REORGANIZATION OF THE EMPLOYER. IMPACTS ON THE EMPLOYMENT CONTRACTS

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Abstract

The paper deals with identifying the impacts of the different methods of reorganization of the hiring unit on the employment contracts. It takes into account the methods of reorganization regulated in the new Civil Code, as well as the judicial reorganization or the transfer of the undertaking, in an attempt of organizing these important circumstances in the life of the enterprise, considering their impacts on the working relations. Taking into account the variety of the meanings and circumstances in which the term reorganization is used, there is carried out a classification of the reorganization situations, whereas the criterion is the impact of these circumstances on the employment contracts. It presents the hypotheses in which dismissal for reasons which are independent from the employees can be decided, in a restricted way, the cases in which such redundancies can be decided in an unrestricted way, as well as the cases in which the reorganization cannot be at all accompanied by measures of making employees redundant.

Keywords: *employment contracts, reorganization, employees, redundancy*

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1. The Concept of „Reorganization"

Following the fact that an employment contract is carried out along a (sometimes long) timeframe, in the circumstances of the market economy, which require quick changes of the varieties of kinds of organization of economic agents, there is a high probability that the hiring entity suffers changes, transformations or reorganizations. Such changes (of an even bigger amplitude during the economic crisis) are in principle dedicated to increasing the efficiency of the economic activity and have inevitable impacts on the employment contracts, as well, with direct effects on the human resources. However, the employer will not be able to change, cease or modify these contracts automatically and unilaterally; firstly, he will have to identify the category of decisions that are allowed by the labour law, as opposed to those which are interdicted.

We would start be mentioning that the term „reorganization" has different meanings in the civil law, as opposed to the labour law. In this way, the Civil Law[2] uses this term in cases in which the performed changes have an impact on the juridical personality of the unit, with effects which are either extinctive or constitutive, or (like in cases of transformation) effecting a change in the category of legal entities to which this unit belongs. It is of no significance if the employment contracts are maintained or if the jobs are cut. On the contrary, the hypotheses of changing the unit's structure, even if with a major impact on the employment contract, according to the Civil law, are not cases of „reorganization", as long as the juridical personality of the unit stays unchanged.

The Labour Code makes no specific references to the concept of reorganization, but the judicial practice and the doctrine are of the same opinion in how they use the term in cases in which, for example, there is mentioned a redundancy based on reasons which are independent from the employee, following a change in the organizational structure of the unit. In this case we

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[2] Law Nr.287 of July 17 2009 related to the Civil Code, published in the Official Gazette of Romania, Part I, No. 505 of July 15 2011.

are not talking about a change which impacts the juridical personality of the unit, but a change in its structure, which might lead to job cutting[3].

Nevertheless, in a large sense, one way of reorganization is also the „temporary change of the employer's structure", which is referred to by Art. 83 letter b) of the Labour Code, as a hypothesis which allows signing employment contracts on temporary basis.

Law No. 86/2006 about the procedure of insolvency [4] regulates the „judicial reorganization" as well, as the procedure applied to the debtor, juridical person, in order to pay his debts, according to the debt payment plan. The reorganization procedure stipulates drafting, approving, implementing and respecting a plan, called reorganization plan.

The Labour Code also makes references to this specific interpretation of the term „reorganization", in Art. 60 Para. (2), where it foresees that the interdictions of redundancy mentioned in the previous paragraph will not be applied in the cases of redundancy out of reasons following judicial reorganization, bankruptcy or liquidation of the employer.

Finally, in the management of human resources there are foreseen not only the reorganization of the unit or of one of its departments, but the reorganization of the job, meaning the change of one or several of the clauses of the employment contract signed with the employee who holds this job.

Taking into account this variety of meanings and circumstances in which the term of reorganization is used, we will proceed to a classification of the situations of reorganization (disregarding the legislative act in which these are mentioned), whereas the criterion is the impact of these circumstances on the employment contracts.

