University of Bucharest
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"LEGAL STATUS OF NULLITY IN LABOUR RELATIONSHIPS"

SUMMARY

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NULLITY – LEGAL INSTITUTION OF CIVIL LAW. GENERAL ASPECTS

Nullity of the civil legal act in Roman law

There are two categories of nullity in Roman law:

- *Civil nullity,* with the origins in law;
- *Praetorian nullity,* based only on procedural principles and, in some cases, *contra legem* was pronounced, so even by breaching the law.

In modern law, there are no more differences between civil and praetorian nullity as (i) there is no longer a source of praetorian law; (ii) nullity can only be applied in the cases regulated by law.

Nullity as sanction of the civil legal act

In Roman law, the legal act affected by nullity has no legal effect, according to the Roman law principle: *quod nullum est, nullum producit efectum.*

Nullity is, basically, partial and remediable. Also, the theory of remediable nullity is also of particular importance in labour relations, the rule being the remediability of nullity in labour legislation. Whilst regarding this concept of nullity remediability in labour law, applicable to bilateral documents, labour contracts, we find, as stated above, the particular situation of unilateral documents issued by the employer, such as unilateral decisions, dismissal decisions, when nullity usually affects the entire unilateral legal document.

Classification of the civil legal act nullities

The nullities are classified based on the following criteria:

- *Depending on the nature of the interest protected,* in general, considering the legal provision that was breached by concluding the civil legal act, the nullity is classified into: **absolute nullity** and **relative nullity**;

- *depending on the extent of its effects*, nullity can be: **partial nullity** and **total nullity**;

- *depending on the legislative regulation*: **express** or *textual* **nullity** and **virtual** or *implicit* **nullity**;

- *depending on the validity condition that has not been observed:* **substantive nullity** and **formal nullity**;

- *depending on the valorisation*, it is classified into: **legal nullity and amiable nullity**.

Legal status of the civil legal act nullity

The main classification of nullity as absolute and relative is important in terms of different legal status of each type of nullity.

The legal status of nullity refers to the rules the absolute or relative nullity is subject to.

Thus, the legal status of nullity is interesting from three aspects, namely:

1) the person that may invoke nullity;

2) the time frame for invoking nullity;

3) the possibility to cover nullity, by confirmation.

Absolute and relative nullity have a different legal status, which shall be analysed separately, based on the three elements above.

Legal status of absolute nullity

Under art. 1247 para. (2) of the Civil Code: "*absolute nullity may be invoked by any interested person, by way of action or exception, according* to art. (3): *"the court is obliged to invoke ex officio absolute nullity",* and according to para. (4): "*the contract affected by absolute nullity is not susceptible of confirmation, except for the cases provided by law".*

Legal status of relative nullity

Art. 1248 para. (2) of the Civil Code provides that: *"relative nullity can be invoked only by the person whose interest is protected by the breached legal provision",* and para. (3) provides: *"relative nullity cannot be invoked ex officio by the court".*

NULLITY IN LABOUR LEGAL RELATIONSHIPS

Nullity in civil law and labour law

By comparing the nullity in civil law and in labour law, it can be noticed the civil law is governed by *the principle of freedom of contract*, while the labour law the freedom of contract is limited by law, protecting the employees; therefore, we can state that *the principle of freedom of contract*, specific to **the civil law** is applied

with limitations in **labour law,** the limitation being dictated by the *principle of protection of employees.*

Definition of nullity in labour legal relationships

Nullity "*represents the sanction that consists of the cancellation of those clauses of the legal act contrary to the legal provisions or of the entire legal act, only if it is impossible to keep it, regarding the essential content and the purpose of the legal provisions violated at its conclusion"*[1].

Classification of nullity in labour law

The nullities **are classified** according to the following criteria:

1. ***Depending on the nature of the interest protected by law***, general or individual regarding the legal provision violated at the conclusion of the civil legal act, the nullity is classified as: absolute nullity and relative nullity;

The absolute nullity is the sanction applied when at the conclusion of the legal act, a legal provision protecting a general interest was not complied with.

The relative nullity is the sanction applied when at the conclusion of the legal act, a legal norm protecting a particular interest, personal or individual, was not complied with.

2. ***Depending on the extent of its effects***, nullity can be: partial nullity and total nullity;

3. ***Depending on the legislative regulation***: express or textual nullity and virtual or implicit nullity;

4. Depending on the validity condition that has not been observed: substantive nullity and formal nullity;

5. Depending on the valorisation, it is classified into: legal nullity and amiable nullity.

Legal status of absolute and relative nullity in labour relationships

Nullities in the public law reside in the fact that in most cases, there are absolute nullities, as the violated rules are rules of public policy, mandatory rules, as most of the legal rules contained in the Labour Code and, in general, in the entire labour legislation. This classification of nullities in labour law as absolute and relative

[1] Ghimpu Sanda, Ștefănescu Ion Traian, Beligrădeanu Serban, Mohanu Gheorghe, Dreptul Muncii, Tratat, Vol I, Ed. Științifică și Enciclopedică, Bucharest 1978, page 269

nullities, according to the doctrine, has its legal grounds in the doctrine dispute regarding the status of labour law in terms of areas of law, as public law or as private law, considering, like other authors[2] that: "*the dispute is devoid of practical use although the characters of labour law are clearly defined"*.

NULLITY OF INDIVIDUAL LABOUR CONTRACT

Origin

De lege lata, this nullity of individual labour contract is regulated by the **Labour Code**, firstly, in **art. 57** and in other legal texts regulating nullity thereof, such as **art. 15**, **art. 27 para. (2),** and **art. 56 par. e)** of **Labour Code republished.**

Preliminary considerations on the nullity of individual labour contract

Nullity, in labour law, as well as in civil law is not a sanction against the legal act itself, but " *it is a sanction that causes certain effects – those vitiated by nullity – not to occur"*[3].

In labour law, nullity has the following features:

a) usually, **nullities are partial**;

b) **nullities are remediable**;

c) **the effects of nullity are not retroactive**.

Nullity of individual labour contract – absence of written form – failure to comply with an *ad validitatem* condition

In the current legal regulations, the absence of a written labour contract is sanctioned by the law with absolute nullity of the contract. It is also questionable the superficiality of the legislator that basically makes art. 16 para. (1)[4] in the current form, not to be in accordance with art. 8 para. (1)[5] of the Labour Code, thus setting the

[2] Athanasiu Alexandru, Dima Luminita, Dreptul Muncii, University Course, All Beck Publishing House, Bucharest, 2005, page 8

[3] Athanasiu Alexandru, Dima Luminita, Regimul juridic al raporturilor de muncă în reglementarea noului Cod al Muncii Pandectele Romane, No. 2/2003, part I, Bucharest 2003 – Universul Juridic Publishing House page 225

[4] Art. 16. - (1) The individual labour contract is concluded based on the written agreement of the parties, in Romanian language. The employer has the obligation to conclude a written individual labour contract. The written form is compulsory for the valid conclusion of the contract.

[5] Art. 8. - (1) the labour relationships are based on the principle of consensus and good faith.

written form *ad validitatem* of the individual labour contract being against the principle of consensus.

