

**Considerations for Ensuring Payment of Wage Claims in Case of
Insolvency of the
Employee in Line with EU Rules**

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Abstract: In this topic are discussed certain provisions of Directive no. 80/987/CEE amended by Directive 2002/74/EC on the protection of outstanding claims for the opening of employer insolvency law and to ensure no. 85/2006 outstanding claims under the Act no. 200/2006. It was argued that, in line with the Community Directive, the protection of outstanding claims will take place once the application for opening insolvency proceedings finding employer collective aspect emphasized in the practice community court. Also showed that wage arrears in the category of resources that are supports of the Guarantee Fund under the Law no. 200/2006, no references are made on payments due for unfair dismissal as provided in the Community directive which in fact, the law impose such a provision.

Keywords: Community Directive, the Community courts, national courts, insolvency proceedings, claims wage guarantee fund

Headquarters matter of worker protection in case of insolvency of the employer in the Community rules is the Council Directive no. 80/987 / EEC on the approximation of national laws on protection of employees in case of insolvency of the employer¹ as substantially (Teyssie, 2006, p. 242) (Voiculescu, 2005, p. 165) by Directive 2002/74/EC of the European Parliament and Council.²

The Directive 2002/74/EC and Directive no. 80/987 were based on International Labor Organization Convention no. 95 in 1949 on the protection of workers³ and the

¹ Published in the Official Journal of the European Communities L 283 of October 28, 1980.

² Published in the Official Journal of the European Communities L 270 of October 8, 2002.

³ Romania ratified by Decree no. 284/1973, published in the Official Gazette of Romania no. 81 of June 6, 1973.

emergence of the fund in some Western countries as Belgium, Holland, Denmark and France.

Since the content of these directives were not well outlined some aspects of the regulations on employment and collective dismissal procedures particularly those of bankruptcy, the European Parliament and Council adopted Directive no. 2008/94/EC of 22 October 2008 on protection of employees in case of insolvency of the employer.¹

With regard to our country, the issue of the guarantee fund to pay outstanding claims sparked disputes still living in the Code development phase work,² especially regarding the financing of the Fund by employers. By art. 167 of the Code of State formation and the role of the Fund and stated by art. 168 (literally reproducing art. 5 b) of Directive no. 80/987/CEE), principles of formation and use of the Fund.

In that period, to assess, in consultation with the European Commission that Romania must at least in principle, to assert the intention of establishing the Labor Fund and benchmark principles of training and its use. Article 168 of the Code reproducing the text from the Directive, materialize, therefore, a commitment to negotiations.

Government Emergency Ordinance no. 65/2005³ amends art. 167 of the Code and repeals art. 168 of the same Code. As stated in the doctrine, (Stefanescu, 2006, p. 98) these changes allowed the legislature “only appears to have a broad range of options on how to set up a Guarantee Fund for payment of claims, in fact amend and repeal Article art. 167. 168 of the Code are useless if the subtext, it was intended, in any circumstances employers may not even partially finance the Fund.

In this regard, we believe that the legislature did not merely postpone again, drawing up the bill announced by art. 167 of the Code and obligations arising from Romania negotiated and enshrined in the Treaty of Accession to the European Union (Law no. 157/2005).

¹ Published in the Official Journal of the European Communities L 283/36 of 28 October 2008.

² Adopted by no. 53/2003 Law, published in the Official Gazette of Romania, Part I, no. 72 of February 5, 2003, subsequently amended and supplemented.

³ Published in the Official Gazette of Romania, Part I, no. 576 of July 5, 2005.

The problem was cut by adopting the Law on the establishment and use no. 200/2006 fund to pay outstanding claims¹ which entered into force on June 1, 2007. In applying this law, detailed rules were approved by Government Decision no. 1850/2006², and the content of the law and implementing rules subject to reviews in the literature. (Ticlea, 2007, p. 262) (Ștefănescu, 2007, p. 593) (Tinca, 2005, p. 177)

Given the comments set out in theory, content no. 200/2006 Law as amended thereafter, in relation to Community directives, and doctrine of the Court of Justice, some observations can be made.

