BUCHAREST ACADEMY OF ECONOMIC STUDIES
Council for Doctoral Studies
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PHD THESIS

INFORMATION AND COLLECTIVE CONSULTATION OF WORKERS

ABSTRACT

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I. GENERAL ASPECTS OF THE SCIENTIFIC RESEARCH SUBJECT AND OBJECTIVES

1. Importance and topicality of the subject

The primary and secondary sources of European legislation highlight the fact that the right to collective information and consultation of workers is a fundamental concept of European social law which, together with collective negotiation, is the *sine qua non* for reconciling economic and social objectives in the unique market[1].

The European regulation in the field of information and consultation of workers has started, atypically, from the specific to the general, being harmonized first by the legislations of the Member States on the protection of the rights of employees affected by company restructuring by Directive 75/129/EEC of 17 February 1975[2] and by company transformations by Directive 77/187/EEC of 14 February 1977[3]. Framework Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting workers in the European Community[4] was subsequently adopted on 11 March 2002, because the existing legal system, both at the Member State and European Union level, was characterized by an excessive *a posteriori* approach to the process of change, and it was necessary to create a general, permanent, and statutory system of information and consultation to promote workers involvement and anticipation of change, which would operate not only in critical situations such as collective dismissals and transfer of undertakings. The Framework Directive did not replace, but complemented the *ad hoc* directives on collective dismissals and transfer of undertakings, each with a different purpose and specific objectives.

The European legislator has defined institutions and minimum and transnational standards that support and complement Member States' actions to improve information and consultation of workers employed in multinational companies. The most important and evolving component of the EU *acquis* on the right to information and consultation of workers is Council Directive 94/45/EC, as revised by Directive 2009/38/EC[5], which sets minimum

[1] Article 151 of the Treaty on the Functioning of the European Union promotes social dialogue as a key factor in ensuring a balance of power on the labor market.
[2] Directive 75/129/EEC was amended by Directive 92/56/EEC and replaced by Council Directive 98/59/EC of July 20, 1998 on the approximation of the laws of the Member States relating to collective redundancies.
[3] Directive 77/187/EEC was amended by Directive 98/50/EC and replaced by Council Directive 2001/23/EC of March 12, 2001 on the approximation of the laws 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.
[4] Published in Official Journal L 80, 23.3.2002, p. 29-34.
[5] Published in Official Journal L 122, 16.5.2009, p. 28-44.

requirements for establishing and functioning employee representation bodies in multinational companies.

The status of the right to information and consultation as a fundamental right in the European legal order is sanctioned in Article 21 of the revised European Social Charter and Article 27 of the Charter of Fundamental Rights of the European Union, as well as in Principle 8 b) of the European Pillar of Social Rights, which is a non-binding political instrument.

In perspective, in the current social and economic context, given the medium and long-term objectives assumed at the EU level on environmental, financial, and social sustainability and the implementation of new technologies, the policies adopted at the European level aim to strengthen the guarantees of the right to information and consultation, the most recent initiative in this regard being the European Commission's proposal[6] for the revision of Directive 2009/38/EC.

In **Romania**, the process of harmonization of national legislation with the European *acquis* in the field of information and collective consultation of workers began before Romania acceded to the European Union[7], based on the commitments made by the Romanian state in the negotiations on Chapter 13 "Employment and Social Policies"[8]. The directives were transposed into domestic law by essentially taking over their minimum body of rules, without appropriate adoption of implementing measures specific to the national industrial relations system that would make it fully possible and effective for workers to exercise their right to information and collective consultation.

2. Objectives of scientific research

In the context in which the right to collective information and consultation of workers has a solid legislative basis at the European and national level, has generated a rich jurisprudence of the Court of Justice of the European Union and national courts and is receiving new valences concerning the dynamics of employment relations and the proven benefits of effective social dialogue, it is necessary to conduct an in-depth scientific analysis of the

[6] Proposal for a Directive of the European Commission, Brussels, 24.01.2024, COM(2024) 14 final, 2024/0006(COD), available at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2024:14:14:FIN, accessed on 26.01.2024.

[7] Romania became a member state of the European Union on January 1, 2007 by signing the Accession Treaty on April 25, 2005, ratified by Law no. 157/2005, published in the Official Monitor no. 465/01.06.2005.

[8] The 1993 Association Agreement between Romania and the European Union, ratified by Law no. 20/1993, published in the Official Gazette no. 73 of 12.04.1993, entered into force on February 1, 1995. According to Articles 69 and 70 of this pre-accession agreement, Romania undertook that its national legislation would "gradually become compatible with that of the Community".

evolution, current status and prospects in the constitution of effective guarantees of this fundamental right to ensure not only its formal affirmation but also its effective exercise in practice. Starting from the analysis of the main primary and secondary sources[9] of the European *acquis* in this matter, as interpreted with binding force by the Court of Justice of the European Union, the PhD research highlights, structures, and systematizes each of the history of regulation, the objectives pursued, the *ratione materiae* and *ratione personae* scope, the social partners involved, as well as the sanctions and administrative/procedural remedies provided. The aim is also to clarify the meaning of the key autonomous European concepts and to highlight the common aspects and differences between the framework directives at the national and transnational levels.

The scientific approach also aims to highlight the best practices developed in countries with a tradition in this area of social dialog, which can constitute a reference point for achieving European objectives. The subject also analyses the conformity of domestic law with European regulations to identify possible solutions to remedy the shortcomings identified, including the proposals *de lege ferenda*.

3. Research methodology

The primary and secondary sources of European legislation, as well as the domestic legislative framework of transposition, were analysed, first of all, from a historical-teleological point of view, to highlight the legislative evolution of the regulations in the field and the objectives pursued by their adoption in the given historical context.

To elucidate the content and purpose of the rules, the binding jurisprudence of the Court of Justice of the European Union was analysed. It was necessary to systematize and summarize it to understand the rationale behind the interpretations and the evolution of jurisprudential orientations.

Determining the content of the information and consultation obligation *lato sensu*, within the meaning of the Framework Directive 2002/14/EC, involved systematic consultation and interpretation of European policies and regulations that express the medium and long-term objectives assumed at the EU level.

[9] Framework Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, Directive 2001/23/EC on the approximation of the laws 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 and Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

Bearing in mind that the directives in this field are instruments of minimum harmonization, the comparative method has served as an essential tool for understanding the most effective practices adopted in this field in the Member States and that can be taken into account as a benchmark by the national legislator to improve domestic law. The legislative and jurisprudential databases of countries such as **France, the United Kingdom, and Germany** were searched.

Another tool used in the legal research was the quantitative method, which allowed a thorough and objective understanding of the impact of social phenomena on the labour market and the degree of effectiveness of labour market regulations in the practice of Member States.

Using the logical method, for each of the European regulations that were the subject of the scientific approach, as well as for the national transposition rules, the theoretical and practical defining aspects were highlighted and structured, concerning the *ratione personae* and *materiae* scope, the subjects and content of the information and consultation obligation, the legal and material means available to workers' representatives, legal force and administrative/procedural remedies.

II. STRUCTURE OF THE PHD THESIS

The PhD thesis comprises six chapters organized into sections and subsections for an efficient systematization of the information presented.

1. Chapter I presents the importance and topicality of the subject, the objectives of the PhD research, and the methodology.

