Employees’ Claims in the Event of Employer Insolvency in Romania:

A Comparative Review of National and International Regulations

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Foreword

The current global economic crisis (the "Great Recession") has presented the world with unprecedented challenges related to the creation and maintenance of decent work opportunities. In Romania, as elsewhere, the crisis has resulted in a number of company insolvencies, which have a negative impact on employers and workers alike. Enterprise insolvency during the crisis has negatively affected employment rates as well as wage payments in Romania. While a Wage Guarantee Fund exists (in line with EU legislation) to pay employees working for insolvent enterprises their outstanding wage claims, few employees have applied to the Fund, either through lack of knowledge of the Fund's existence or because of the Fund's practical and procedural shortcomings.

This study analyses the increase in insolvency proceedings in Romania in line with the global economic crisis. It analyses their prevalence by region and by sector. It then considers the legal steps taken by Romania to protect workers in the face of widespread employer insolvency, including the adoption of relevant European Law: Council Regulation 1346/2000 on insolvency proceedings, and Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer. However, as unemployment is on the rise and relatively few persons benefit from the Wage Guarantee Fund, it remains important to seek ways to mitigate the negative effects of insolvency on workers in Romania.

The ILO response to the crisis is the Global Jobs Pact, adopted by tripartite consensus at the International Labour Conference in June 2009, which establishes an internationally agreed approach to guide national and international policies aimed at stimulating economic recovery, generating jobs and providing protection for working people and their families. The Global Jobs Pact calls for a decent work response to the crisis in order to strengthen efforts to maintain and create jobs, stimulate the development of sustainable enterprises, develop quality public services and protect both male and female workers, while safeguarding rights and promoting voice and participation.

It provides a framework for the period ahead and a resource of practical policies for the multilateral system, governments, workers and employers. The Global Jobs Pact prioritizes employment and building social protection as key elements of international and national action to aid recovery and development.

In the period of crisis, one guiding principle – highlighted by the Global Jobs Pact as necessary for sustainable recovery and growth – is that governments should adopt policies which promote international labour standards. These standards create a framework for ensuring rights at work and contribute to building a culture of social dialogue, both of which are of great importance during difficult periods. International labour standards include not only the fundamental Conventions, but a number of other ILO instruments concerning employment policy, wages, the employment relationship, and the termination of employment. Among these international standards whose importance has grown is ILO Convention 173 on the Protection of Workers Claims (Employer's Insolvency), 1992.

Romania has adopted EU legislation on the protection of workers in the case of employer insolvency. As a result, it has been argued that Romania does not need to ratify ILO Convention 173. However, this study illustrates how the Convention differs in a number of ways from the legal framework currently in place in Romania, comparing EU and Romanian legislation with the provisions of Convention 173. Indeed, Romania's ratification of Convention 173 would establish more rights and additional protection for employees and employers alike. Ratification of Convention 173 would result in the following:

- the requirement that the social partners be consulted before certain categories of workers were excluded from the protection given under the law, while the government currently can create these categories unilaterally;
- a longer minimum period for employee holiday pay coverage, replacing the three month period currently required in Romanian law by a period of six months;

- the coverage of additional categories of claims under the law; and
- the establishment of the possibility that other, more protective agreements could be added to Romanian jurisprudence in the future.

For these reasons, the study recommends that Romania ratifies Convention 173 in addition to maintaining the legal framework currently in place.

This report has been prepared through the joint collaboration of Cristina Mihes, Senior Specialist in Social Dialogue, and Verena Schmidt, Senior Specialist on Working Conditions and Gender Equality in the ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe in Budapest (DWT/CO-Budapest). Stefan Roch, an external collaborator, carried out substantial redrafting and updating of the text, which is much appreciated.

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1. Background

Of the many negative effects of the global economic and financial crisis, one not frequently considered is the inability of enterprises to meet their obligations to both their suppliers and their employees. One possible legal consequence of this is that they are forced into insolvency.

In Romania, the effects of the global economic crisis first became visible in the last quarter of 2008 and worsened in 2009. Unlike neighbouring economies, however, the Romanian economy shows no signs of recovery at present. The most optimistic forecast estimates that only in the second quarter of 2010 Romania is likely to register modest economic growth.

Consequently, we are witnessing a significant increase in the number of enterprises undergoing insolvency.

Among the reasons for the alarming growth in insolvency at the national level is the accumulation of debt which, in the long run, generates mounting interest payments as well as costs due to the depreciation of the national currency, shrinking markets and declining sales. This leads to a shortage of capital and a lack of liquidity, which in turn reduces access to credit for small and medium-size enterprises (SMEs).

