension of some of the rules of protection for the case of the persons who don't formally work on a ground of an employment contract.*

*In fact, when approaching the question of flexicurity, perhaps the starting point should not be the legislation itself, as the practice of applying it. Besides, the new member states have several particularities in implementing the concept of flexicurity, among which we can identify at least 4: psychological particularities, coming from the shock of adapting to a new system for the workers trained during communism, particularities derived from the competitive disadvantages of economies in the new member states, particularities concerning the type of social dialogue practiced and those concerning the labour force itself, in the context in which the phenomenon of workers' migration reaches unusual dimensions.*

In this context, the changes in the Romanian Labour Code appear to be a way of implementing the concept of flexicurity in our system of law. And among all institutions changed by the new law, probably the one related to termination of employment has the most dramatic effect within labour relations and the very

application of the principle of workers' protection. The Government's goal was to offer the possibility for the employers to dismiss and employ personnel more easily, allowing him/her to select best employees at a time of economic crisis. However, as a result of an analysis of how the flexicurity principles were applied in other states (especially in case of the new member states) one may be very much afraid that flexicurity cannot be obtained by just un-protect the employees and simplify the dismissal procedure.

Consequently, will the Government's goal be attained? Or perhaps the scepticism of the Romanian society in respect with the new labour legislation is justified? Only time will answer this question, for sure.

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