Directive 80/987 states, in Article 2 that parag.1 employer insolvency is the date on which the required opening of collective proceedings based on insolvency of the employer, under the laws of the Member States and the competent authority under these provisions, either decided to open proceedings or found permanent closure of the company, and insufficient assets available to justify the procedure.

Community courts, interpreting these provisions noted³ that Directive 80/987 established a system of protection of workers subject to filing an application for opening insolvency proceedings under the law of the Member State concerned and the existence of a formal decision opening the proceedings or the finding of the closing company. The court held that, because the Directive to apply, two events must occur, namely: first, a request to open insolvency proceedings to the competent national authority and, secondly, to be held either a decision to initiate the procedure or finding a company closure, for asset impairment. The two events make the granting of the guarantee provided by the Directive, but they do not establish unpaid claims covered security. Both art Paragraph 2 and Article 3. 4 parag.2 the Directive concerns the date from which, under the laws of each Member State, guaranteed wage claims. Application of the protection of workers established by Directive application proposes the opening of collective proceedings for a declaration of insolvency, and a formal decision to initiate this procedure, but determining that unpaid debts are guaranteed by the Directive is made in relation to time the onset of insolvency of the employer, not necessarily coincide with the date of that decision. Therefore, the Community courts held that the decision to initiate the proceedings or

¹ Published in the Official Gazette of Romania, Part I, no. 453 of May 25, 2006, as amended by Government Emergency Ordinance no. 91/2007 published in Official Gazette of Romania, Part I, no. 671 of October 1, 2007.

² Published in the Official Gazette of Romania, Part I, no. 1038 of December 28, 2006.

³ See section 35 of the considerations the decision of July 10, 1997, in Cases C-94/95 and C-95/95, Daniela Bonifaci and Wanda Berta against Istituto Nazionale della previdenza social, Rec. Part I, P. 3969.

decision of declaring bankruptcy may intervene after a long period of application for opening the proceedings or the termination of employment for unpaid debts is required so that payment of outstanding claims to be delayed due conduct of foreign workers. The consequence would be contrary to the purpose of the directive, which seeks to consider new employees to ensure a Community minimum protection in the event of insolvency of their employer. As a result, the court decided that the Community, taking account also of the social objective of the Directive and the need to accurately set reference periods in which the Directive attaches legal effect, to impose interpretive concept of “incurred” the insolvency of their employer, as representing the date of application for opening the proceedings”.¹

With regard to our country, the legislature adopted the law on insolvency proceedings no. 85/2006² as amended thereafter.

Article 2 section 4 of the Law establishes that procedure was opened no. 85/2006 is applicable in the debtor, the judge delivered the closing date of opening of the general procedure or the simplified procedure (art. 32 paragraph (1), in If the creditor demand, date of delivery judge opening sentence of the general procedure or simplified procedure, depending on the conditions required by the law.

This legal text, we believe, for the national court and, where appropriate, National Agency for Employment (as an institution paying the remaining outstanding claims) will consider the time the application for opening insolvency proceedings against the employer's collective, as interpreted by the Community courts parag.1 provisions article 2 of Directive 80/987/EEC.

Another issue concerning the interpretation of EU Directive are claims of employees arising from contracts of employment or employment relationship, when such claims relate to remuneration for the purposes of article 3 (1) of the Directive, including compensation for their payment.

Court of Justice³ found that the national court has jurisdiction to determine whether the period of remuneration as defined by national law, including compensation for unfair dismissal.

In another case¹ Community courts held that unlawfully fired workers are in a situation consistent, which gives them the right to compensation when they are not

¹ Section 42 of the considerations the decision of July 10, 1997.

² Published in the Official Gazette of Romania, Part I, no. 359 of April 21, 2006.

³ See section 30 of the considerations the decision of December 16, 2004, Case C-520/03, Jose Vicente Olaso Valero against Fondo de Garantia Salary (Fogso) Rec. part, p. 12065.

reintegrated. Where, under national law compensation for unfair dismissal is recognized as compensation for termination of employment within the meaning of art. 3 (1) of Directive allowance of the same kind established by a legal conciliation procedure should be considered as compensation for the purposes of Community text.