As it is common practice in most EU member states, when an enterprise cannot pay its debts, any creditor having a claim against it over a certain threshold is entitled to request the opening of insolvency proceedings in order to recover part or all of the debt from the remaining assets.

Under these circumstances, many employers have been forced to restrict their commercial activities to those able to generate funds for repaying debts and have accordingly had to significantly reduce costs, especially labour costs.

In 2009, with the aim of encouraging bank lending, the National Bank of Romania took a series of measures to reduce the base lending rate and, at the same time, to reduce the reserves that the credit institutions have to deposit with the central bank. Unfortunately, the credit institutions substantially limited corporate lending as a result of the financial crisis and demanded high levels of security for borrowing and high interest rates. In particular, SMEs have been negatively affected by this through high interest rates and commission fees, as well as so-called hardship clauses.

Table 1 presents statistics on the enterprises which became insolvent in the period 2007 to June 2010. After rising from 14,104 insolvency proceedings in 2007 to 14,483 in 2008, there were 18,421 insolvency proceedings in 2009, representing a 20 per cent annual rise. The total number is likely to increase in 2010, as there were more insolvency proceedings by June 2010 than there were by June 2009.

TABLE 1
NUMBER OF INSOLVENCY PROCEEDINGS, BY SECTOR, ROMANIA, 2007 – 2009 AND JUNE 2008 – JUNE 2010

Sector	June 2010	June 2009	June 2008	Total 2009	Total 2008	Total 2007
Wholesale trade	2,256	2,134	1,501	3,501	3,553	2,371
Retail	2,010	2,136	1,770	3,684	2,932	3,431
Construction	1,641	1,328	822	2,497	1,666	1,066
Transport	816	661	411	1,237	811	723
Others	708	577	377	1,022	782	520
Manufacture of textile garments and footwear	593	442	355	979	718	625
Hotels and restaurants	583	592	387	927	793	810
Agriculture	537	372	341	762	705	731
Metallurgical industry	338	263	17	934	575	1,093
Food and beverages	332	365	391	573	627	1,064
Manufacture of wood and wood products	281	534	412	496	38	338
Real estate	179	137	88	223	158	302
Other personal service activities	145	116	50	281	159	121
Sanitation and refuse removal, sanitation and similar activities	107	127	79	206	163	185
Recreational, cultural and sporting activities	134	101	86	204	114	86
Manufacture of chemicals and chemical products	121	139	77	157	111	115
Machinery and equipment industry	89	101	71	166	94	136
IT	97	92	56	172	132	96
Financial intermediation	68	73	50	139	78	83
Post and telecommunications	82	73	50	129	97	92
Mining industry	44	32	72	54	131	45
Health and social assistance	37	25	17	47	19	26
Production and supply of electricity and heat, water and gas	23	15	13	31	27	45
Total	11,221	10,435	7,493	18,421	14,483	14,104

Source: Coface Romania, 2010 & Coface Romania, 2009.

Trade (either retail or wholesale and distribution), construction, transportation and hotels have been hit hardest by the economic and financial crisis. It is worth mentioning that private enterprises are dominant in these sectors. The least affected by the adverse effects of the crisis have been telecommunications, extractive industries, health and social insurance, and the production and supply of electrical and thermal energy, water, and gas (branches in which public ownership is the rule).

In the wholesale sector, during the same period, the initial peak was registered in 2007, at 3,431, although the 2009 number was slightly higher, with 3,684 proceedings.