Nullity of individual labour contract – partial and remediable nullity

Whatever the nature of nullity, absolute or relative, the void labour contract shall not produce effects for the past, and it can be concluded that what is under nullity in labour law is the partial nature of the document's content and its effects in time. The effects of nullity occur *ex nunc,* starting with the date the nullity was found, but not *ex tunc,* from this date.

Absolute and relative nullity of the individual labour contract

This classification of nullities in labour law as absolute and relative nullities, according to the doctrine, has its legal grounds in the doctrine dispute regarding the status of labour law in terms of areas of law, as public law or as private law. Thus, the nullities in public law mainly have an absolute nature, as the norms breached are public norms, like most of the legal norms contained in the labour code and, in general, in the entire labour law, while the relative nullity cases, in the field of employment, are rare.

Procedural and formal conditions on the nullity of the individual labour contract

According to the law (Labour Code, art. 57 para. (6)), finding and establishing the nullity of effects thereof is made by agreement of the parties, the legal solution being consistent with the one put forward before the adoption of the Labour Code in the specialized legal literature. Obviously, when nullity is not found amicably, it is pronounced by the court.

Effects of individual labour contract nullity. Termination of the individual labour contract

The person performing work based on a void individual labour contract, under art. 57 para. (5) of the Labour Code, is entitled to the payment of the salary for the performance of the duties stipulated in the job description. At the date of amicable or judicial nullity finding, the individual labour contract terminates *ipso jure*.

NULLITY OF UNILATERAL ACTS ISSUED BY THE EMPLOYER

Preliminary considerations on the unilateral act in common law and labour law

Usually, in labour law, during the employment period, the employers issue most unilateral legal acts, such as decisions to modify, suspend and terminate labour relationships. Also, the main internal normative acts of an employer, legal person, are unilateral (e.g. Internal Regulation, Regulation for Organisation and Operation, optional in case of some companies, but compulsory in case of credit institutions, banks, leasing companies, and considered [6] "*specific internal sources*", with the collective labour contract and instructions and internal rules on occupational health and safety.

Nullity of acts on modification, suspension and termination of individual labour contract

Nullity of unilateral decision to modify the individual labour contract

The unilateral decision to modify the individual labour contract should be issued by the employer under the mandatory provisions of the Labour Code (art. 42 – art. 48 of the Labour Code), namely, to observe under penalty of nullity, the period during which the measure can be ordered, 60 days in 12 months in case of delegation, respectively, one year, in case of secondment, to obtain the employee's consent in case of delegation or secondment extension, granting the employee the rights for transport, accomodation and the allowance for delegation, respecively, for secondment.

Other cases of individual labour contract modification. Collective (full) transfer of employees in case of transfer of company/unit or parts thereof

Collective (full) transfer of employees as named in the legal literature[7] occurs in case of transfer of companies, units or parts thereof.

Also, in terms of individual and collective (full) transfer, starting from the *intuitu personae* nature of the individual labour contract, we consider by *de lege ferenda* that it would require not only the notification of the transferred employee and his consent for transfer; in the absence thereof, it should be sanctioned by nullity or

[6] Ștefănescu Ion Traian, Tratat teoretic și practic de drept al muncii, 3rd Edition, Revised and Completed, Universul Juridic Publishing House, Bucharest, 2014, page 58 - 59

[7] Volonciu Magda, Transferul colectiv (integral), Revista română de dreptul muncii No. 2/2005, Rosetti Publishing House, Bucharest, 2005, page 43 - 47

similar to nullity, which occurs in case of the absence of the written individual labour contract.

Nullity of the decision to suspend the individual labour contract

Regarding the nullity of decisions to suspend the labour contract, we ca n mention the nullity of the decision to suspend *de jure* the individual labour contract, establishing (even with the consent of the employee) a shorter maternity leave than the period provided by law or issue a decision to suspend from office during preliminary disciplinary investigation or when the employer filed a criminal complaint against the employee at Romania's Constitutional Court, finding the unconstitutionality of these two cases of suspension.

Nullity of the decision of termination *de jure* of the individual labour contract

Regarding the cases of termination of the individual labour contract, the legislator provided exhaustively and expressly, beyond of the will of the parties, the situations an individual labour contract terminates *ope legis*. The employer has the obligation to issue a decision finding the intervention in case of termination *de jure* of the individual labour contract. If the employee considers the decision of termination *de jure* of the individual labour contract is not grounded *de facto* or *de jure*, or the decision does not correspond to a concrete case of termination *de jure*, he/she may file an appeal to the Court of Law within 30 days from the date of decision and may request the annulment of the respective decision.

Nullity of individual labour contract termination notification during the probation period

The written form of the notification is **the only condition for validity thereof**, the notification must not be motivated *de facto* and *de* jure, as the provisions of art. 62 para. (2) of the Labour Code and art. 61 par. d), based on art. 64 para. (1) of the Labour Code republished do not apply.

Nullity of the dismissal decision

Preliminary considerations

The nullities operating in case of dismissal decisions issued contrary to the legal provisions have multiple regulations, especially in art. 78-80 of the Labour Code, and also in art. 76, as well as regarding disciplinary dismissal in art. 62 para. (3)

respectively, art. 252 para. (2) of the Labour Code, but these regulations shall be applied equally to all dismissal decisions.

Interdictions regarding dismissal

As a corollary of employee's right to protection against illegal dismissal, the legislator provides permanent and temporary interdictions regarding dismissal.

Legal status of unlawful dismissals[8]

The dismissal nullity status has the following characteristics:

- The nullity of decision may be strictly invoked by the person whose right was violated;
- Decision annulment may be requested only as a result of a legal action contesting the unilateral dismissal measures, within the period prescribed by law;
- Dismissal decision annulment may lead to the appointment of the employee in the position prior to dismissal, in the sense of reintegration, if the employee invokes it expressly. Art. 80 para. (3) of the Labour Code solves a practical problem in case of decision annulment, in case only the dismissal decision annulment is requested, without the reintegration into employment.

Effects of dismissal decision nullity

The legislative document regarding the nullity of dismissal decision is the principle provisions of art. 62 para. (3) and art. 76, where nullity is expressly or implicitly provided, and also the provisions of art. 59, art. 60, art. 62 para. (1) and para. (2), art. 63 in conjunction with the provisions of art. 251 para. (1), art. 64 para. (1) – para. (4), art. 65 para. (2), art. 68 – art. 74, art. 75 all coming under the

[8] **Art. 78 of the Labour Code:**
Dismissal without observing the procedure prescribed by law is null and void.