2. Chapter II is dedicated to the general framework of collective information and consultation of workers in situations without a transnational component and is structured in three sections. In **Section 1**, the main European regulations on the subject, which are part of the primary legislation of the European Union, namely the European Social Charter and the Charter of Fundamental Rights of the European Union, as well as the European Pillar of Social Rights, which expresses the first set of principles and essential rights for the labour market proclaimed by the institutions of the European Union, were analysed. The defining aspects of the right to information and consultation were outlined, as defined by Directive 2002/14/EC, an act of the secondary European *acquis,* in **Section 2**, which is subsumed into several subsections. Subsequently, the conformity of the regulation in domestic law transposing the provisions of Directive 2002/14/EC, represented by Law No. 467/2006 on establishing the general framework for informing and consulting workers, was analysed in **Section 3**. This law

is the common law on the subject, being complemented by the special provisions in the Labor Code, in Law No. 367/2022 on social dialogue, as well as in other special laws, such as Law No. 67/2006 on the company transfer, Law No. 319/2006 on occupational safety and health, Law No. 190/2018 on personal data.

3. Chapter III, structured in 12 Sections and related subsections, focuses exclusively on the collective information and consultation of workers in the collective dismissal procedure, according to Directive 98/59/EC on the approximation of the laws of the Member States relating to collective dismissals, which was transposed into domestic law by the provisions of Art. 68-72 of Law no. 53/24.01.2003 on the Labor Code. In its current form[10], the Labor Code regulates the right to information and consultation of workers in Section 5 entitled "Collective dismissal. Information, consultation of workers and collective dismissals procedure", Art. 68-74.

The systematization of the information in the 12 Sections has aimed at clarifying, in a logical order, all the essential aspects for the understanding of this *ad hoc* form of information and consultation of workers: the autonomous concept of "collective dismissal" according to Directive 98/59/EC, the evolution of European and national regulations on the subject, the legal nature of the right to information and consultation, the social partners involved, the categories of workers exempted from the provisions of the Labor Code on the collective dismissal procedure, the content of the obligation to inform and consult and its temporal landmarks, the legal force and procedural remedies for failure to comply with the right to information and consultation of workers in the collective dismissal procedure, comparative law aspects.

The relevant practice of the Constitutional Court of Romania has placed the information and consultation of workers as component elements of the right to social labour protection measures with constitutional valence, a characterization expressly retained by Decision No 64/2015 of the Constitutional Court[11] regarding the exception of unconstitutionality of the provisions of Art. 86 para. (6) of Law no. 85/2006 on insolvency proceedings. This decision is a landmark, but it is not safe from criticism, since it takes the direct effect of the provisions of Directive 98/59/EC in relations between private individuals, ignoring the jurisprudence of the Court of Justice of the European Union, which holds that the right to information and

[10] Labor Code republished in Official Gazette no. 345 of 18.05.2011.
[11] Decision no. 64/24 February 2015 of the Constitutional Court published in the Official Gazette no. 286/28.04.2015.

consultation of employees is a principle[12], and not a right and, therefore, cannot be invoked as such in disputes between private individuals[13].

4. Chapter IV, structured in 6 main sections and related subsections, deals with the institution of collective information and consultation of employees in the transfer of undertakings procedure. Given the diversity of situations that may arise in practice and the difficulties in classifying specific factual elements in the hypothesis of the legal provisions underlying the content of the transfer of undertaking, the PhD research highlighted the essential elements on which the protection of workers' rights is based, according to the binding interpretations of the Court of Justice of the European Union. The compatibility of the provisions of domestic law was checked relating to them. In this respect, the meaning of the autonomous concept of "transfer of undertaking" at European level was analysed, the regulation of this concept in domestic law and the difficulties of interpretation that have arisen in the judicial practice of national courts, the rules on the preservation of rights provided for in the individual employment contract/collective employment contract and their full transfer to the transferee, the prohibition of dismissal on the grounds of transfer and the content of the right of workers affected by the transfer to be informed and consulted in due time.

5. Chapter VI analyses the information and consultation of workers in situations with a transnational component, as regulated by Directive 94/45/EC, revised by Directive 2009/38/EC, which is the most important and evolved component of the European Union *acquis* on the right to information and consultation of workers. In the **9 Sections of this chapter**, the main aspects that define the institution of the European Works Council, the practice of the courts of the Member States in this subject, as well as the existing policies at the EU level aimed at strengthening the legislation that establishes the right of workers to information and consultation in situations with a transnational component, have been analysed.

6. Chapter VI summarizes the conclusions reached by the PhD research and, based on them, presents solutions for the consistent interpretation of national legislation, i.e. proposals ***de lege ferenda*****,** which would ensure the full effect of the European regulations analysed.

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[12] See Case C-176/12 delivered by Judgment of the Court (Grand Chamber) on January 15, 2014 - Association de médiation sociale v Union locale des syndicats CGT and Others available on 62012CJ0176 (europa.eu), accessed on 17.02.2023.

[13] A detailed analysis of the direct horizontal effect of Directive 98/59/EC is provided by Banu Constantin-Mihai, Calin Dragos, Sandru Mihai, *Concedieri colective în cazul insolvenței societății comerciale și efectul direct orizontal al unei directive. Două hotărâri ale instanțelor române în context european* in "Revista română de drept european" nr.3/2014, Biblioteca juridică Wolters Kluwer (sintact.ro), accessed on 17.02.2023.

III. Conclusions and proposals *de lege ferenda*

1. General framework for informing and consulting workers in non-transnational situations

- **Threshold rules**

The threshold rules determining the applicability of the information and consultation procedures are laid down in Art. 4 para. (2) of Law No 467/2006, considering the number of workers in the company "existent on the date on which the information procedures are initiated", without excluding any specific category of workers from the calculation of the number of workers employed, which is a proper transposition of the European regulation as interpreted by the Court of Justice of the European Union. To ensure effective protection for small and medium-sized companies and to bring the legal text into line with the provisions of domestic law applicable to these categories of companies, namely Law 346/2004 on incentives for the establishment and development of small and medium-sized companies, ***de lege ferenda,*** **we consider that** the threshold rules should be adjusted by providing for a longer reference period (calendar year) and considering the average number of workers.

- **Holders of the right to information and consultation - employees/workers**

According to Art. 3 letter c) of Law no. 467/2006, the holders of the right to collective information and consultation are all employees/dependent workers with standard or atypical employment contracts. The concept of the worker in domestic law is narrower than the one in practice, as the new forms of highly atypical employment, which are on the rise in the European Union, do not benefit from their regulation. **In our opinion**, to bring the law into line with the facts, so that all workers, including the falsely self-employed, can benefit from the right to information and consultation, ***de lege ferenda***, the definition of worker should include the essential points of interpretation laid down in the established jurisprudence of the Court of Justice of the European Union, which essentially refer to the fact that a person performs, over a given period, for and under the direction of another person, services for which he receives remuneration; he acts under the direction of his employer as regards his freedom to choose the time, place and content of his work; he does not share the commercial risks of his employer.

- **Employee/worker representatives**

Law no. 467/2006 establishes an order of priority between union and non-union representatives, stating that the right to information and consultation is exercised, in the first

place, through trade union organizations and, only in the absence of a trade union, through non-union representatives. The solution is maintained and made explicit in the content of Art. 102 para. (1) letter B of Law no. 367/2022 on Social Dialogue, a legal text that establishes in a determined and exclusive order of priority the representatives of the employees/workers as parties to the collective employment contract/collective labour agreement. By expressly referring Art. 31 and Art. 32 of Law No 367/2022 to Art. 102 para. (1) letter B, it follows that the representatives of the employees/workers in matters of collective negotiation are the same as those entitled to participate in the information and consultation procedures.