In this way, there can be considered:

1) Reorganization of the unit with no relevance for the employment contract. This category comprises the hypotheses of structural changes of the unit which do not lead to cutting or modifying jobs, or to cutting open (vacant) positions;

2) Reorganization with relevance for the employment contracts. These hypotheses can be subdivided into:

a) situations of reorganization which can lead to redundancies, in the limits of the restrictions imposed by the Labour Code (e.g. situations of restructuring with impact on the organizational structure of the unit);

b) situations which can lead to redundancies out of reasons independent of the employee, with no restrictions (e.g. judicial reorganization of the unit);

c) hypotheses of reorganization where redundancies out independent of the employee are not allowed (e.g. the transfer of the undertaking).

2. Situations of Reorganization provided by the Civil Code

The Civil Code provides in Art. 233 the fact that the reorganization of the juridical person is carried out through merger, division or transformation.

According to Art. 234, the **merger** takes place through the absorption of one juridical person by another juridical person or through the melting together of several juridical persons, with the purpose of forming a new unit[5].

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[3] On the contrary, the civil law considers that the „internal restructuring of the juridical person, which implies activities like the liquidation of assets, the sell or lease of goodwill, the relocation, opening or closing down of secondary units, is not a sort of reorganization in the sense of the Civil code". See Gh. Piperea, in F. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole (New Civil Code. Comments Article by Article)*, publisher CH Beck, Bucureşti, 2012, p. 232.

[4] Published in the Official Gazette of Romania, Part I, No. 359 of April 21 2006.

[5] In the case of joint stock companies, the merger is the operation through which:

In the case of absorption, the rights and duties of the absorbed juridical person are transferred in the assets on the absorbing juridical person. As a consequence, the juridical personality of the absorbed unit ceases. It is a direct suspension, not preceded by liquidation and dissolution. The personnel is taken over by the absorbing unit.

In the case of the melting together of the juridical persons, the rights and duties of these juridical persons are transferred in the assets of the newly founded juridical person. The melting business entities cease their existence, and their employees are taken over by the company which results from the merger.

It must be noticed here that the merger itself is not a reason for ceasing employment contracts. Even if the hiring company ceases to exist, the employment contracts survive, only that the employer is another juridical person. Nevertheless, in practice, such judicial operations still have an impact on the employment contract, because it is most probable that the merger or the absorption take place because of reasons of increasing efficiency. If it will be decided to reduce the number of positions, the reason of ending the employment contracts of the employees holding these positions will not be the judicial operation of the merger, but the cutting of the job, decided by the absorbing company, in case of absorption, or by the company resulting after the melting, in the case in which the merger takes place in this way.

In order to invoke Art. 65 of the Labour Code and to carry out individual or collective redundancy, out of reasons which are independent from the person of the employee, it will be not sufficient to notify the act of absorption or melting together; it will be necessary that the absorbing unit, respectively the company resulting from the melting, takes the decision of reducing the number of jobs (through its management body, e.g. the company's general assembly). This means that the redundancies cannot be simultaneous with the merger operation, but can only be subsequent[6].

Nevertheless, the possible impact that reorganization can have on the employment contracts has to be considered from the beginning. Art. 251^5 of the Companies Law No. 31/1990 provides that the administrators or the members of the management of the company which will take part in the merger will draft a common merger project which will include, amongst other details, the impacts of the merger on the jobs of the employees of the companies which take part to the merger.

In regards to **division**, this can be total or partial:

- The total division is carried out by dividing the entire assets of one juridical person between two or more juridical persons which are already existing or are created through division. The assets of the juridical person who ceases to exist because of the division is divided equally between the receiving juridical persons, if the document which decides the division does not provide a different proportion. The rights, as well as the duties, are divided.
- The partial division means that one part of the assets of one juridical person, who will continue to exist, is uncoupled and transferred to one or several juridical persons who already exist or are founded in this way. In the case of partial division, when one part of the assets of a juridical person is uncoupled and transferred to one single juridical person, who already exists or

a) one or more companies are dissolved, without entering into liquidation, and they transfer their entire assets to another company, in exchange for the fact that the stock holders of the absorbed company or companies receive stocks of the absorbing company and, if it is the case, a cash payment of a maximum of 10% of the nominal value of the stocks which have been distributed in this way; or

b) several companies are dissolved, without entering into liquidation, and they transfer their entire assets to a company which is founded, in exchange for the fact that the stock holders receive stocks of the newly founded company and, if it is the case, a cash payment of maximum 10% of the nominal value of the stocks which have been distributed in this way.