Art. 79 of the Labour Code:
In case of labour conflict, the employer cannot invoke before the court other reasons de facto or de jure than those specified in the dismissal decision.
Art. 80 of the Labour Code:
(1) In case the dismissal was unreasonable or illegal, the court shall order its annulment and shall oblige the employer to pay compensation equal with indexed wages the employee would have benefited from.
(2) Upon the request of the employee the court that ordered the annulment of dismissal shall restore the parties in the situation prior to the issuance of dismissal decision.

provisions of art. 78 of the Labour Code republished, which states that in case of failure to comply with the "*procedure prescribed by law*" the dismissal decisions are absolutely null. Regarding the effects of nullity of the dismissal decision, we can refer to: the payment of compensations according to art. 80 para. (1) of the Labour Code, reintegration into the position held prior to the issuance of unlawful dismissal – art. 80 para. (2) of the Labour Code, and in case the reintegration was not requested, the termination *de jure* of the individual labour contract at the date of the final and irrevocable legal decision -– art. 80 para. (3) of the Labour Code.

Revocation of unilateral acts issued by the employer. Revocation of dismissal decision

The revocation of the unilateral acts issued by the employer is exclusively a creation of the doctrine of specialty, and thus raises issues in the relation with the institution of unilateral acts nullity, and, in this case, of the decision of dismissal as it was held as part of doctrine and, especially, of jurisprudence[9] that in terms of revocation of unilateral acts, the labour law has not provision in this regard.

Nullity of disciplinary dismissal. Nullity of disciplinary sanction

The legislative document regarding the nullity of disciplinary sanction that intervenes where it conflicts with the formal and substantive requirement provided by law, is art. 252 para. (2) in conjunction with the provisions of art. 62 para. (2) of the Labour Code which state that: "*under penalty of absolute nullity, the decision must include the following:*

- *description of the deed which constitutes disciplinary offense;*

- *the provisions of the applicable employees status, internal regulations or collective labour contract violated by the employee;*

- *the reasons for which the defense formulated by the employee during disciplinary investigations were not considered or the reasons why, under art. 251 para. (3), disciplinary investigation was not conducted;*

- *the legal grounds for applying the disciplinary sanction;*

- *the time frame to contest the sanction;*

[9] Bucharest Court of Appeal Section VII of Civil cases for causes related to labour conflicts and social insurance, Decision no. 5553/R/2012, Revista română de dreptul muncii No. 2/2013, Wolters Kluwer Publishing House, Bucharest 2013, page 29 - 30
Bucharest Court of Appeal Section VII of Civil cases for causes related to labour conflicts and social insurance, Decision no. 4689/2013

- *the competent court where the sanction can be contested*".

Preliminary disciplinary investigation procedure

The procedure for preliminary disciplinary investigation is compulsory in case of disciplinary sanctions, except for the warning notice.

If the employer orders a sanction without prior disciplinary investigation, the decision thus issued is sanctioned by absolute nullity.

The effects of disciplinary sanction decision nullity. Partial annulment of the disciplinary sanction decision – replacement of the disciplinary section by the court

Thus, the court found the employee that received a disciplinary sanction is guilty, but the sanction applied is too severe, usually in case of termination of the labour contract as a result of disciplinary offense and it may order the replacement of this sanction with a less severe one.

Regarding the measure of ***replacement of disciplinary sanction with another sanction, less severe,*** **the High Court of Cassation and Justice** has ruled in the referral in the interest of the law by **Decision no. 11/2013**.

Removal of sanction decision

Law no. 40/2011 for the modification of the Labour Code has introduced a new provision regarding the institution of disciplinary sanctions cancellation, regulation which has solved many of doctrine controversies on the prescription of disciplinary liability.

Dismissal of the employee remanded in custody for a period exceeding 30 days

Dismissal of the employee in remanded in custody under the Penal Procedure Code (art. 61 par. b) of the Labour Code) and consists in the possibility of the employer to order the dismissal of the employee remanded in custody[10] "*for a period exceeding 30 days"*.

Dismissal in case of employee's physical or mental unfitness

Dismissal in case of employee for medical or physical reasons represents, in the opinion the legislator dismissal related to the person of employee, which has as grounds the decision of competent bodies for medical expertise, and according to a

[10] Art. 223 and the following art. 241 – art. 244 of the Civil Procedure Code

recent decision of the Constitutional Court, even the occupational medicine doctor, finding the physical or mental unfitness, leading the objective impossibility of the employee to efficiently fulfil the duties and prerogatives of the position held.

Dismissal for professional noncompliance

Art. 61 par. d) of the Labour Code stipulates that: "*the employer may order the dismissal for reasons related to the personality of the employee, if he/she does not correspond professionally to the position held".*

Legal status of nullity in case of individual and collective dismissal

Under art. 65 para. (1) of the Labour Code *dismissal for reasons not related to the employee* represents: "*termination of individual labour contract as a result of annulment of the position held by the employee, for one or several reasons not related to his/her person",* and under para. (2) "*the annulment of the position must be effective and must have a real and serious cause".*

Although under art. 66 of the Code "*dismissal for reasons not related to the person of the employee may be individual or collective"* in reality, the dismissal decision is seen as individual legal act, as it refers to the termination of the contract regarding the employee strictly individually.

Art. 68 para. (1) of the Labour Code determines what is collective redundancies, and in case of such redundancies, the employers should observe a certain procedure established by law, procedure corresponding to the obligation to inform and consult the employees.

NULLITY OF CLAUSES OF COLLECTIVE LABOUR CONTRACT

Legislative document

De lege lata, this nullity is regulated by the Labour Code and in the Law on social dialogue republished with subsequent modifications [11].

[11] **Law no. 62/2003 on social dialogue**
Art. 142. - (1) the Clauses in collective labour contracts negotiated by breaching the provisions of art. 132 are null.
(2) the nullity of contractual clauses is found by competent courts, upon the request of the interested party, by action or exception.
(3) If the court finds the nullity of certain clauses, the parties may agree upon negotiation thereof.
(4) Until renegotiation of clauses whose nullity was found, they are replaced by provisions more favourable to the employees, provided by applicable law or collective labour concluded at the higher level, where appropriate.

Definition. Terminology

The law on social dialogue republished with subsequent modifications no. 62/2011 contains a legal definition[12].

The legal nature of the collective labour contract

In terms of the legal nature of this contract, it can be state it is a bilateral contract/act by which the parties set mutual rights and obligations and source of law, having the legal force of a normative act.

Legal features of the collective labour agreement

This legal institution has the specific features of a source of law, of a public law, as according to the doctrine it is[13]:

- **A mutually binding contract,**
- **An onerous contract**,
- **Commutative,**
- **Appointed contract**
- **With successive benefits**,
- **A solemn contract,**
- **For a determined period**,
- **An exception to the principle of relativity of contract effects[14].**

Procedural and form conditions regarding the nullity of the collective labour agreement

The nullity of clauses in a collective labour agreement can be found by the parties, although neither the Labour Code, nor the Law on social dialogue regulates amicable nullity as it does in case of individual labour contract. Therefore, the

Thus, it may be invoked the argument that the regulations of the Labour Code are completed by the provisions of the Civil Code[15], and as consequence, nullity can be both *legal* and *amicable*.

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[12] Art. 1 i) of the collective labour contract – the written convention between the employer or employer's organization and the representatives of employees, which sets clauses regarding the rights and obligations arising from the labour relationships.