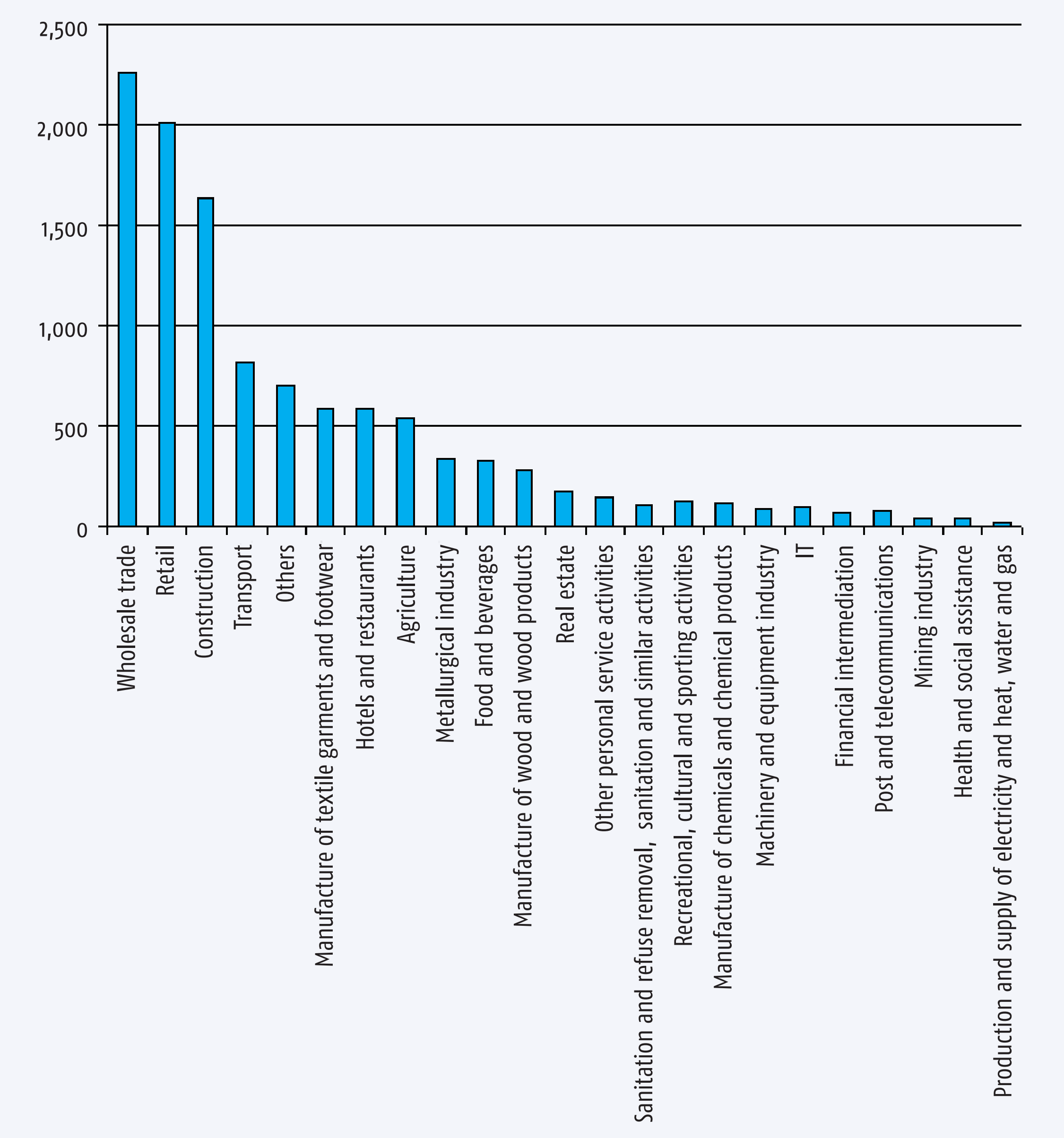
In contrast, in construction, the figure rose from 1,066 enterprises involved in insolvency proceedings in 2007 to 1,666 enterprises in 2008, while further increasing in 2009 to 2,497 enterprises.

Other sectors hard hit by the economic and financial crisis also registered substantial increases in insolvency proceedings:

- In transportation, the number of enterprises involved in insolvency proceedings rose from 723 in 2007 to 811 in 2008 and peaked at 1,237 enterprises in 2009.
- In hotels and restaurants, the number of enterprises involved in insolvency rose from 520 in 2007 to 782 in 2008, and reached 972 in 2009.

Figure 1 displays the insolvency proceedings registered in the first semester of 2010.