On the Community texts presented no. 200/2006 Law inaccuracies.

According to Article 2 of the Guarantee Fund for payment of outstanding claims to ensure payment of outstanding claims arising from individual employment contracts and collective agreements concluded by employers against employees who were given final judicial decision to open insolvency proceedings and to which was prepared as a total or partial removal of the right of management (employers in the state of insolvency).

Outstanding claims are in accordance with article 4 letter d) of the Act, any pay and other entitlements due and unpaid employees, who were established in the individual employment contract and / or collective labor agreement.

According to the article 155 of the Labor Code the payment includes the basic salary, allowances, bonuses and supplements.

As such, the benefits covered by national legislation must be interpreted and applied in line with EU rules.

Guarantee Fund resources to bear, according to article 13 (1) a)-e) of the Act no. 200/2006 following categories of wage claims: wage arrears, cash compensation paid by employers for outstanding annual leave not taken employees, but only up to a year of work, outstanding compensation in the amount specified in the collective work and / or individual employment contract, if termination of employment, outstanding compensation which the employer has the obligation to payments under the collective work and / or individual employment contract, in case of accidents or illness; outstanding allowances, which employers are obliged, by law, to pay them during temporary interruption of work.

Although article 13 of Law no. 200/2006 listed categories of wage arrears which supports the Fund resources, still there is no reference on payments due for unfair dismissal. The problem could be cut, according to the Romanian legislature, under the provisions art. 78 par. (1) of the Labor Code, under which, if layoffs were made

¹ Point 27 the order of December 13, 2005, Case C-177/05, Maria Cristina Guererro Pecino against Fondo Garanta Salary, Rec. part, p. 10887.

in unlawful, the court shall require the employer to pay indexed wages equal to compensation and other employee rights that would benefit.

We appreciate that Romanian legislature had to make a reference to this in content no. 200/2006 Law, whereas Article 3 (1) of Directive 80/987 requires that institutions guarantee to pay unpaid claims of employees arising of employment contracts or employment relationships, including where national law provides compensation for termination of employment. The Opinion that art. 78 par. (1) of the Labor Code relating to compensation equal to not receive salaries, which means that they replace, but do not believe that they pay for that employee has not performed any activities in the period from dismissal and its cancellation by the court.

The provisions of the article 3 (1) of the Community directive shall be construed as meaning that where national law provides compensation for termination of employment, compensation paid within the concept of unpaid claims that are the responsibility of guarantee institutions. As such, the national court should include the concept of wage claims to be incurred by the Guarantee Fund including employee compensation under article 13 paragraph. (1) c) of the Act no. 200/2006.

It should also be noted that Art of section 4 of Directive no. 80/987 enable Member States to set a ceiling to ensure payment of outstanding employees. In this regard, the Article 14 (1) of Law no. 200/2006 envisaged that the total amount of outstanding claims incurred by the Guarantee Fund may not exceed the amount of average gross wages in the economy 3 per person. As such, wage claims under art. 13 (1) a), c), d) and e) of the Act shall bear no. 200/2006 for a period of 3 calendar months as provided in article 4 point 2 of the Community directive. Period is provided prior to award of damages and requiring prior or after the date of opening of insolvency proceedings. Another request for the payment of outstanding claims can be made only if the period provided for less than 3 months.

In conclusion, claims arising from employment relationship, if insolvency proceedings are paid, the amounts paid is discount by the Guarantee Fund. Therefore, wage claims are paid by the Guarantee Fund only if and insofar as may be covered by insolvent debtor's assets during the insolvency proceedings and regulated by the Law no. 85/2006. If the ruling of the completion of insolvency shall act, the employer is obliged to reimburse amounts paid by the Guarantee Fund within 6 months from closing pronouncement of the procedure.

It said that the Guarantee Fund shall not bear the social contributions paid by employers into insolvency.

This provision Romanian legislature is in full agreement with the indication given in art. 6 of Directive no. 80/987/CEE amended by Directive 2002/74/EC and the provisions of the Guarantee Fund for payment of outstanding claims are harmonized with EU rules.

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