A special case of merger is the cross-border merger, when the involved companies have juridical personalities belonging to more than one European Union member state.

[6] See also R. Dimitriu (coord.), *Consilier – Codul muncii (Advisor – Labour Code)*, publisher Rentrop şi Straton, Bucureşti, 2011, p. R 70/002

is founded in this way, the decrease of the assets of the divided juridical person is proportional with the part which has been transmitted[7].

The partial division can be called split off. In the case of a split off, only a part of the assets of one company, who does not cease its existence, is transmitted to one or several companies, which are already existing or are founded through this operation.

In case of division, the contracts will be split so that each of them will be carried out by one single receiving juridical person, except for the case in which this is not possible. This rule, provided in Art. 239 of the new Civil Code, will be applied always in the case of individual and collective labour contracts, which can be carried out by one single employer. The employment contracts will never stay divided amongst several juridical persons subject to division.

As it is in the case of a merger, the division cannot be invoked as direct reason for personnel redundancy. On the contrary, the individual and collective employment contracts will be maintained, being taken over by the receiving juridical persons. Only after this, the topic of cutting personnel can be approached, and not as an effect of the division, but as an effect of the receiving juridical person.

The transformation is a new case of reorganization of juridical persons, regulated for the first time in the new Civil Code. Of course, in practice this way of reorganization was already met for a long time, but our legislation did not have direct references for it.

The transformation of a juridical person occurs in the situations provided by the law, when one juridical person ceases its existence, at the same time with the foundation of another juridical person[8], in its replacement.

In the case of transformation, the rights and duties of the juridical person who has ceased to exist are transferred in the assets of the newly founded juridical person, except for the case in which the document that foresees the transformation provides different instructions.

At the same time, the individual and collective employment contracts are transferred, whereas the new company takes over all these contracts, while the agreement of the employees is not necessary. The end of the contracts cannot be motivated directly on the operation of transformation.

3. The Transfer of Undertaking

A specific way of reorganization, which covers a part of the hypotheses considered by the Civil Code, but is not limited to these, is the one of the transfer of the undertaking. The concept of transferring of an undertaking covers the circumstances in which a change of the employer

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[7] In regards to joint stock companies, according to Law No. 31/1990, is the division the operation by which:

a) One company, after it is dissolved, without entering liquidation, is transfering its entire assets to other companies or, in exchange for the fact that the stock holders of the divided company receive stocks of the beneficiary companies and, if it is the case, a cash payment of a maximum of 10% of the nominal value of the stocks which have been distributed in this way;

b) One company, after it is dissolved, without entering liquidation, is transferring its entire assets to other newly founded companies, in exchange for the fact that the stock holders of the divided company receive stocks of the newly founded companies and, if it is the case, a cash payment of a maximum of 10% of the nominal value of the stocks which have been distributed in this way;

The division can take place also through the simultaneous transfer of the assets of the divided company to one or several existing companies and one or several newly founded companies.

In regard to the merger and division of companies, it is worth mentioning that the Emergency Ordinance of the Government No. 2/2012 containing amendments and completions to Law No. 31/1990 regarding commercial companies, published in the Official Gazette No. 143 of March 2nd 2012, the procedures for reorganizing were simplified. It was aimed to simplify the administrative tasks for commercial companies, with the immediate effect of cost reduction and enhancement of the activity of these economic operators.

[8] In the case of companies, the transformation can have in view the change of their legal form. In order to register amendments in regards to the change of the legal form of a company at the Trade Register, a documentation has to be submitted to the Office of the Trade Register of the area where the company is deciding to have its registered office, at the counter or per mail. Answering the request is the duty of the delegated judge.

occurs. This can occur through legal operations like: merger, absorption, melting, total division, partial division, sell, donation, legal or testamentary inheritance, privatization, etc.