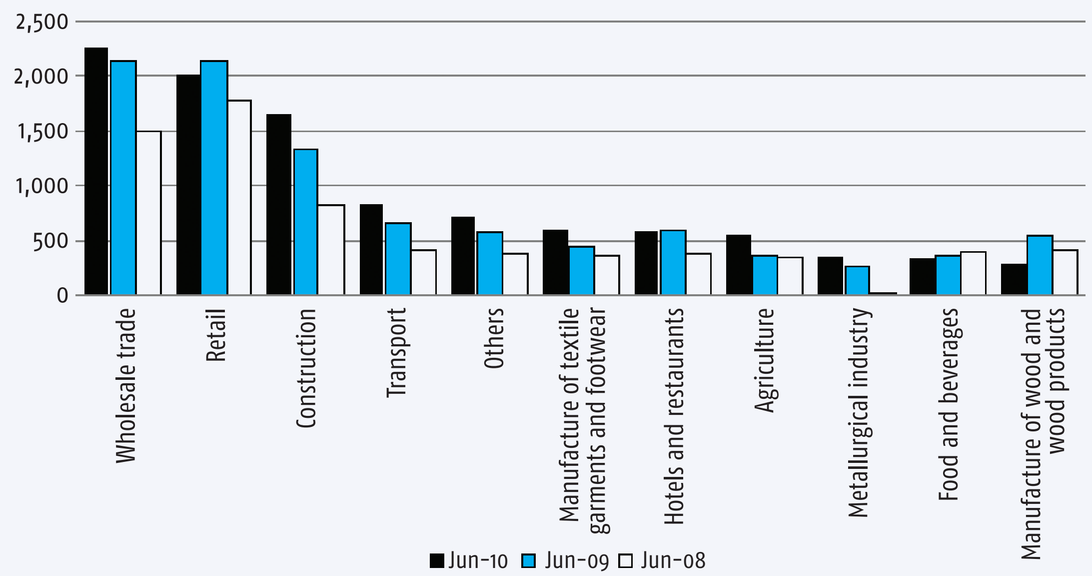
FIGURE 1
NUMBER OF INSOLVENCY PROCEEDINGS, SELECTED SECTORS, ROMANIA, JUNE 2010



Source: Coface Romania, 2010.

Total annual insolvencies in the abovementioned sectors are very likely to increase further by the end of 2010, as numbers of insolvencies were higher by midterm in most sectors, compared to the same period of previous years, as demonstrated in Figure 2.

FIGURE 2
NUMBER OF INSOLVENCY PROCEEDINGS, SELECTED SECTORS, ROMANIA, JUNE 2008, JUNE 2009 AND JUNE 2010



Source: Coface Romania, 2010 & Coface Romania, 2009.

Table 2 presents the distribution by county:

TABLE 2
DISTRIBUTION OF INSOLVENCIES, BY COUNTY, ROMANIA, 2008 – 1ST QUARTER 2010

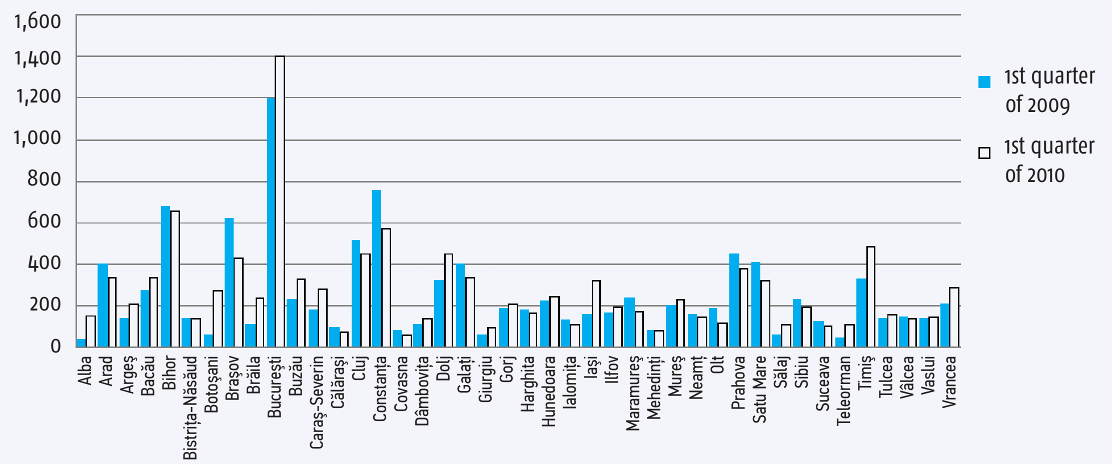
County	Total insolvency proceedings		
	2008	1st quarter of 2009	1st quarter of 2010
Alba	56	36	151
Arad	287	401	330
Argeş	169	137	207
Bacău	226	267	329
Bihor	475	675	657
Bistrița-Năsăud	170	129	129
Botoşani	162	58	266
Braşov	421	618	429
Brăila	219	111	232
Bucureşti	1,719	1,195	1,405
Buzău	490	229	323
Caraş-Severin	277	177	277
Călăraşi	150	94	66
Cluj	600	511	443
Constanța	572	752	571
Covasna	82	79	60
Dâmbovița	174	107	133
Dolj	319	319	447
Galați	645	392	330
Giurgiu	72	55	94
Gorj	561	184	208
Harghita	518	178	163
Hunedoara	469	215	242
Ialomița	89	123	102
Iaşi	388	156	319
Ilfov	168	161	191
Maramureş	248	232	169
Mehedinți	182	80	72
Mureş	344	198	230
Neamț	173	154	142
Olt	156	183	113
Prahova	654	444	377
Satu Mare	212	407	320
Sălaj	160	59	107
Sibiu	192	225	189
Suceava	352	118	97
Teleorman	56	42	106
Timiş	983	327	481
Tulcea	247	132	155
Vâlcea	197	141	134
Vaslui	199	131	145
Vrancea	650	203	280
Total	14,483	10,435	11,221