The legislative solution in Law no. 367/2022 is open to criticism, firstly, because it does not distinguish between workers representatives in the collective negotiation procedure and those in charge of information and consultation procedures, ignoring the recommendations of the International Labour Organization[14]. Secondly, the prioritization of trade union representation, as implemented by Law 367/2022 as a "*one size fits all*" solution, may represent a barrier to the representativeness of workers' representation in the forms of work generated by new technologies. The clear division between the system of information and consultation in the decision-making process and collective negotiation in Member States **such as France and Germany** can only be achieved by the mandatory establishment of works councils at the company level as permanent statutory consultative bodies, separate from those for collective negotiation. Another example of good practice for implementing information and consultation procedures is the "works council" in **France**, a form of worker representation, that has been compulsory since 1945 in companies with more than 50 employees. The regulation ***de lege ferenda*** in the Romanian legal system of the works council, as a form of representation of all workers in the company for the exercise of the right to information and consultation, constitutes a substantial and necessary reform of the traditional system of industrial relations, which the PhD research supports, in line with the opinions expressed in the literature[15].

Law No 367/2022 lowered the minimum threshold of employees/workers required to form a trade union to at least 10 employees/workers. It also correlated the collective negotiation

[14] Art. 1 and 2 of R094 - Co-operation at the Level of the Undertaking Recommendation, 1952 (No. 94) adopted at Geneva, 35th ILC session (26 Jun 1952), available on Recommendation R094 - Co-operation at the Level of the Undertaking Recommendation, 1952 (No. 94) (ilo.org), accessed on 08.09.2023.

[15] In the specialized literature, prior to the adoption of Law no. 367/2002, it was argued that, *de lege ferenda*, the institution of works council should be regulated in domestic law, with mandatory character. See in this regard, Ion Traian Ștefănescu, *Tratat teoretic și practic de dreptul muncii*, 3rd ed. C.H. Beck, București, 2022, p. 299; Alexandru Țiclea, *Reprezentanții salariaților*, in "Revista Română de Dreptul Muncii" nr. 1/2004, Wolters Kluwer Legal Library (sintact.ro); Ovidiu Ținca, *Comentarii la Legea nr. 467/2006 privind stabilirea cadrului general de informare și consultare a angajaților, in "*Revista Română de Dreptul Muncii 3/2007", Wolters Kluwer Legal Library (sintact.ro), accessed on 08.09.2023.

provisions, making collective negotiation mandatory in companies with at least 10 employees/workers. For identity of reason, **we believe that** the legislator should apply the same solution to the right to collective information and consultation, so that in companies with at least 10 employees, collective negotiation and procedures for informing and consulting employees/workers should be mandatory[16].

Concerning **non-union representatives**, the study highlighted both the positive aspects of the new regulation of social dialog, as well as certain elements which, being insufficiently regulated, do not converge towards an effective implementation in practice of this form of representation. As the main positive aspect, Law no. 367/2022 has achieved a unitary regulation of the status of all social partners entitled to participate in the forms of social dialogue, devoting an entire chapter to the institution of employee/worker representatives, which, under the previous regulation, was not included in the social dialogue law. In our opinion, the points that need to be reformed ***de lege ferenda*** are as follows:

- concerning the employer's obligation to facilitate the procedures for electing representatives, at the request of employees/workers, for the clarity of the regulation, we believe that it is necessary to provide in the content of Art. 57 para. (4) of Law no. 367/2022 **the facilities that workers/employees may request from the employer, for example, material support, logistical support,** etc.;
- with regard to the manner in which the procedure for electing non-union representatives is carried out, according to art. 57 para. (5) from Law no. 367/2022, we consider that it is necessary to **establish a minimum numerical threshold to ensure a minimum representativeness for the initiative group**, especially since it is responsible for drawing up the procedures and/or regulations for the election of employee/worker representatives.

The PhD research also looked in detail at the **guarantees to be provided to trade union and non-union workers' representatives** so that they can carry out their duties in information and consultation procedures. In conclusion, it was found that only some of the guarantees set out in the interpretation of Directive 2002/14/EC are established in domestic law and that the regulatory aspects of the legislation are not in line with the following points:

- *de lege lata*, according to the new law on social dialogue, Law 367/2022, **trade union leaders who are not paid by the trade union and non-union**

[16] And in France, for example, the Labor Code makes it compulsory to set up a Social and Economic Committee (CSE) in all companies employing more than 11 employees for 12 consecutive months.

representatives are only entitled to reduced monthly working hours for the exercise of their representation duties, without providing for their right to remuneration for this activity. This legislative solution does not comply with the European Parliament resolution of February 19, 2009, on the application of Directive 2002/14/EC, according to which the arrangements for carrying out the mandate of workers' representatives "must be carried out during working hours and remunerated as such". It is also contrary to Recommendation R143 of the International Labour Organization on the protection and facilities to be afforded to workers' representatives in companies and raises questions of conformity with the freedom of association guaranteed by Article 11 of the European Convention on Human Rights. In a comparative law analysis, the PhD research revealed that in countries such as **France, Germany, and the United Kingdom**, it is expressly stipulated that the employer must grant workers' representatives the time off necessary to carry out their mandate during working hours, without any reduction in pay. As a consequence, ***de lege ferenda***, it is necessary to provide expressly in the contents of Law no. 367/2022 on the right of trade union leaders who are not paid by the union and, respectively, of non-union representatives to be remunerated for the representation activity carried out in the information and consultation procedures;

- for **trade union leaders who are paid by the trade union**, art. 11 of Law no. 367/2022 provides, without any circumstance, for the suspension of the individual employment contract, upon notification of the trade union organization, with the trade union leaders benefiting from the recognition of this period as seniority and from keeping their position and job with the employer, during the period of suspension of the individual employment contract. The rule enshrines an objective and protective solution, when it is justified and possible for the trade union to pay the salary of the union leader at a level compatible with that of the employer, and also when the activity of representation involves overlapping work schedules, in which case Art. 35 of the Labour Code prohibits the cumulation of employment contracts. If these prerequisites are not met, in our opinion, the legal suspension of the basic contract is not justified, and it is necessary, ***de lege ferenda***, to allow the cumulation of contracts and, at the same time, to expressly provide, as in the case of trade union leaders not paid by the union, for the employer's obligation to grant

time off during working hours and remunerate the representation activity carried out in the information and consultation procedures within the company.

- concerning the **provision of material and logistical resources** for the mandate execution by the workers' representatives, the provisions of Art. 22 para. (2) of Law no. 367/2022 provides only the possibility for trade union, not for non-union representatives, to negotiate, through the collective negotiation agreement/contract at the level of the company or by agreement, the provision of the premises and facilities necessary for the performance of trade union activities. In a comparative law analysis, the PhD research has shown that in countries such as **France, and Germany**, the employer is required by law to provide adequate facilities for workers' representatives to carry out their mandate promptly and effectively. **In our opinion**, to ensure the full effect of Directive 2002/14/EC, it is also necessary ***de lege ferenda*** to lay down in domestic law the employer's legal obligation to provide material and logistical resources for trade union and elected workers' representatives, indicating the minimum content of this obligation, namely work premises, material resources, information and communication technology and other costs necessary for the execution of the representation mandate.
- national legislation does not contain any guarantees for workers' representatives either as regards **their right to appeal to experts** when their assistance is necessary for workers' representatives to understand and assess the issues raised in the information and consultation procedures. Taking the legislation of other Member States, such as **France**, as an example, we consider that, to ensure that Directive 2002/14/EC has a useful effect ***de lege ferenda***, it is necessary to incorporate into domestic law all the elements of the content of the right of workers' representatives to appeal to experts, both the cases and conditions for exercising that right and the system for financing the costs, bearing in mind the need to maintain a balance between the interests of the company and those of the workers.
- an essential component of the guarantees to be provided to workers' representatives in the light of Directive 2002/14/EC is also the right to **paid time off to attend training/educational courses for the training/development of the knowledge and skills necessary to carry out their mandate**. In countries such as **Germany** and **France**, the right of workers' representatives to training and the arrangements for exercising this right during working hours without loss of pay are expressly provided for. As the domestic legislative framework does not offer guarantees for

the training and development of workers' representatives' competences and skills, we consider that ***de lege ferenda***, their right to paid time off to attend training/educational courses should be established.