In all situations of company transfers, the following issue arises: what will happen with the individual and collective employment contracts, which were negotiated and signed with the previous employer, if this one is changing? Will the employees be affected by this change of their contractual party?

The transfer of the undertakings is currently regulated by Law No. 67/2006 regarding the protection of the rights of the employees in the case of transfer of an undertaking, the unit or a part of these[9]. This regulation is an implementation of the provisions of the Directive of the Council 2001/23/CE on the approximation of the law of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[10].

The regulation has in view the effects of the transfer of the ownership over the company between the transferor and the transferee over the employees. The transferor (seller, absorbed juridical person, privatizing state unit, etc.) transfers the assets of the unit to the transferee (buyer, beneficiary, absorbing juridical person, juridical person resulting from a merger or division, etc.). The employees are not part of this contract, but they can request from the transferee that they receive the same rights which were provided by the transferor[11].

Before the date of the transfer, the transferor has the duty to notify the transferee about all rights and duties which will be transferred to him. Nevertheless, a default in carrying out this duty will not affect the transfer of these rights and duties to the transferee, and nor the rights of the employees. In other words, the transferee cannot use the argument of not knowing these employees' rights, in order not to grant them. He will be obliged to grant them, and afterwards he can turn back to the transferor for any prejudices which have been created through the fact that these rights have not been communicated.

The transfer of the undertaking, the business or parts of those cannot be used as a reason for individual or collective redundancy by the transferor or the transferee.

The European directive about the transfer of undertakings provides, as well, that „the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce".

This does not mean that such dismissals cannot occur, but they will have to be grounded on Art. 61 or 65 of the Labour Law. If redundancy out of economic reasons is intended, the employer will have to prove the fact that the job held by the employee or employees is cut.

The transferee has the duty of respecting the provisions of the collective employment contract applicable at the date of the transfer, until its termination or expiry date.

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[9] Published in the Official Gazette No. 276 of March 28th 2006

[10] Published in the Official Journal of the European Communities (JOCE) no. L 82/2001.

[11] In regards to safeguarding the rights of the employees in case of the transfer of undertakings, businesses or parts of undertakings or businesses, see also I.T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii (Theoretical and Practical Labour Law Treaty)*, publisher Univers Juridic, 2012, p. 466 and ssq., N. Voiculescu, *Legislaţia comunitară, naţională şi jurisprudenţa privind protecţia salariaţilor în cazul transferului întreprinderii, al unităţii sau al unor părţi ale acestora (National Community Legislation and Jurispridence in regards to the Safeguarding of Employees in the case of the Transfer of Undertakings, Businesses or Parts of Undertakings or Businesses)*, in „Romanian Labour Law Magazine" no. 1/2006, p. 22-27; A. Uluitu, *Drepturile salariaţilor în cazul transferului întreprinderii, al unităţii sau unor părţi ale acestora (The Rights of the Employees in case of the Transfer of Undertakings, Businesses or Parts of Undertakings or Businesses)*, in „Romanian Labour Law Magazine", no. 1/2006, p. 28-35, etc.

Through agreement between the transferee and the representatives of the employees, the clauses of the collective labour contract applicable at the date of the transfer can be renegotiated, but not earlier than one year before the date of the transfer. For at least one year, the provisions which were negotiated with the transferor may be opposed to the transferee.

In the case in which the company, the unit or parts of those are not keeping their autonomy after the transfer, and the collective employment contract applicable to the transferee is more favourable, the more favourable collective employment contract will be applied to the employees.

Additionally, the representatives of the employees who are affected by the transfer are keeping their status, their tasks and their function, if the representation requirements are fulfilled, according to the law. For example, the union leaders keep their position in the union. If the legal requirements in regards to the representation are not fulfilled, the transferred employees choose new representatives, according to the law.

In the case in which the company, the unit or parts of those are not keeping their autonomy after the transfer, the transferred employees will be represented, with their explicit agreement, by the representatives of the employees in the company of the transferee, until new representatives are appointed, according to the law.