[13] Athanasiu Alexandru, Volonciu Magda, Dima Luminița, Cazan Oana, Codul Muncii, Comentariu pe articole Vol. II, art. 108 – 298, C.H. Beck Publishing House, Bucharest 2011, page 243 - 244

[14] The Civil Code art. 1270 stipulates: "*the validity of the contract concluded has the force of law between contracting parties" and* art. 1280 sets forth: "*the contract produces its effects only between the parties, unless the law provides otherwise".*

OTHER CASES OF NULLITY IN LABOUR RELATIONSHIPS

Internal regulations is the unilateral act issued by the employer, observing the written form *ad validitatem*, consulting the social partners, either the union or the representatives of employees, as appropriate, and which has a minimum content regulated by law[16].

The finding note and prejudice assessment is regulated[17] as amicable method to recover the prejudice caused by an employee to the employer.

The job description, most of the times, is an internal document predefined by the employer, prepared for a certain position in the company's organization, based on the Code of Occupations in Romania (C.O.R.), special law in certain areas of activity, such as legal advisors, occupational health and safety responsible, chief accountant etc., Internal Regulations[18] or even the Rules of Organization and Operation if any, at company level, or when this regulation is compulsory, for example in case of finance and credit institutions, bank, subject to BNR approval.

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[15] art. 1246 para. (3) of the Civil Code
Unless the law provides otherwise, nullity of the contract may be established or declared by the parties.

[16] The Labour Code
Art. 242. – The internal regulation contains at least the following types of provisions:
a) rules on protection, hygiene and occupational safety in the unit;
b) rules on discrimination and elimination of all forms of violation of dignity;
c) the rights and obligations of the employer and employees;
d) the procedure to solve individual requests or complaints of employees;
e) rules on labour discipline in the unit;
f) disciplinary offenses and penalties;
g) rules on disciplinary procedure;
h) methods to apply other legal or contractual specific provisions;
i) employees' professional evaluation criteria and procedures.

[17] The Labour Code
Art. 254. - (1 The employees shall be liable, on the basis of the rules and principles of contractual civil liability, for the material damages caused to the employer as a result of their fault and related to their work.
(3) if the employer finds that the employees caused a damage as a result of their fault and related to their work, it can request the employee, in a finding and damage assessment notice, the recovery of the damage, by mutual agreement, in a period of minimum 30 days from the date of communication.
(4) the value of the damage recovered by mutual agreement, under para. (3) cannot exceed five gross minimum salaries.

[18] Athanasiu Alexandru Codul muncii comentariu pe articole Update to vol I – II C.H. Beck Publishing House, Bucharest 2012 page 10
Strictly formal, the job description may be an annex to the individual labour contract or a different document, based on the internal regulation which makes possible the achievement of the rights and obligations of employees, including by legal mandating the employer to draw up the job description.
To conclude, the job description is not a legal element defining the position or occupation, but, usually, the means that enable the employer to adapt the normative content of the position or occupation to the requirements of the respective position.

JURISPRUDENCE IN THE LEGAL STATUS OF NULLITY IN LABOUR RELATIONS

Jurisprudence in the nullity of individual labour contract

1. Nullity in case of individual labour contract in the absence of employer's consent. **Civil Sentence no. 5166/May 18, 2011 in Case No. 3328/3/2010 Court of Bucharest**[19].

2. Competence of settlement the request on finding the absolute nullity of addenda to the individual labour contract without the consent of the parties. **Ploiesti Court of Appeal, Labour Conflicts Section.**

3. Annulment of individual labour contract on the grounds that the employee has not consented to the conclusion of the second individual labour contract. Dolj Court, Civil Sentence **737 from May 8, 2007,** in **Juridex**.

4. The term to request the ascertainment of nullity of the individual labour contract. Civil Sentence no. **396/24.03.2004, Constanța Court**

5. The causes of individual labour contract nullity that justify the possibility to invoke nullity at any time. **Decision of Romanian Court of Accounts no. 378/2004 regarding the unconstitutionality of provisions of art. 57 para. (2), art. 77[20] and art. 283 para. (1) par. d)[21] of the Code**,

6. The nullity of the addenda to the contract does not entail the nullity of the contract. The absence of the medical certificate when changing the place of work or the type of work entails the nullity of the addendum to the contract.

7. The nullity of the addendum to the individual labour contract, as a result of failure to comply with a provision of the applicable Collective labour contract. **Timișoara Court of Appeal**,

8. The nullity of the individual labour contract can appear in case of modification of individual labour contract duration[22].

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[19] The nullity of individual labour contract for the absence of employer's consent. Signing the labour contract by a person that does not have the legal capacity to represent the legal person. Published in Revista Română de Jurisprudență number 3 from March 31, 2012. Bucharest 2012 Universul Juridic Publishing House

[20] Art. 77 of the Labour Code after republication, became art. 79 of the Labour Code

[21] Art. 283 of the Labour Code after republication, became art. 268 of the Labour Code

[22] Galați Court of Appeal Section of labour and social insurance conflicts Decision No. 1200/R/2009

9. The null and void clause is covered by replacement de jure with a legal clause[23].

10. The nullity of the individual labour contract – expressly regulated in the Labour Code, by special norms and derogations, produces effects for the future. **Civil Sentence No. 4380/21.05.2009, Court of Bucharest**.

11. The proof of compliance with the legal provisions imposed under penalty of nullity regarding the termination of the individual labour contract for a determined period. Civil sentence no. 2624 from March 26, 2010, Court of Bucharest

12. The consequences of concluding an individual labour contract for determined period, breaching the provisions of art. 83 of the Labour Code republished. The nullity of the clause which provides the determined period of the determined period of the individual labour contract. The qualification of the respective contract as concluded for undetermined period. **Civil sentence no. 11216 from December 13, 2013 of the Court of Bucharest, in Case no. 37512/3/2012**[24].

13. Failure to apply the provisions of art. 38 of the Labour Code in the sense of nullity of individual labour contracts where, through a penal clause, the parties anticipate the equivalent of the prejudice suffered by the employer. **Civil sentence 3395/24.05.2007, pronounced by the Court of Bucharest**

Jurisprudence in decisions of modification, suspension, termination de jure, of the agreement of parties, of resignation and notification during probation

Jurisprudence in the nullity of decision of unilateral modification of the labour contract

[23] Galați Court of Appeal Section of labour and social insurance conflicts Civil Decision No. 543/R/2008

[24] Bodea Adela Cosmina Suspendarea contractului individual de muncă în cazul întreruperii sau reducerii temporare a activității angajatorului (Suspension of individual labour contrat in case of temporary discontinuation or reduction of the employer's activity) Revista Română de Jurisprudenţă, number 3 from July 31, 2014 Bucharest 2014 Universul Juridic Publishing House

I. Unlawfulness of individual labour contract modification after termination of secondment. **Civil Sentence No. 4789/2004** In **Case No. 2384/LM/2004 Court of Bucharest**

II. Nullity of unilateral modification of the individual labour contract/ job relationship in the absence of employee's written consent[25]**.**

III. Nullity of decision of unilateral modification of the individual labour contract duration. **Civil Sentence No. 1311/0312.2007 Maramureș Court**