- **Information to be disclosed**

Romania belongs to the category of member states of the European Union in which the information obligation provided for by Directive 2002/14/EC has been transposed by rules with a high generality. This regulation method significantly affects the effectiveness in practice of the right to information and consultation, since employers tend to interpret the obligation to provide information extremely formally and restrictively, by abusively invoking either the lack of relevance of the data or their confidential nature. Taking the legislation of other Member States, **such as France**, as an example of good practice, the solution we propose ***de lege ferenda*** is to lay down a core set of information to be provided to workers' representatives in Law 467/2006, while maintaining the right of the social partners to decide at any time to expand this legally established database.

Regarding the **confidential information,** as their legal regime laid down in Article 7 para. (1) of Law No 467/2006 is not able to ensure a useful effect to Directive 2002/14/EC, ***de lege ferenda,*** is necessary to define the concept of "legitimate interest of the company", indicating the cases and conditions in which the employer is entitled to request confidentiality and, at the same time, to provide that, in the confidentiality contract, the parties are required to lay down a specific or determinable term, as appropriate, of the obligation of confidentiality.

Art. 7 para. (2) of Law 467/2006 enshrines the employer's right **not to communicate certain sensitive information to workers' representatives**. As the employer's refusal to communicate information constitutes a substantial interference with the exercise of the right to information and consultation, Art. 6 para. (2) of Directive 2002/14/EC requires Member States to lay down "objective criteria" and "specific cases, conditions, and limits" in which the employer is allowed to refuse. Art. 7 para. (2) of Law No 467/2006 does not satisfy those requirements, which create the preconditions for an arbitrary exercise of the employer's right to refuse to communicate information, ***de lege ferenda*** being necessary to define the concept of sensitive information, and to specify the objective conditions and specific cases in which the refusal may be exercised.

- **Information and consultation methods**

Unlike the previous regulation of Law no. 62/2011, by the provisions of Art. 30 para (1) and (2) of Law no. 367/2022 was established a genuine obligation of the employer, legally sanctionable, to invite the trade union representative at the level of the establishment to participate in the works of the board of directors or other similar body, having as its only object the discussion of issues of professional and social interest with impact on the employees/workers. Where there is no representative trade union at the level of the company, the trade union organizations together with the employees/workers shall designate an elected representative to take part in this work. As in the old regulation of Law no. 62/2011, the legal text refers to the "participation" of the representative trade union/elected representative in the work of the board of directors or other similar body, a notion which, in our opinion, has an ambiguous content and purpose and cannot be framed in the forms that social dialogue takes: information, consultation or co-decision (agreement). Taking as an example of good practice the French Labor Code, we consider that, ***de lege ferenda***, it is necessary to expressly provide, in Art. 30 para. (1) of Law no. 367/2022, that workers/employees' representatives **participate with a consultative vote** in the work of the board of directors or other similar body and, at the same time, that the employer must ensure that workers/employees' representatives have access to all documents on the basis of which or in connection with which the works will be carried out.

Art. 31 para. (2) of Law no. 367/2022 reiterates and complements the employer's obligation provided for by Art. 5 para. (1) letter c) of Law no. 467/2006 to inform and consult the employees/workers represented according to Art. 102 para. (1) letter B, regarding decisions that may lead to significant changes in the organization of work, contractual relations, or employment relationships. **The legal text infringes European law, as interpreted by the Court of Justice of the European Union**, in that the obligation to initiate and complete the process of informing and consulting employees/workers is wrongly placed "before the implementation of decisions", and not at the moment the employer foresees the need to adopt these decisions, so that employees/workers have a real possibility to influence the decisions that the employer foresees.

From the analysis of the provisions of art. 31 para. (2) letter b) from Law no. 367/2022, it resulted that the information and consultation process can be initiated by employees/workers, without expressly stating that the right is exercised through representatives. We consider that this lack of clarity may give rise to different interpretations and that it is necessary, ***de lege ferenda,*** to expressly provide in Art. 31 para. (2) letter b) of Law no. 367/2022 that, if

employees/workers consider there is a threat to their jobs, the information and consultation process shall start upon their written request, **through** their **representatives,** within 10 calendar days from the communication of the request. The previously expressed conclusion is also valid with regard to art. 31 para. (1) from Law no. 367/2022, which, ***de lege ferenda***, we propose to expressly stipulate that the right to initiate the procedure belongs to the employees/workers through representatives and is not a right that can be exercised directly by the employees/workers.

- **Remedies and sanctions**

Art. 7 para. (3) of Framework Law No 467/2006 enshrines a direct right of action for workers' representatives, which aims to sanction the employer's decision/refusal to inform and consult, by ordering the employer to perform in kind the information and consultation obligations. This judicial procedure does not establish a specific right of action for workers' representatives to obtain the suspension/cancellation of the effects of the decision taken by the employer in disregard of the duty to inform and consult.

Confronted with the issue of the applicable sanction in case the employer has issued a decision without fulfilling the legal obligation to inform and consult the workers' representatives, in the absence of an express legal text, the **national courts have approached different interpretations of** this legal issue, in the light of the common law provisions governing the nullity regime, three jurisprudential orientations being identified and presented in the thesis. **In our opinion**, the failure to comply with the obligation to inform and consult is sanctioned by the absolute, virtual nullity of the decision and the full application of the effects of nullity, because only by applying this sanction can be achieved the purpose of the violated rule, which is of public order and protects a general interest, according to Art. 41 para. (2) of the Romanian Constitution and Decision no. 64/2015 of the Constitutional Court.

Since there has not been a consistent judicial practice of the national courts attesting to the possibility of applying civil sanctions for breaches of the right to information and consultation, we consider that, in this respect, the right of access to the courts is not effective and concrete. ***De lege ferenda*****,** we propose that Law No 467/2006 should expressly provide for the cases and conditions in which the nullity of the act adopted by the employer without respecting the obligation to inform and consult the workers occurs, as well as for the effects the nullity produces.

Regarding the ***jurisdiction of the national courts to hear the claims filed by workers' representatives***, in agreement with the opinions expressed in the specialized literature, we

consider that ***de lege ferenda***, it is necessary to amend the provisions of art. 7 para. (3) from Law no. 467/2006, in order to establish the jurisdiction of the labour courts for all judicial proceedings intended to protect the right to information and consultation of workers which, without exception, represent individual labour conflicts, subject to labour jurisdiction.

The domestic legislative framework has raised problems of interpretation in the jurisprudence of the national courts also concerning the **legal capacity of workers' representatives to stand in judicial proceedings** that tend to enforce/sanction infringements of workers' right to information and consultation. **We consider that** is correct the jurisprudential approach according to which, in actions based on Art. 7 para. (3) of Law no. 467/2006, the active legal standing of the trade union is subsumed under the general mandate provided for by art. 28 para. (1) of Law No 367/2002 and is not conditional on the existence of a written authorization from the union members.

In the case of **elected workers' representatives**, there is no express legal provision in the domestic legal framework, similar to Art. 28 para. (3) of Law 367/2022 that establishes active legal standing for the trade unions. As the judicial procedures made available to workers' representatives must be adequate to enable compliance with the obligations deriving from Directive 2002/14/EC, the interpretation required is to recognize the right of elected representatives, without the need for a special mandate from the employees/workers, to challenge in court infringements of the right to information and consultation, based on Art. 7 para. (3) of Law 467/2006.