For example, if a transfer takes place through sell or inheritance, the company maintains its autonomy, and the representatives of the employees remain in place. If the transfer takes place through merger or absorption, the company does not maintain its autonomy, and the ceded employees become colleagues of the initial employees of the transferee. In relation to the total amount of employees, the representatives in the transferor's undertaking are not fulfilling the representation conditions any more, which means that new elections have to be organized.

If a transfer of the undertaking takes place, but it is determined by the procedure of judicial reorganization or bankruptcy, according to the law, the provisions of safeguarding the employees cannot be applied. Nor can be applied the safeguarding provisions in Art. 60 Labour Law, which interdict redundancy in certain time periods (like temporary incapacity for work, maternity/paternity leave, etc.).

As a conclusion, if a transfer of an undertaking takes place:

- The new employer will respect the rights which were agreed by the transferor with the employees;
- The workers' employment contract cannot be changed unilaterally, neither in regards to the working conditions, nor in regards to other details;
- The representation of the employees to the collective negotiation is maintained, except the case in which the company loses its autonomy as a result of the transfer;
- The transferee has the duty to inform and to consult the employees he takes over;
- The employees can be made redundant only according to the provisions of the common law. The employment contracts will not be ended in fact, based on the simple fact that they have been negotiated with a different employer;

One of the problems occurring in practice is the difference between transfer and outsourcing. It is true that the limit between these two terms is not always clear, and the practical consequences are important. So, if one activity is outsourced, the employees who were initially working for the undertaking which has externalized the activity cannot be made redundant based on reasons which are independent from their person. If that department is transferred to another undertaking, the employees have to be taken over by this transferee undertaking; the situation of being made redundant is unacceptable.

The courts distinguish normally between the outsourcing and the transfer of a company according to the purpose for which it is carried out and to the real effects of the judicial act. But

the difference is not always clear, despite of the fact that the validity of the redundancies depends on it.

Certain difficulties can occur even in regards to the concept of the undertaking's transfer. According to the Romanian law, only the transfer of the ownership on the undertaking is part of the definition of the concept of the transfer, while in the regulation, as is was interpreted by the Court of Justice of the European Union, even the simple transfer of the right of user on a company means undertaking transfer, having as an effect the fact that redundancy out of transfer reasons is forbidden.

In the same way, the courts encountered the problems of the effects of the absorption on the employment contracts. In the case of absorption, is there a transfer taking place? In this concrete case, the management positions in the absorbed company were dissolved. The absorbing unit kept its own managers and fired those who were managing the absorbed company up to the moment of the absorption.

The transferee (the head of the absorbing company) notified to the employees holding these positions that their contracts will end legally, based on Art. 56 letter a) Labour Code. The invoked reason was the fact that this is the effect of the fact that the absorbed company's juridical personality ceased.

But in the judicial practice, in such cases it is considered that the end of the contract was not a termination by law, since a transfer of undertaking took place. It was stated that, in case of absorption, the absorbed unit is not dissolved, so that Art. 56 letter a) of the Labour Code is not applicable. Noting the cutting of the management positions, the transferee should have applied Art. 65 of the Labour code and should have decided the redundancy of the employees out of economic reasons, by respecting their right to notice.

4. Judicial reorganization

The procedure of judicial reorganization is regulated in Law No. 85/2006 regarding the procedure of insolvency, according to which there are two procedures of insolvency:

a) the general procedure, applicable in principle to any juridical person of private right which carries out economic activities, amongst others. Within the frames of the general procedure, a general reorganization will be possible;

b) the simplified procedure, applied to the debtors who are in the state of insolvency, applicable to the natural persons traders who act individually and in family businesses, but also to private companies in the following (alternative) cases:

- If they do not own any goods in their assets;
- The articles of incorporation or the accounting documents cannot be found;
- The administrator cannot be found;
- The headquarters does not exist anymore or does not match with the address in the Trade register.