IV. Unilateral modification of the individual labour contract. The effect of absolute nullity of unilateral modification. **Civil Sentence No. 2273 from March 18, 2009, pronounced by the Court of Bucharest**

V. Unilateral modification of the individual labour contract. Type of work, place of work and salary **Ialomița Court, Civil Department**, by **Civil Sentence No. 953/F from May 4th, 2010**

VI. Modification of the place of work and salary. Employee with management position. **Civil Sentence No. 3475 from April 22, 2009, Court of Bucharest,**

Jurisprudence in the nullity of decision to suspend the individual labour contract

I. Nullity of unilateral decision to suspend the individual labour contract regulated by the applicable collective labour contract. **Constanța Court** by **Civil Sentence No. 109 from January 24 , 2005**

II. Suspension of the period of execution of the individual employment contract, namely the application of a disciplinary sanction in case of individual labour contract suspension during maternity leave, respectively during childcare leave *Civil* **Sentence No. 705 from October 16, 2012 Dolj Court**

Jurisprudence in the nullity of the decision of *de jure* termination of the individual labour contract

I. De jure termination of the individual labour contract does not involve the obligation of the employer to fulfil formalities or to issue an act of finding[26].

[25] Decision of Pitesti Court of Appeal Civil Department, conflicts labour and social insurance conflicts No. 212/R/CM from April 18, 2006, Revista Română de Dreptul Muncii No. 2/2007, Wolters Kluwer Publishing Bucharest 2007, page 152 - 161

[26] Iasi Court of Appeal, Labour and social insurance Decision No. 739/14.11.2006

II. The nullity of decision of de jure termination of the individual labour contract in case of cumulative fulfilling the conditions of standard age and minimum period of contribution for retirement

III. The nullity of decision of individual labour contract termination under the provisions of art. 84 para. (2) of the Labour Code **Court of Bucharest Civil Sentence No. 8698/09.10.2013** *and* **Civil Sentence No. 1595/27.06.2012 of Court of Bacau, Civil Department**

Jurisprudence in the nullity of decision of the individual labour contract termination by mutual consent

I. The nullity of decision of individual labour contract termination by mutual consent, in the absence of the employee's consent. **Court of Bucharest, in Case 2144/3/2010**

II. Termination of the individual labour contract by mutual agreement, the absence of obligation to issue a decision of individual labour contract termination. **Civil Sentence No. 7424/20.10.2010, Court of Bucharest**

Jurisprudence in the nullity of the unilateral act of resignation, and of decision of unilateral act of resignation, and the decision which ordered the termination of the individual labour contract through resignation

I. Resignation. Certainty of the will of the employee. **Civil Sentence No. 4204/17.05.2010 Court of Bucharest**

II. Document that does not meet the conditions to qualify as resignation.

Civil Decision No. 1073/R/2011 Bucharest Court of Appeal

III. Pressures from employer on the employee to resign. Vice of consent. Cancellation of the employer´s decision on the termination of the individual employment contract. **Civil Decision No. 1332/2009 Alba Iulia Court of Appeal.**

IV. Nullity of the decision for termination of the individual labour contract by resignation in the absence of notification of the employee's resignation. Absence of formal act of resignation. **Civil Sentence No. 736/2003 Arad Court**.

Nullity of the notification ordering the termination of the individual labour contract during the probation period. Jurisprudence

I. Communication of the notification ordering the termination of the individual labour contract during the probation period **Bucharest Court of Appeal** through **Decision No. 2009R/04.05.2010, unpublished**[27]

II. Establishing the concept regarding the duration / end of the probationary period

Bucharest Court of Appeal Decision No. 2009R from May 4, 2010 unpublished[28].

III. Absence of obligation to motivate the individual notification of termination of employment on probation period. **Bucharest Court of Appeal** [29]

IV. Notification of individual labour contract during the probation period. Individual employment contract termination during the probationary period does not constitute an abuse de jure. Invoking the ultractivity of law. **Civil Sentence No. 2313/09.03.2012 Court of Bucharest**

V. Nullity of notification of the individual employment contract termination during the probation period. Invocation of the applicable collective labor contract provisions at unit level. **Dolj Court Civil Sentence No. 2509/2015**

Jurisprudence in nullities of dismissal decisions.

Jurisprudence of European Committee regarding the interpretation of art. 24 of the Revised European Social Charter[30]

Regarding the judicial practice of the European Committee, it is of relevant practical importance the application of provisions of Art. 24 of the European Social Charter (revised).

Thus, according to art. 24[31] "*the employees have* ***the right to protection in case of dismissal.***

[27] Farmathy Amelia op. cit. page 106
[28] Farmathy Amelia op. cit. page 107
[29] Mischie Beatrice, Conflicte de muncă, Culegere de practică judiciară, C. H. Beck Publishing, Bucharest, 2010, page 154 – 156
[30] Digest De Jurisprudence Du Comite Europeen des Droits Sociaux
[31] Conclusions 2003, statement of interpretation of Article 24: "The Committee indicates that Article 24 of the Revised Charter obliges states to establish rules on termination of employment to all workers who have signed an employment contract." To assess compliance with Article 24 rules applied in the case of dismissal, the examination will focus on:
- Reasons for dismissal under the general scheme of redundancy and the most rigorous safeguards against certain forms of dismissal (Article 24 and Annex Article 24);

Dismissal for reasons related to the employee.

Nullity of decision of disciplinary dismissal and disciplinary sanction

1. ***The absence of one of the conditions of disciplinary liability entails the nullity of the decision of disciplinary sanction.*** **Civil Sentence No. 135/2013**
2. ***Incomplete convocation prior to disciplinary investigation. Nullity of decision.*** **Decision No. 1281/2012 Brasov Court of Appeal**
3. ***Written notice. Absence of obligativity of prior investigation***. **Timisoara Court of Appeal Decision No. 550/2013.**
4. ***Dismissal ordered for several disciplinary violations. Absence of absolute nullity grounds of the decision appealed against.***

Bucharest Court of Appeal in **Civil Sentence No. 233/R from 16.01.2014**

5. ***Unjustified absence from the place of work. Participation in a training. Absence of employee's fault.***
6. ***Unjustified absence of the employee as a result of reintegration into employment. Unjustified absences. Absence of grounds regarding the annulment of decision of sanctioning*** **Decision No. 5378 din 20.12.2011 Cluj Court of Appeal**

- Penalties for unjustified dismissal and the status of the body empowered to impose them (Article 24b).

The Committee recalls that several provisions of the Charter and Revised Charter require enhanced protection against dismissal for certain reasons:

-articles 1§2, 4§3 and 20: Discrimination;
-Article 5: Trade union activity;
-Article 6§4: Participation in a strike.
-Article 8§2: Maternity;
-Article 15: Disability;
-Article 27: Family responsibilities;
-Article 28: Worker representation.