Concerning the **system of sanctions**, it has been noted that the minimum and maximum limits of fines under Law no. 367/2022 for offenses in the field of social dialogue have been significantly increased compared to those previously provided for by Law no. 62/2011. The limits of contraventional fines under Law no. 467/2006 have, however, remained unchanged since the law came into force (January 1, 2007), and it is necessary to **correlate the provisions of this normative act with those of Law no. 367/2002**, to ensure a uniform sanctioning regime for all offenses in the field of informing and consulting workers.

2. Informing and consulting workers in the collective dismissal procedure

- **Passive subject of the information and consultation obligation**

Considering the mandatory benchmarks of interpretation drawn from the jurisprudence of the Court of Justice of the European Union in defining the autonomous notion of "establishment", the **PhD research concluded that the** provisions of Art. 68 - Art. 74 of the Labour Code that use the notion of "employer" conditional on the attribute of legal personality

is not in compliance with Art. 1 para. (1) letter (a) point (i) of Directive 98/59/EC. Legal personality implies that the employer has his own patrimony and a separate organization, or these attributes do not necessarily have to characterize an "establishment", as interpreted by the Court of Justice of the European Union. ***De lege ferenda*****,** it is necessary to correlate domestic legal provisions with the binding interpretation of the Court of Justice of the European Union, so that even entities without legal personality fall within the scope of the autonomous concept of "establishment" in the European law.

- **Workers' representatives**

In the judicial practice of national courts before the entry into force of Law No 367/2022 on Social Dialogue, the provisions of Art. 69 para. (1) of the Labour Code were interpreted differently in determining the scope of application of the notion of "trade union". The disagreement concerned whether the procedure for informing and consulting workers had to be carried out **also concerning non-representative trade unions if a representative trade union existed at the level of the employer**. The PhD research has found arguments both in support of the jurisprudence according to which there was no legal obligation for the employer to involve all trade union organizations within the company in the mandatory social dialogue in the case of collective dismissals, but only the trade union organization that was representative, and in support of the contrary interpretation, also supported in the doctrine of domestic law, according to which the employer was obliged to inform and initiate consultations with all the existing trade unions. **The conclusion that we support, in the light of the recommendations of the International Labour Organization,** is that granting preferential and exclusive rights to the representative trade union in the information and consultation procedure in the context of collective dismissal violates the fundamental right of minority trade unions to be heard.

In disagreement with the recommendations of the International Labour Organization regarding the rights of minority trade unions and confirming the interpretation supported by the first jurisprudential orientation, the new law on social dialogue expressly provides that the information and consultation procedure will be carried out with all non-representative trade unions, only in the hypothesis that, at the level of the company, there are no legally constituted representative trade union organizations. **In our opinion**, the granting of preferential rights to representative trade union organizations may be justified for the collective negotiation procedure, but not for the information and consultation procedures in the field of collective dismissals, which are of a different legal nature. We reiterate proposals ***de lege ferenda*** to make

a clear division between the collective negotiation mechanism and the information and consultation procedures and to stop using the same workers' representatives for both forms of social dialogue since the application of rules by analogy in matters that are different in purpose and legal nature is not in line with Directive 98/59/EC and does not ensure the effectiveness of the approach.

Regarding **the representation of workers through elected representatives, according to Art. 69 para. (1) of the Labor Code**, the PhD research revealed that, before the entry into force of Law 367/2022, elected workers representatives could coexist with one or more non-representative trade unions. In cases where **both unrepresentative trade unions and elected workers representatives existed** at the level of the company, the provisions of Art. 69 para. (1) of the Labor Code have been interpreted inconsistently in the literature and judicial practice concerning the social partners to be involved in the information and consultation procedure. **In our opinion**, in light of Convention No. 135/1971 on the Protection of Workers' Representatives in Companies and the Facilities to be Afforded to them, the correct interpretation is the one that recognizes the right of both elected representatives and minority trade unions to participate in the information and consultation procedures, since the presence of elected representatives should not be used to weaken the position of the trade unions concerned or their representatives but to encourage cooperation.

De lege lata, if there are no *representative and/or non-representative trade unions* at the employer level, from the combined analysis of the provisions of Art. 69 para. (1) Labor Code, Art. 31 para. (2) and Art. 102 para. (1) letter B point 5 of Law no. 367/2022, it follows that the employer who intends to carry out collective dismissals must initiate information and consultation with the elected representatives of the employees/workers. If there is a non-representative trade union in the establishment, the procedure will be carried out exclusively with that trade union, and workers may not elect non-union representatives. The solution applicable under the current rules respects the rights of the minority trade unions concerned, but, **in our view,** it raises problems of compliance with Directive 2002/14/EC, as it does not ensure a "relevant level of representation" of employees within the company. Moreover, for non-unionized workers to exercise their right to information and consultation, they are in practice forced either to join the existing trade union in the establishment or to form a new trade union, which is a violation of the worker's right not to associate, a negative aspect of the freedom of association also protected by Article 11 of the European Convention on Human Rights - European Court of Human Rights. ***De lege ferenda***, we consider that every unionized or non-unionized employee/worker in the company must be guaranteed the right to be informed

and consulted through freely elected representatives, as restrictions on the right to information and consultation are not compatible with the purpose of Directive 98/59/EC.

Another possible situation in practice, which was the subject of the PhD research, is when **there are no trade union organizations at the level of the employer and no worker representatives have been elected.** The provisions of Art. 69 para. (1) of the Labor Code and Law no. 367/2022 do not cover this hypothesis, and it is necessary to clarify whether the obligation of the employer who intends to carry out collective dismissals to inform and consult still exists and, if so, who is the active subject of the right to information and consultation.

The provisions of Directive 98/59/EC, in a situation such as that described above, were interpreted by the Court of Justice of the European Union **in Case C-496/22** to the effect that, in the absence of workers' representatives in the company, the employer is not obliged to inform and consult individually the workers affected by collective dismissals and, if there is a non-compliance with the national legislation regarding the regulated methods and procedures for appointing workers' representatives, this cannot be directly opposed to the employer, but exclusively to the Romanian state. After the delivery of that preliminary ruling, applying the binding rules of interpretation laid down by the Court of Justice of the European Union, the national courts have handed down final decisions either rejecting or upholding appeals brought by individual workers against collective dismissal decisions issued by the same employer. Inconsistent judicial practice has arisen as a result of the different interpretations that national courts have given to the national legal framework regarding the employer's obligations in the absence of workers' representatives within the company.

In our opinion, the provisions of the Romanian law that regulate the appointment of workers' representatives do not guarantee the full effect of Directive 98/59, in the hypothesis that there are no representatives within the unit for reasons of exclusive fault on the part of the workers. ***De lege ferenda***, we consider that Art. 69 of the Labour Code should be supplemented with a provision expressly specifying that, in the absence of workers' representatives within the unit, the employer must invite the workers to elect representatives and allow them a reasonable time to do so, depending on the circumstances. If, after the expiry of the time limit, the workers do not agree to elect representatives, the employer is exempted from the duty to inform and consult.

- **Categories of workers exempted from the provisions of the Labour Code on the collective dismissal procedure**

In accordance with the provisions of Directive 98/59/EC, Art. 74 para. (5) and (6) of the Labour Code provides that the collective dismissal procedure does not apply to workers of public institutions and public authorities, nor to workers employed under individual employment contracts concluded for a fixed term, except in cases where such dismissals take place before the expiry date of such contracts. The jurisprudence analysis of the Constitutional Court on the constitutionality of Article 74 para. (5) of the Labor Code has shown that different regulations may be established regarding the collective dismissal procedure for certain categories of workers, an objective and non-discriminatory criterion of differentiation being the specificity of the employment relationships of civil servants and contractual staff employed in public authorities and institutions. In the case of **contract staff** in public institutions and public authorities, the proportionality test applied by the Constitutional Court was based on the decisive argument that the special primary legislation provides for "appropriate accompanying measures not liable to discriminate against this category of workers in comparison with workers in the private sector". However, the PhD research did not identify in Title III of OUG No. 57/2019, which regulates *de lege lata* the status of contractual staff in public authorities and institutions, any special procedure applicable to these workers in the event of reorganization of the public institution or authority. At the same time, from the analysis of the provisions of the Labor Code, Law no. 367/2022, and OUG no. 57/2019 on the Administrative Code, it emerged that, also for the category of civil servants, the workers representatives *lato sensu* have no specific right conferred by the legislator to be informed and consulted in the event of reorganization of the public institution or authority.