In the case of the simplified procedure, the debtor will enter directly the procedure of bankruptcy, once the procedure of insolvency is opened, or after a review period of maximum 60 days. The procedure of reorganization requires the drafting, approval, implementation and following of a plan, called reorganization plan, which can foresee, together or separately:

a) the operational and/or financial restructuring of the debtor;

b) the corporative restructuring, through the change of the structure of the share capital;

c) the reduction of activities through the liquidation of some of the goods in the debtor's assets.

After the syndic judge confirms a reorganization plan, the debtor will carry out his activity under the supervision of the judicial administrator and according to the confirmed plan, until the syndic judge decides, on a reasoned basis, either the end of the insolvency procedure and

taking all the measures in order to reintroduce the debtor in the commercial activity, or the end of the reorganization and the transition to bankruptcy. The confirmation of the reorganization plan will be done by taking into account the interests of an extensive retrieval of the debts, whereas the employees are counted amongst the creditors. In other words, the reorganization plan does not aim directly to avoid redundancies; on the contrary, these might be necessary; it aims to reintroduce the debtor in the commercial activity.

In regards to the working relations, these will be regarded as obligational legal relations, meaning that the plan is considered as fulfilled in the extent in which the payment of the outstanding salaries succeeds.

If the judicial reorganization was not a success, the company enters in the bankruptcy's procedure. From a work relations perspective, it must be noticed that the debts resulting from such conditions have a privileged character, Art. 123 in Law No. 85/2006 providing that these are on the second position, immediately after the expenses caused by the bankruptcy.

Through derogation from the provisions of the Labour code, in the simplified procedure, as well as in the case of bankruptcy in the general procedure, ending the individual employment contracts of the debtor's personnel will be done as an emergency by the liquidator; it is not necessary to go through the procedure of the collective redundancy. The liquidator will grant only a notice of 15 working days to the employees who are made redundant.

In this way, according to Art. 86 of Law No. 85/2006 regarding the procedure of insolvency, in order to increase to the maximum the value of the debtor's assets, the judicial administrator / liquidator can maintain or terminate any contract, the unexpired leases or other long term contracts, as long as these contracts will not be executed entirely or substantially by all the parties involved.

The judicial administrator / liquidator must answer within 30 days to a note of the contractor, through which he is asked to choose between maintaining and terminating the contract; if such an answer does not exist, the judicial administrator / liquidator cannot request the execution of the contract, which will be considered terminated.

In the legal literature it is considered that this is a separate case of redundancy, which is not regulated in the Labour Code, case which deprives the employee of a series of rights which were granted by the Labour Code[12].

We observe the following:

- This termination of the employment contracts is not carried out by the employer, but by the syndic judge himself. As a consequence, it cannot be appealed by the employee in court, and cannot lead to setting off a labour conflict;
- The legal period of notice, provided in Law No. 85/2006, is shorter than the one provided by the Labour Code (which is of 20 working days);
- The employees whose employment contract was terminated under the circumstances of Art. 86 Law no. 85/2006 do not benefit of the rights of employees who are made redundant in a collective process (information, consultation, notification to the agency for professional training and employment, compensatory payments).

But there is a problem of consistency with the provisions of Directive 98/59/CE in regards to collective redundancy, which has been raised by the concrete case Claes, judged in 2011 by the European Court of Justice. Within the solution, the European Court of Justice interpreted the provisions of Directive 98/59/CE, stating that its domain of applicability covers the collective redundancies which occur because the employer ceases its activity.

[12] See, I. T. Ştefănescu, *op. cit.*, p. 482 and ssq; Al. Ţiclea, *Tratat de dreptul muncii (Labour Law Treaty)*, publisher Univers Juridic, 2012, p. 762 and ssq.

The Court showed that „until the juridical personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations in regards to collective redundancy must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment in question, where it is still in place, even with limited powers of management over that establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator". The term „redundancy", in the interpretation of Art. 1 Par. (1) letter a) in the directive was considered as including „any termination of the contract which is not desired by the employee, without being necessary that the reasons which justify it are according to the will of the employer".