Most of these reasons are also listed in the Annex to Article 24 as being the valid reasons for dismissal. However, the Committee will continue to examine the compliance of situations arising at national level with the Revised Charter in respect of these reasons taking into account the reports on each of these provisions. The Committee shall limit such examination situations extensive protection against dismissal for reasons stipulated in the Annex to Article 24 thus will be limited to those included elsewhere in the Charter, namely "filing a complaint or participation in proceedings against an employer involving alleged violations of laws or regulations or recourse to competent administrative authorities "and" temporary absence from work due to illness or injury".

The Committee considers that national legislation should contain an express warranty against dismissal for "the fact of making a complaint or participating in proceedings against an employer for alleged violations of the law by it or for submitting an appeal to the administrative authority "(according to the Annex to Article 24).

Indeed, the existence of guarantees to protect against repressive measures, particularly in the form of dismissal of persons who appealed to courts or other competent authorities, to benefit from their rights is essential in any situation where an employee claims a violation of the law (see, mutatis mutandis to Articles 1§2 and 4§3).

In the absence of express prohibition in national law, the responsibility to demonstrate how the legislation complies with the requirements of the Revised Charter belongs to the States.

7. ***Disciplinary violation not committed by the sanctioned employee. Nullity of Decision.*** **Bucharest Court of Appeal** by **Decision No. 3970/R/2012**

<u>Jurisprudence regarding the nullity of decisions ordered in the other cases of dismissal for reasons related to the employee.</u>

1. Dismissal for physical/mental inaptitude. The decision of a specialized body. Medical expertise on work capacity. **Decision No. 2427/R/21.08.2006**, ***Bucharest*** **Court of Appeal** in **Decision No. 2427/R from August 21, 2006**.

2. Dismissal for professional inadequacy. **Mehedinti Court** in **Case No. 1672/ March 2, 2004**[32]

3. Nullity of dismissal decision in case the employer does not fulfil its obligation to provide another place of work in case of dismissal for professional inadequacy

4. Dismissal for professional inadequacy. Conditions. **Civil Decision No. 81/R from 09.01.2014 Bucharest Court of Appeal**

<u>Dismissal for reasons not related to the employee</u>

A. Individual dismissal

1. Individual dismissal motivated by activity reorganization. The nullity of the measure considering the modification de facto, in general terms.

Bucharest Court of Appeal by Civil Decision No. 796 from March 12, 2015

2. dismissal by breaching the provisions of art. 62 para. (2) of the Labour Code. **Bucharest Court of Appeal Decision No. 2638/R/2006** and **Bucharest Court of Appeal Decision No. 1702/R from April 13, 2010**.

3. Violation of the prohibition of dismissal under the law - maternity leave [33].

4. Violation of the prohibition of dismissal under the law – pregnant employee[34].

5. Nullity of dismissal decision without period of notice.

Bucharest Court of Appeal by Civil Decision No. 5707/R from 28.11.2011[35]

[32] Dismissal for professional inadequacy. Cancellation. Reintegration in office. Sentence No. 292/2004. 292/2004 Revista Romana de Dreptul Muncii No. 3/2004, Revista Rosetti, Bucharest 2004, page 136 - 140

[33] Cluj Court of Appeal, Civil Department, labour and social insurance conflicts, minors and families, Civil Decision No. 1945/2008

[34] Bucharest Court of Appeal Civil Department VII labour and social insurance conflicts

B. Collective dismissal.

1. Failure to state reasons for ordered dismissal decision in the context of a collective dismissal. Failing to state the criteria of precedence in the case of collective dismissal. **Bucharest Court** by **Decision No. 4408/18.09.2004**[36]

2. Collective dismissal. Nullity of decision. Conditions. **Bucharest Court of Appeal by Civil Decision No. 4607/R from 10.10.2013**

3. Collective dismissal. Criteria for assessment of professional competence and discipline. Conditions. **Bucharest Court of Appeal by Civil Decision No. 2744/R from 05.04.2012**

Jurisprudence in collective labour contract nullity

I. Rejection of the appeal on the nullity of the collective labor contract because the contents of clauses that were to be negotiated by the president of the Board of Directors with the Union were not approved by the General Meeting of Shareholders. **Valcea** Court by **Civil Sentence No. 26/01.02.2002**

II. Non-provision in law of nullity of collective labor contract at unit level for absence of signatures of parties. **Civil Sentence No. 2770/20.06.2005 Bucharest Court and Cluj Court of Appeal – Decision No. 139/R from 2008**.

III. The effects of not inviting to negotiation all parties entitled to negotiate the collective labour contract[37].

IV. Invoking reasons that do not entail nullity, but target the unenforceability of this contract. **Romanian Constitutional Court Decision No. 511/2006** and **Decision No. 380/2004**.

V. Absence of a nullity cause in case of refusal to participate in the negotiation of a new collective contract at unit level[38]

VI. The nullity of the addendum to the contract in the absence of negotiation mandate. **Bucharest Court of Appeal Decision No. 2609/R from June 4, 2010**[39].

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[35] Jurisprudence. Failure to give the notice period. Grounds for nullity of dismissal decision. Conditions. Revista Romana de Dreptul Muncii No. 3/2014 Wolters Kluwer Publishing, Bucharest 2014 page 114 – 120
Jurisprudence. Nullity of dismissal in the absence of the notice period. Conditions. Revista Romana de Dreptul Muncii No. 5/2014 Wolters Kluwer publishing Bucharest 2014 page 134 – 140
Bucharest Court of Appeal Civil Department VII and for causes regarding labour and social insurance conflicts Decision 81/R/2014

[36] Bucharest Court of Appeal Civil Department VII and for causes regarding labour and social insurance conflicts Decision No. 1415/2005 Revista Romana de Dreptul Muncii No. 3/2005 Rosseti Publishing House, Bucharest 2005 page 139 – 140

[37] Constanta Court Civil Department, Civil Sentence No. 1142/15.10.2008.

[38] Ploiesti Court of Appeal labour and social insurance conflicts Decision no. 2180/CM/2009

CONCLUSIONS AND PROPOSALS *DE LEGE FERENDA*

In concluding this paper dedicated to the nullity in labour contracts, it appears that an important analysis was dedicated to unilateral acts issued by the employer, namely, dismissal decisions; in this regard, "statistical" details on the practical issues of nullity in labour law documents should be provided.

Most of nullity cases found in legal practice, analysed in the legal doctrine are mainly encountered in the nullity of dismissal decisions, as the discontented employees, challenge the employer's decisions.

Continuing the analysis, we should specify that the nullity regarding the individual labour contract is not particularly frequent in practice, as a result of the amicable nullity or the fewer nullity cases that appear in these contracts.

At the end of the theoretical analysis of the institution of nullity, we provide some proposals *de lege ferenda*.

Regarding the nullity of the individual labour contract, some proposals *de lege ferenda* should be made on the necessity of the written form *ad probationem* and the possibility to remedy nullity as a result of the absence of medical opinion at employment, provisions that, in fact, existed in the Labour Code without modifications, unjustly abrogated by Law no. 40/2011.

To conclude, de *lege ferenda,* should be abrogated **the provisions of art. 16 para. (1) of the Labour Code republished, returning to the provision prior to the modification of the Labour Code by Law No. 41/2011**.