In our opinion, the specific nature of the employment relationships of civil servants and contract staff employed in public authorities and institutions cannot in itself justify the denial of their right to information and consultation in the procedure of reorganization of the public institution or authority. The rules of domestic law also raise questions of compatibility with the requirements of Article 11 of the European Convention on Human Rights, which enshrines freedom of assembly and association, as ruled by the European Court of Human Rights in the **DEMİR and BAYKARA** case. ***De lege ferenda*****,** we consider that it is necessary to establish protective mechanisms in the reorganization procedure also for workers of public institutions and authorities to enable them to exercise the right of trade union association, so that this category of workers is not discriminated in comparison with workers in the private sector.

As regards workers with fixed-term employment contracts, the exclusion of individual fixed-term employment contracts from the *ratione materiae* scope of Directive 98/59 is justified by objective criteria, based on the fact that the legal termination by reaching the term of these contracts makes it unnecessary to carry out the collective dismissal procedure.

- **Employer's duty to communicate relevant information to workers' representatives and to initiate consultations to reach an agreement**

The duty to inform and consult workers in the collective dismissal procedure has a complex content that includes both the employer's obligation of result to communicate relevant information to workers' representatives and to initiate and carry out consultations and the duty of diligence to reach an agreement with workers' representatives. Considering that the duty to consult also includes the identification of a solution to avoid collective dismissal, the PhD research analysed the legal force of the opinion expressed by the workers' representatives, especially when it is based on the conclusions of a specialized technical expert's report. Researching the jurisprudential and doctrinal guidelines on this issue, the conclusion that we support is that **the labour court cannot censor the appropriateness of the collective dismissal measure**. However, in analysing the legality of the collective dismissal decision, the court must verify whether the employer acted in good faith in the consultations held with the workers' representatives to reach an agreement. The employer's margin of discretion is therefore subject to this limitation of the obligation to analyse in a real and serious manner the proposals put forward by the workers' representatives and to show diligence to achieve the legally prescribed aim of reaching an agreement.

- **Launching the information and consultation procedure**

In domestic law, Art. 69 para. (1) of the Labour Code places the obligation of information and consultation on "the employer who intends to carry out collective dismissals". The national legislation must be interpreted in accordance with the jurisprudence of the Court of Justice of the European Union on this matter, which shows that the intentional element is not essential, but that **the employer must provide for collective dismissals** when adopting economic decisions which, although not issued for that purpose, may nevertheless have repercussions on the employment of a certain number of workers.

- **Legal force and procedural remedies for failure to respect workers' right to information and consultation in collective dismissal procedures**

The Romanian legal system falls into the category of the majority of Member States in which the right to information and consultation of workers is conceived as an essential component of the collective dismissal procedure, the non-compliance with which, in the form, terms and conditions imposed by the Labor Code, entails the nullity of collective dismissal decisions and full compensation for the damage suffered by the dismissed worker. From the perspective of the Romanian State's obligation to comply with the principle of transposition of Directive 98/59/EC, **we consider that the** provisions of Art. 78 and 80 of the Labour Code establish an effective sanction, with a real deterrent effect for the employer, capable of providing workers with effective legal protection.

3. Informing and consulting workers in the transfer of undertaking procedure

- **The concept of transfer of undertaking**

The comparative analysis of the regulation of the transfer of undertakings in domestic law with that existing at the European Union level showed that **the Romanian legislator did not fully and correctly transpose the provisions of Directive 2001/23/EC**, since the domestic regulation restricts the field of *ratione materiae* application of Directive 2001/23/EC, by providing for the conditions of transfer of ownership and the contractual link between the transferor and the transferee which, according to the jurisprudence of the Court of Justice of the European Union, are not *sine qua non* conditions for the existence of a transfer of undertaking. These inconsistencies, which prevent Directive 2001/23/EC from being applied with full effect in domestic law, were examined by the Constitutional Court of Romania in the *a posteriori* unconstitutionality review procedure, but the constitutional judge, by Decision No 729/2020, rejected the objection of unconstitutionality as inadmissible, on the grounds, in essence, that determining the meaning of the concept of "transfer of undertaking" has no constitutional relevance, but is a matter of interpretation of the law which falls within the competence of the courts. Further, from the analysis of the jurisprudence of the national courts and the specialized literature, it was found during the study that a unitary point of view could not be outlined regarding the remedial character of the compliant interpretation of the national law for the existing normative inconsistency.

As far as we are concerned, *de lege lata*, the full application of the directive in terms of its *ratione materiae* scope can be achieved by a consistent interpretation of domestic law,

which allows contrary provisions of domestic law to be left unapplied, without thereby leading to a direct application of Directive 2001/23/EC. On the other hand, given the desire of any legal system to have a uniform judicial practice, **we consider that, *de lege ferenda***, it is imperative to **redefine the concept of transfer of undertaking in domestic law, in accordance with the jurisprudence of the Court of Justice of the European Union**, so that the requirement of a contractual link between transferor and the transferee, as well as the requirement that there must be a transfer of ownership of the goods should no longer be regarded as conditions *sine qua non* for establishing the existence of a transfer of undertaking, but as elements which the national courts, depending on the specific circumstances of the case, will assess under the scope of Directive 2001/23/EC.

- **Maintaining workers' rights**

Although Directive 2001/23/EC does not make any distinction, by Art. 9 para. (3) of Law no. 67/2006, the Romanian legislator also regulated the hypothesis in which, following the transfer, the undertaking, business, or part of an undertaking do not retain their autonomy and the collective negotiation agreement applicable at the level of the transferee is more favourable, stipulating that, in this situation, the transferred workers will be subject to the more favourable collective negotiation agreement. Since the provisions of Directive 2001/23/EC on maintaining workers' rights are mandatory and no derogation is permitted, we consider that the introduction of the principle *in favorem* in this matter is not in conformity with European Union law and that it is necessary, ***de lege ferenda*** to provide for an absolute and general prohibition on the modification of the rights of transferred workers that are based on the collective negotiation agreement, without making the inconsistent distinction regulated in Art. 9 para. (3) of Law 67/2006.

- **Procedure for informing and consulting workers**

In domestic law, the transposition of the European regulation on the procedure for informing and consulting workers has been realized through the provisions of Art. 11 of Law no. 67/2006, which regulates the obligation to consult at least 30 days before the date of the transfer, respectively Art. 12 of Law no. 67/2006, which stipulates the obligation to inform workers within the same period of 30 days before the date of the transfer, and also sets out the elements that make up the content of the information. Among these, as an **element of**

difference *in favorem*, the Romanian legislator added in Art. 12 para. (1) letter e) of Law no. 67/2006 the mandatory information on the working and employment conditions of the workers.

- **Subjects of the information and consultation obligation**

As regards the passive subject of the obligation to inform and consult, although Law no. 67/2006 does not regulate any exception for companies and organizations with less than 20 workers, we consider that the provisions of the common law on the matter are applicable, namely Art. 4 para. (1) of Law no. 467/2006, which limits the regulations applicability concerning the right to information and consultation of workers to companies based in Romania with at least 20 employees. **Unlike the collective dismissal procedure**, the company may be either private or public, the essential requirement being that it carries out an economic activity, regardless of whether or not it is profit-making.