The term „redundancy" will also have to be interpreted in a very large sense, as including as well the hypotheses in which not the employer is the one who takes the decision of terminating the employment contracts. As a conclusion, even if the employment contract are not terminated by the employer, but by the syndic judge, the procedure of informing, consulting, professional training – in advance of the collective redundancy – should still be applied[13].

5. Conclusions

As a conclusion, certain cases of reorganization of the unit can lead to cutting jobs and, as a consequence, to the redundancy of the employees holding these jobs, as well as in other cases the redundancy of employees is interdicted *de plano*. In the situations in which the law allows it, such redundancies can be individual or collective, according to the number of affected employees, related to the total amount of employees in the company.

If, as a consequence of the reorganization, only open positions are cut, there is no redundancy issue, but if occupied positions are cut, as well, the procedure carries on and can be ended by the redundancy of employees out of reasons which are not related to their person. The standard established by Art. 65 in the Labour Code is the existence of a real and severe reason, in such way that a redundancy operated in this way will have to comply with this double condition.

The issue of the real and severe reason is very difficult in the cases of restructuring in which a part of the positions are cut, while others are being established. The purpose of the court's analyse, in such situations, will be to identify the cases of abuse, as well as the cases in which the employer used the argument of cutting jobs as a simple excuse for making the employee redundant, case in which the redundancy is objectively unjustified.

In the case in which the redundancy is a collective one, the effect of cutting the position will be also based on the Project of collective redundancy, registered at the regional agency for employment. Despite of the fact that in this project it is not necessary to name the employees who will be made redundant, it must not be invalidated by any subsequent decision of the employer. If the project foresees the cutting down of a certain type of positions, the redundancy may not affect employees holding other categories of positions.

The proof of the extent in which cutting positions was an objective measure can be done, of course, by presenting the organizational chart before and after the redundancy. If there is such an organizational chart, it shall be filed by the employer.

The problems occur if such a organizational chart does not exist. Because, as it has been stated, „it is not imperative that the proof of the effective cutting of the position and of the real and severe reason of the redundancy is made through organizational charts and statements of nominal functions; if these documents do not exist, the employer can be required to prove a negative action. The legislative did not state a duty for the privately owned business to function

[13] For details, see R. Dimitriu, *Opinii despre actuala reglementare românească a concedierii colective (Opinions about the Current Romanian Regulation of Collective Redundancy)*, in "Romanian Labour Law Magazine" no. 2/2012, p. 9 – 16

based on an organizational chart or on statements of nominal functions" [14]. As a principle, the simple absence of the organizational chart does not lead to the invalidation of the redundancies, but proving will be more difficult.

An independent step in this process is the analysis of the ways of avoiding the redundancy. It can be talked about the offer made to the employee, of taking over another position, about moving some of the employees on technological unemployment, about suggesting unpaid leave, granting paid holidays which will be compensated through additional labour in the next 12 months, under the circumstances of Art. 122 Par. (3) Labour Code, about diminishing the working hours in a certain department from 5 to 4 days a week, under the circumstances of Art. 52 Par. (3) Labour Code, etc. None of these measures is compulsory, in this way the redundancy cannot be invalidated only for the reason that these alternatives to redundancy were not applied. But it is recommended that these options are analyzed (and the proof of such an analysis) before carrying out any redundancy as an effect of a reorganization. The redundancy must be seen as a last solution, which is applied after exhausting all other possibilities.

It is true that these steps are not compulsory as such, but the redundancy must be carried out only in real and severe circumstances. The case in which the entire process of taking the decision of redundancy was not carried out (or the lack of proof) can be considered by the court as lack of real and severe reason. In other words, if without a restructuring decision, without changing the organizational chart, without analyzing the alternative options – redundancy is still decided, it is very probable that the court will invalidate it.

As judicial operation at the confluence of the civil right with the labour right, the reorganization of the enterprise, with possible impact on cutting jobs, is a major event in the life of the employing unit and of its employees. The law requires a staged process, based on the communication with the employees considered for being made redundant, and, in some cases, interdicts such redundancies. Furthermore, the courts have the duty of watching for the fact that the reorganization, as decision in the hand of the employer who acts as a manager, is not abusively decided.

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