To conclude with the proposals to modify art. 16 of the Labour Code republished and the written form of the contract, we consider the provisions of para. (2) providing: "***the obligation to register the individual labour contract before starting work in the general register of employees, by sending this recording to the territorial labour inspectorate"*** should also be abrogated. As it was already mentioned in the legal doctrine[40] we consider "*this text, interpreted rigidly, may lead to the*

[39] Decision of Pitesti Court of Appeal Civil Department labour and social insurance conflicts No. 212/R/CM from April 18, 2006, Revista Română de Dreptul Muncii No. 2/2007, Wolters Kluwer Publishing Bucharest 2007, page 152 - 161

[40] Athanasiu Alexandru, Codul Muncii, Comentariu pe articole, Updated to Volume I and II, C. H. Beck Publishing House, Bucharest, 2012, page 7

conclusion that if the employee worked before the registration, the labour contract is null and void."

De lege ferenda we consider necessary the modification of **para. (3) of art. 27 of the Labour Code in the sense that although at employment there was no medical certificate, it can be obtained after the conclusion of the contract,** correlating the legal provision with the rule mentioned in art. 57 para. (3) of terms of nullity remediability.

D*e lege ferenda* we also deem necessary **the completion of the provisions of art. 56 par. d) of the Code, meaning that an individual labour contract is terminated as a result of the finding of absolute or relative nullity**, at the date nullity was found by mutual agreement. The current text of the law only targets absolute nullity, although it surely occurs in case of relative nullity; the proposal of a sustainable *de lege ferenda* is mentioning the contract termination cause ope *legis*, finding the nullity without mentioning whether it is absolute or relative nullity or, eventually, if the absolute nullity is mentioned, relative nullity should be mentioned in the same context.

De lege ferenda in the following situations: termination of **the fixed-term individual labour contract with the violation of the legal provisions regarding the termination cases[41] and the failure to comply with the conditions of contract termination, without specifying expressly the contract period, extension without complying with the conditions laid down in art. 83 after the initial term has expired, and without observing the provision to conclude maximum 3 successive fixed-term contracts[42], to set as penalty** the absolute nullity of such a contract. Also, by applying the principle of *substitution of the null and void provision in the collective contract,* this principle could be established in case of individual labour contract, and the fixed-term in case of an individual labour contract concluded without observing the legal provisions to be replaced with the indefinite duration. In this regard we mention the proposal made by a legislative initiative to modify the Labour Code[43].

[41] Art. 83 par. a) – h) of the Labour Code;
[42] Art. 82 para. (4) of the Labour Code
[43] Athanasiu Alexandru Vlăsceanu Ana Maria Kniesner Mariana Teoroc Ştefan Onofrei Ioana Ionescu Mircea Anghel Dan Valentin Poroşnicu Alexandru Miu Ilie Căpăţână Gheorghe Mureşan Adolf Freibergher Niculina Hulubei Emilian Petre Costel Pisc-Scrădeanu Ion Chelaru Dănuţ Mihai Cristian Costin Dumitru Ivaşcu Minel Members of the Initiative Committee, Legislative initiative from *16/11/2012* Published in the Official Gazette, Part I, no. 773 from 16/11/2012 *Legislative initiatives of the citizens under Law no. 189/1999 – Explanatory*

Also, *de lege ferenda* the **provisions of art. 267 para. (1) par. d) of the Code, stipulating that if an individual or collective labour contract or provisions thereof are found null and void, during the contract nullity may be requested should be abrogated,** adopting the rule from the common law (**absolute nullity may requested at any moment and relative nullity may be requested in a prescription period, such as the general period of 3 years** or in case of legal effects that occur after the termination of contracts, the nullity should be found during the period the contract is still in effect. Regarding the practical interest of this proposal, it can be noticed that in case of subsequent litigations related to the individual labour contract, the request of a party regarding cause of nullity both by way of action and by way of exception, currently, considering the legal provision invoked, it shall be rejected as belated. This way, we can apply the common law rule in the field, namely art. 1249[44] of the Civil Code in force.

Regarding the cases provided in the Code, where the individual labour contract **is terminated de jure**, we propose *de lege ferenda* the completion of provisions of **art. 56 para. (1) par. i) of the Labour Code** with the provisions of art. **84 para. (2)**, namely: *the existing labour contract terminates de jure: at the date* ***of the expiry of the individual labour contract*** *concluded* ***for a fixed period*** *or in case of individual labour contract concluded for a fixed period, it terminated to replace an employee whose individual labour contract is suspended,* ***the duration of the contract expires at the termination of the reasons that caused the suspension of the individual employment contract of the post-owner***.

Regarding the nullity in case of dismissal decisions, we make more proposals *de lege ferenda*, that the text of art. 76 par. d) of the Labour Code under the sanction of nullity of dismissal decision, should be corroborated with the provisions of art. 64 para. (1) and, eventually, of para. (2) to stipulate **the obligation of vacancies, to the extent of their existence, and also professional compatibility of the employee in**

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statement regarding the legislative initiative of citizens to promote the law draft on the modification and completion of Law no. 53/2003 – Labour Code on the introduction:
art. 84[1] ***If it is found by a court the employer concluded a fixed-term individual labour contract for permanent activities, breaching the provisions of art. 82, the individual labour contract shall be considered indefinite***

[44] the Civil Code
Art. 1.249. - (1) If the law does not provide otherwise, absolute nullity can be invoked at any time, by way of action or by exception.
(2) Relative nullity can be invoked by way of action only in the prescription period set by law. However, the party that is requested to execute the contract can always oppose the relative nullity of the contract, even after the expiration of prescription period for the action for annulment.

case of dismissal ordered for reasons not related to the employee, under art. 65 para. (1) of the Code, whether it is about individual or collective dismissal and, eventually, **to eliminate the obligation of jobs provision in case of dismissals ordered on ground of professional inadequacy** where the objective of the vacancies is somehow "pleonastic" considering that before dismissal for professional inadequacy he/she is offered jobs compatible with the capacity of an employee found inadequate, as a result of professional assessment. Also, based on the legal requirements before dismissal, to provide jobs compatible with the capacity of the employee, with the dismissal for professional inadequacy can also be extended the obligation regarding jobs in the same conditions, not only in case of termination *de jure*, under art. 56 para. (1) par. e) but also under art. 56 para. (1) par. g)[45] of the Code which is somehow related to the employee's professional competence, certified by third parties.

Regarding the content of the dismissal decision for reasons not related to the employee, *de lege ferenda* should be completed the regulation on the content of dismissal decision, under penalty of nullity, by completing art. 76 with a para. (2) mentioning the formal conditions regulated in art. 62 para. (3) of the Code, that are missing, namely that the decision: "*contains details on the period it can be appealed against and the court where it can be appealed against"* or to introduce a single legal text in the Labour Code to regulate the content of the dismissal decision, whatever the reasons for dismissal.