According to Art. 7 para. (6) of Directive 2001/23/EC, where there are no workers' representatives in an undertaking or business "**through no fault of their own"**, Member States are required to state that the obligation to provide prior information subsists with the same content as in Art. 7 para. (1) of Directive 2001/23/EC. **In Romanian law,** the legislature has not taken over the distinction made in the directive according to the reasons for which workers' representatives have not been constituted or appointed. However, the consistent interpretation and the rules of domestic law regarding the worker's financial liability support the conclusion that, **where the workers' fault is found for the absence of their representatives, the obligation to provide prior information will not remain incumbent on the transferor/ transferee.**

Both European regulations and domestic law stipulate that the obligation to inform and consult is incumbent on the transferor/ transferee, each for their workers. The difference in the transposition of the directive lies in the fact that Directive 2001/23/EC uses the concept of workers "affected by the transfer", whereas Law 67/2006 refers only to "own workers". We have argued in the thesis that this difference does not represent a non-conforming transposition of the Directive, but a **more favourable provision**, permitted by the Directive, which fairly ensures that all workers, both those who will be transferred and those who will be indirectly affected by the transfer, are included in the scope of the beneficiaries of the right.

- **Content of the information obligation**

The information elements represented by the **date of the transfer/proposed date of transfer and the reasons for the transfer** are not intended to provide workers' representatives with a basis for initiating consultations on these issues. The decision to make the transfer rests strictly with the employer, being an expression of the right to conduct his business as enshrined in Art. 16 of the Charter of Fundamental Rights of the European Union. **This is an important difference from the procedure for collective dismissals,** in which the workers' representatives have a right to information and consultation to reach an agreement, including on the methods and means of avoiding collective dismissals.

Concerning **informing workers about exercising the option to be transferred to the transferee /the right to object to the transfer**, the comparative law analysis showed that there are two approaches to the right to object to the transfer at the EU level: in countries, such as **Romania, France**, it is considered that this right does not exist, since the transfer operates independently of the will of the parties, in which case the worker will be free, after the transfer, to decide not to continue the employment relationship with the transferee; in countries, such as **Germany, Portugal, United Kingdom,** the right of opposition of the worker is recognized in the stage before the transfer, in which case the automatic transfer of his employment contract will not operate, and the employment relationship will continue with the transferor or will be terminated on the initiative of the transferor, respectively the worker.

In our opinion, the choice of the second option is preferable for the following reasons: there is no infringement of the binding rulings of the Court of Justice of the European Union in **Joined Cases C-132/91, C-138/91, and C-139/91**, which explicitly stated the worker's right to object to the transfer of his contract; the fundamental principle of freedom of choice of employment and the *intuitu personae* nature of the employment contract are respected; there is no infringement of the worker's rights since the right to object is an expression of his free will not to continue the employment relationship with the transferee. Based on these arguments, **we conclude** that the worker's right to information should include, as a part of the right to information, the possibility of exercising the option to transfer, an aspect which, ***de lege ferenda***, must be expressly specified in the provisions of Art. 12 para. (1) of Law No 67/2006.

- **Legal force and procedural/administrative remedies**

As regards the minimum and maximum limits of the fine provided for by Art. 13 of Law no. 67/2006, we note that these have remained unchanged since the date of Romania's

accession to the European Union (January 1, 2007), when Law no. 67/2006 entered into force. To ensure the preventive and dissuasive function of penalties, **we consider that, *de lege ferenda*, it is necessary to increase the limits of the fine** established by the provisions of Art. 13 para. (1) of Law no. 67/2006.

Unlike the procedure of collective dismissal, in which the failure to comply with the procedure of information and consultation of workers is expressly sanctioned by the provisions of Art. 78 of the Labor Code, with the nullity of the dismissal decision, in the matter of transfer of undertaking **there is no provision for the sanction of nullity of the transfer operation for breach of the information and consultation obligations**, the only remedy for the transferred workers being the award of compensatory damages. Liability for failure to comply with post-transfer information and consultation obligations will be borne exclusively by the transferee, since domestic law does not provide for the liability of the transferor jointly and severally with the transferee, and, according to the binding decisions of the Court of Justice of the European Union **in Joined Cases 144 and 145/87**, in the absence of such a provision, the rule of full transfer of the transferor's rights and obligations to the transferee is applicable, including obligations before the transfer.

Regarding **procedural remedies**, the mere mention in Art.15 of Law No 67/2006 on the right of affected workers to apply to the courts does not represent an accessible and predictable regulation on the claims that may be the subject of such actions. **We consider that, to ensure that Directive 2001/23/EC is fully effective, *de lege ferenda***, it is necessary: to clarify the conditions for bringing an action for compensation for damage caused by breach of the right to information and consultation of workers affected by the transfer; to expressly sanction in law the joint and several liability of the transferor and transferee for damage resulting from failure to comply with the right to information and consultation of transferred workers; to increase the limits of the fine.

4. Informing and consulting workers in situations with a transnational component

Nearly 30 years after the adoption of Directive 94/45/EC, the institution of European Works Councils is still in the process of evolution and, although their usefulness is widely recognized, practice shows that there is still room for improvement. To strengthen transnational social dialogue, the **European Commission's proposal, made at the request of the European Parliament, to revise Directive 2009/38/EC** aims to eliminate the shortcomings of the existing legislation and to strengthen the guarantees of the right to information and consultation.

In domestic law, although Law no. 217/2005 with subsequent amendments and additions has faithfully transposed Directive 94/45/EC, as revised by Directive 2009/38/EC, given the fact that there are very few community-scale companies with central management in Romania, no European Works Council subject to Romanian law has been set up to date and practice in this area is almost non-existent.

During the PhD research, the main aspects that define the institution of the European Works Council were analysed, as well as those that the European Commission aims to revise in Directive 2009/38/EC through the Proposal formulated on 24.01.2024, highlighting the context that was the basis for the formulation of the proposal for the revision of Directive 2009/38/EC, as well as the specific objectives pursued to strengthen transnational social dialogue.

- **Removal of derogations from the *ratione personae* scope of Directive 2009/38/EC and adaptation of the revised existing agreements**

One of the main changes targeted by the European Commission's Proposal for the revision of Directive 2009/38/EC of 24.01.2024 concerns the abrogation of Art. 14, which provides for two situations in which the Directive does not apply to community-scale companies or community-scale groups of companies. The first hypothesis of this provision concerns community-scale companies/groups of companies within which voluntary agreements applicable to all workers on transnational information and consultation already existed before the transposition of Directive 94/45/EC. The second hypothesis concerns the situation of companies/groups of companies in which agreements were signed or revised between 5 June 2009, when Directive 2009/38/EC entered into force, and 5 June 2011, when the deadline for Member States to transpose Directive 2009/38/EC expired. In addition to the derogations for voluntary agreements removal, the revision proposed by the European Commission also includes ways of adapting existing agreements to the revised requirements.

- **Clarifying the notion of "transnational aspect"**

Art. 1 para. (4) of Directive 2009/38/EC limits the competence of the European Works Council to transnational matters. The European Commission's proposal to amend Directive 2009/38/EC of 24.01.2024 aims to clarify the concept of the "transnational aspect" by establishing a presumption of transnationality, which removes any doubt as to the existence of an obligation to inform and consult the European Works Council in the case of measures that

explicitly concern establishments in a single Member State but which may have consequences affecting workers in another Member State.

The amendment in question is necessary in the context of the legal uncertainty as to the interpretation of the concept of "transnational aspect", which has led, in some cases, to a restrictive approach to this concept in the judicial practice of the courts of the Member States.

- **Amendments to the regulatory requirements for consultation**

To remove any doubt of interpretation concerning the normative temporal requirements of the consultation, laid down in Art. 2 para. (1) letter g) of Directive 2009/38/EC, in the Commission proposal of 24.01.2024, it is provided for the express mention in the legal text that the consultation procedure must take place before the adoption and implementation of the decision.

In domestic law, the provisions of Art. 6 pct. (9) of Law No 217/2005 have taken as such the benchmarks set by the European legislator for determining the moment at which consultation must be initiated and completed, without going further, in the sense of expressly mentioning the imperative that the procedure must be carried out before the decision on the proposed measure is adopted. To clarify the rule and in anticipation of the European Commission's legislative proposal, the content of the proposal should be supplemented by expressly stipulating that both the views expressed by the European Works Council and the response of the central management must be given in a timeframe before the decision on the proposed measures is adopted.

- **Changes to the legal treatment of confidential information/Transmission of information for specific reasons**

Noting the lack of clarity in the provisions of Art. 8 of Directive 2009/38/EC regarding the conditions under which central management may request confidential treatment of information or refuse to disclose the information requested, which creates the grounds for an abusive exercise of the right, the European Commission's proposal to amend Directive 2009/38/EC provides for expressly stating that central management must, when providing confidential information or refusing to disclose the information requested, also communicate the reasons justifying the confidentiality requirement or the reasons justifying the non-disclosure of information. It is also stated that the obligation not to disclose confidential information shall cease when the justification provided becomes obsolete.

- **Amendments concerning the resources of special negotiating bodies/European Works Councils**

The analysis carried out by the European Commission in 2023 on the effectiveness of Directive 2009/38/EC revealed that one of its shortcomings was the lack of resources and skills needed by workers' representatives, as well as the lack of possibility for them to use external expertise. The European Commission's proposal to amend Directive 2009/38/EC spells out the minimum guarantees of the right of the special negotiating body/European Works Council to have the material and financial resources necessary to carry out their tasks. In the spirit of cooperation between the parties, the suspensive condition expressly stipulated is **that such expenditure must be notified to the central management** before being committed.

The judicial practice of the national courts of the Member States analysed during the PhD research on the issue of the means to be provided to the members of the European Works Council highlights that, in the context of Directive 2009/38/EC, there are uncertainties regarding the interpretation of the notion of "necessary means" and the conditions and cases in which they must be provided by the central management. From this point of view, we consider that the amendments proposed by the European Commission on 24.01.2024 create the premises for a uniform judicial practice, by clarifying and expressly providing for certain aspects that have given rise to difficulties of interpretation.

- **Amendments to the content of the agreement/sub-agreement on strengthening gender balance in European Works Councils**

The European Commission's proposal of 24.01.2024 to revise Directive 2009/38/EC provides for the introduction of a new normative requirement for the content of the agreement on ensuring gender equality in the composition of the European Works Council, in compliance with the relevant jurisprudence of the Court of Justice of the European Union.

In **Romania**, Art. 23 letter b) of Law no. 217/2005 has the same content as Art. 6 para. (2) letter b) of Directive 2009/38/EC, without laying down rules on gender balance in the composition of the European Works Council. As a general rule, Law no. 202/2002 on equal opportunities and equal treatment between women and men provides, in Chapter IV, Art. 21 para. (2) and Art. 22, Chapter IV, Art. 21 para. (2) and Art. 22, the obligation of trade unions and employers' organizations to ensure fair and balanced representation of women and men "when nominating members and/or participants in any council".

- **European Works Council's right to report at national level**

This right was provided for from the outset by Directive 94/45/EC (Art. 5 of the "Subsidiary Requirements"), but Directive 2009/38/EC moved it into the basic text in Art. 10 para. (2) to ensure a better link between the two levels of exercise of the right to information and consultation, national and transnational.

In **Romania**, the right to report at the national level has not been moved into the substantive provisions of the law, but has remained regulated in Art. 41 of Chapter IV "Subsidiary Provisions", which applies only in the situations referred to in Art. 27 of the same normative act, namely European Works Councils subject to subsidiary requirements. This constitutes an inconsistent transposition of the provisions of the recast Directive 2009/38/EC, as it is necessary, ***de lege ferenda***, for the right to report at the national level to be mentioned in Art. 47 of Chapter V "Protection of workers' representatives', to make it applicable to the European Works Councils set up by agreement.

The right of the European Works Council to report at the national level is subject to **the confidentiality requirement** laid down in Art. 8 of the Directive, which prohibits the disclosure to "third parties" of information that has been expressly communicated to them in confidence. The legal uncertainty as to the scope of the concept of "third parties" has been widely debated in **European legal doctrine** and, at the same time, has been interpreted unevenly **in judicial practice**, without a uniform opinion emerging. **For our part**, we consider that the concept of "third parties" also includes workers' representatives at the national level, as well as all workers, in the absence of a stipulation to the contrary in national legislation or negotiated by the parties.

- **Changes in sanctions and access to justice**

The European Commission's proposal of 24.01.2024 to amend Directive 2009/38/EC aims to toughen the system of sanctions for transnational violations of the right to information and consultation by imposing on Member States the obligation to establish sanctions, based on relevant criteria, including financial penalties for failure to comply with transnational information and consultation, set according to the size and financial situation of the company or group sanctioned. The materialization of this proposal will make Directive 2009/38/EC different from all other directives on the right to information and consultation of workers which, without exception, contain a general and minimal regulation of the sanctions system, subject to the principle of effective transposition of the directive.

In terms of **procedural/administrative remedies,** the Commission's proposal does not refer to the remedies of annulment of the decision and temporary suspension of the central management's decision until the information and consultation obligations have been fulfilled, although the normative provision of these judicial procedures has been a priority on the agenda of European trade union organizations, and was also included in the recommendations made by the European Parliament in the legislative resolution of 2 February 2023, which formed the basis for the proposal to revise the directive. **In our opinion**, in addition to tightening up the system of penalties, the provision in the directive, as a remedy, of the preventive procedure of temporary suspension of the decision, would have led to the standardization of national legislation in this area and the creation of predictable and accessible common rules that would have given the directive a useful effect, even ensuring the realization of the right in kind.

In **Romania**, the domestic law regulation on remedies, contained in Art. 52 of Law 217/2005, provides for the right of the European Works Council/workers' representatives to challenge the confidentiality requirement, respectively the decision of the central management not to disclose information, and establishes the jurisdiction to settle these disputes in favour of "the competent courts". To ensure that the internal rules have a useful effect, it is necessary ***de lege ferenda*** to expressly provide for the following aspects in the text: that the labour courts have jurisdiction to settle claims; that the duration of the procedure must be compatible with the effective exercise of the right to information and consultation; and that the members of the special negotiating body have the right to take action where the employer unlawfully requests confidentiality or fails to provide the information requested.

As far as **legal capacity** is concerned, in **our opinion**, the economy of Law No 217/2005 does not suggest that the European Works Council has full civil capacity, similar to that of trade union organizations, but only a procedural capacity to be a party to legal proceedings, without having legal personality enabling it to engage in relations with third parties. Following the European Parliament Resolution of February 2023, ***de lege ferenda*** is necessary to expressly provide for the legal personality of the European Works Council in Law 217/2005.

Finally, the PhD research revealed that the fines regulated by Article 53 of Law no. 217/2005, with minimum and maximum limits between 2,000 lei and 4,000 lei, placing Romania in the category of Member States with the lowest level of monetary sanctions and are not able to ensure the useful effect of the regulation, ***de lege ferenda*** being necessary to adjust these limits to have a preventive and dissuasive role.