Regarding the content of disciplinary sanction decision, considering the provisions of art. 252 para. (2) par. c)[46] of the Labour Code, *de lege ferenda,* this provision must be corroborated with art. 251 para. (1)[47] of the Code; thus, under penalty of absolute nullity, it cannot be ordered that all disciplinary sanction decisions to include these details, provided that in case of written notice the reasons for

[45] Art. 56 para. (1) par. g) of the Labour Code
The individual labour contract terminates *de jure*:
g) from the date of withdrawal by authorities or competent bodies the permits, authorizations or necessary certifications required by the profession;
[46] art. 252 para. (2) par. c)
Under penalty of absolute nullity, the decision must contain the reasons the defense formulated by the employee during the prior disciplinary investigation was eliminated or the reasons the investigation was not conducted, under art. 251 para. (3)
[47] art. 251 para. (1)
S Under penalty of absolute nullity, no measure, except for the one provided in art. 248 para. (1) par. a), (**written notice**) cannot be ordered before prior disciplinary investigation

eliminating the defense of the employee cannot be mentioned as prior disciplinary investigation is not compulsory.

Considering that by granting the notice period by dismissal decision, the provisions of art. 77[48] of the Code do not seem to be observed, we propose *de lege ferenda* that in art. 75 of the Labour Code to be added para. (4) stipulating, under sanction of nullity of decision, that before issuing the dismissal decisions where the law requires a notice period, to have **the obligation to issue a Notification on the notice period**, in written, containing stipulations on the calculation of the notice period and the legal grounds for dismissal. Given the aspects above, we should mention Law no. 1929 modified in 1932, on the labour contract, which regulated the notice period as essential for employment termination; at that time, it was more important than the termination decision.

De lege ferenda we support **the regulation in the Labour Code of the written form – *ad validitatem* requirement for contract modification and termination decision,** establishing the content of the decision, under nullity penalty in meeting the requirements stipulated for dismissal, such as art. 62 para. (3), art. 76 par. a) – c) of the Labour Code. Thus, we can illustrate the contract modification decision, namely the secondment or delegation decision, imposing conditions of substance and form in motivating a unilateral decision, specifying the duration of delegation or secondment, the period to appeal against and the competent court.

However, considering the practice of the Romanian Constitutional Court regarding the suspension of the individual labour contract as a result of a criminal complaint submitted by the employer against the employee, we consider *de lege ferenda* necessary, as proposed in a legislative initiative[49] **the modification of art. 52 para. (1) par. b) *section I* of the Labour Code** as follows:

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[48] The Labour Code:
Art. 77. – The dismissal decision produces its effects from the date of communication to the employee.

[49] Athanasiu Alexandru Vlăsceanu Ana Maria Kniesner Mariana Teoroc Ştefan Onofrei Ioana Ionescu Mircea Anghel Dan Valentin Poroşnicu Alexandru Miu Ilie Căpăţână Gheorghe Mureşan Adolf Freibergher Niculina Hulubei Emilian Petre Costel Pisc-Scrădeanu Ion Chelaru Dănuţ Mihai Cristian Costin Dumitru Ivaşcu Minel Members of the Initiative Committee, Legislative initiative from *16/11/2012* Published in the Official Gazette, Part I, no. 773 from 16/11/2012 *Legislative initiatives of the citizens under Law no. 189/1999 – Explanatory statement regarding the legislative initiative of citizens to promote the law draft on the modification and completion of Law no. 53/2003 – Labour Code*

The individual labour contract can be terminated upon employer's initiative in the following conditions:

- in case of starting the criminal proceedings as a result of a criminal complaint submitted by the employer against the employee *or if the employee was indicted for criminal acts incompatible with the position occupied, until a final court decision.*

In legal practice we face dismissal decisions under the penalty of nullity sanction for various reasons. Given the *intuitu personae* character of the individual labour contract, and, the various disagreements, even conflicts that arise during the labour relationship, between the employer and the employee (some of them aren't even stipulated in any law that could eventually lead to dismissal, thus affecting irreparably the labour relationships) to avoid illegal and repeated dismissals and labour conflicts, and to relieve the courts of a large number of labour disputes, it is imposed by *de lege ferenda* the modification of the Code, thus **regulating the termination of the individual employment contract by mutual agreement and establishing compensations to be paid to the employee at the date of termination.**

At the same time, it is not a problem directly related to the legal status of nullity, also starting from the *intuitu personae* of the individual labour contract, and we support the proposal for *de lege ferenda* when, **for objective reasons, as a result of an opportunity analysis of the dismissal the court finds this impossibility of reintegration, the position was eliminated, the economic grounds are real etc., as a result of annulment of dismissal decision, the reintegration is no longer possible, the court may have several legal options, as follows:**

- *When it is possible, to dispose reintegrate into employment on an equivalent or similar position*, with the consent of the respective employee; if the employee refuses reintegration on an equivalent or similar position, he/she should benefit from a compensation *calculated based on certain criteria, with the proviso that he/she does not agree with reintegration into employment on an equivalent or similar position, thus reducing the amount of compensations granted by the court;*
- *To dispose directly the payment of compensations calculated based on certain criteria,* such as seniority of the appellant employee or the seniority

with the employer that unlawfully dismissed the employee, the age of the appellant, whether there are only several years until the meeting the contribution period and the retirement age, the professional situation with certifications held, the period of time necessary to be employed at another employer (given the conditions on the employment market) in similar conditions, or the social situations (the only breadwinner for the dependents etc.)

In case of collective dismissal, considering the solutions in the comparative law, we believe the proposal for *de lege ferenda* should take into account the current legal regulations on **exclusive payment of compensation in case of failure to comply with collective dismissal procedure,** as regulated, for example, in Italy.

In conclusion, we state the proposal during the period[50] of application of Law. No. 10/1972 – the Labour Code as *de lege ferenda* **to be regulated in the Labour Code the institution of revocation the disciplinary sanction act**; we believe that even after 30 years from the publication of the article, it is still of present the regulation in the Labour Code regarding the **revocation of disciplinary sanction decision,** and even **the revocation of unilateral acts,** as in case of nullity of dismissal decision, and the employer can issue the unilateral revocation decision, which should meet certain conditions of substance and form, according to the Code, establishing the date until revocation can occur and the its effects. Therefore, most of the times, revocation of these unilateral acts is made by the employer which, after finding some existing causes of nullity in these documents, revokes unilaterally its own acts.

Regarding the financial liability of employees *de lege ferenda* we propose the **elimination of evaluation and conclusion note and governed by art. 254 para. (3) and para. (4) of the Labour Code** which as stated[51] it is *"an imperfect solution*."

Finally, we consider that *de lege ferenda,* **the institution of nullity of the collective labor contract should be regulated along with individual labor contract**

[50] Athanasiu Alexandru Aspecte teoretice şi practice ale revocării deciziei de desfacere disciplinară a contractului de muncă şi a deciziei de imputare Revista Română de Drept No. 3/1984 Association of Lawyers from R.S.R. page 37

[51] Athanasiu Alexandru, Codul Muncii Comentariu pe articole Update, vol. I and II, Publisher C.H. Beck Bucharest 2012 p. 141

nullity in the Labour Code, respectively, in Title VIII "The collective labor contract".