Source: Coface Romania, 2010 & Coface Romania, 2009.

As shown in Figure 3, in the period 2008–2009 Bucharest was the region most affected by company insolvencies, registering 1,719 in 2008 and 1,795 by 30 June 2009. In the same period, the counties most affected by insolvency proceedings were the most industrialized ones:

- In 2008: Timiş(983), Prahova (654), Galaşi (645), Cluj (600) and Constanşa (572);
- By 30 June 2009: Constanşa (752), Bihor (675), Braşov (618), Cluj (511), Prahova (444) and Satu-Mare (407).

FIGURE 3
DISTRIBUTION OF INSOLVENCIES, BY COUNTY, ROMANIA, 1ST QUARTER OF 2009 AND 1ST QUARTER OF 2010



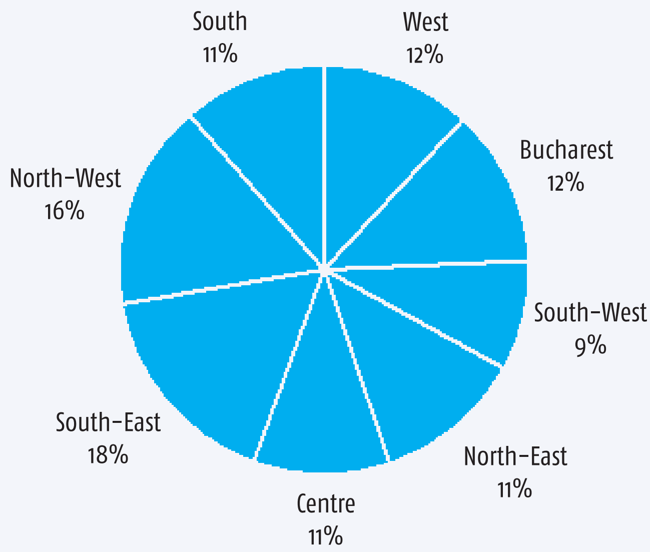
Source: Coface Romania, 2010 & Coface Romania, 2009.

TABLE 3
DISTRIBUTION OF INSOLVENCIES, BY REGION, ROMANIA, 2009 – 1ST HALF OF 2010

Region	1st half of 2009		1st half of 2010	
	Total insolvency proceedings	Share of insolvency proceedings in total proceedings	Total insolvency proceedings	Share of insolvency proceedings in total proceedings
West	1,120	10.7	1,330	11.9
Bucharest	1,195	11.5	1,405	12.5
South-West	907	8.7	985	8.8
North-East	884	8.5	1,287	11.5
Centre	1,334	12.8	1,222	10.9
South-East	1,819	17.4	1,891	16.9
North-West	2,013	19.3	1,825	16.3
South	1,163	11.1	1,276	11.4
Total	10,435	100%	11,221	100%

Source: Coface Romania, 2010 & Coface Romania, 2009.

FIGURE 4
PROPORTION OF INSOLVENCY PROCEEDINGS, BY REGION, ROMANIA, 1ST HALF OF 2010



Source: Coface Romania, 2010.

At the national level, there is a centralized system for monitoring the payment of wages. The National Office of Trade Registration records the number of court judgments and other legal acts related to the payment of wages from the assets of those affected by insolvency, in accordance with Law No. 85/2006. By 31 June 2009, 72,597 judgments and other legal acts issued pursuant to insolvency proceedings had been registered by the National Office of Trade Registration (Table 4).

TABLE 4
JUDGMENTS AND OTHER LEGAL ACTS ISSUED PURSUANT TO INSOLVENCY PROCEEDINGS, ROMANIA, 2007 – 30 JUNE 2009

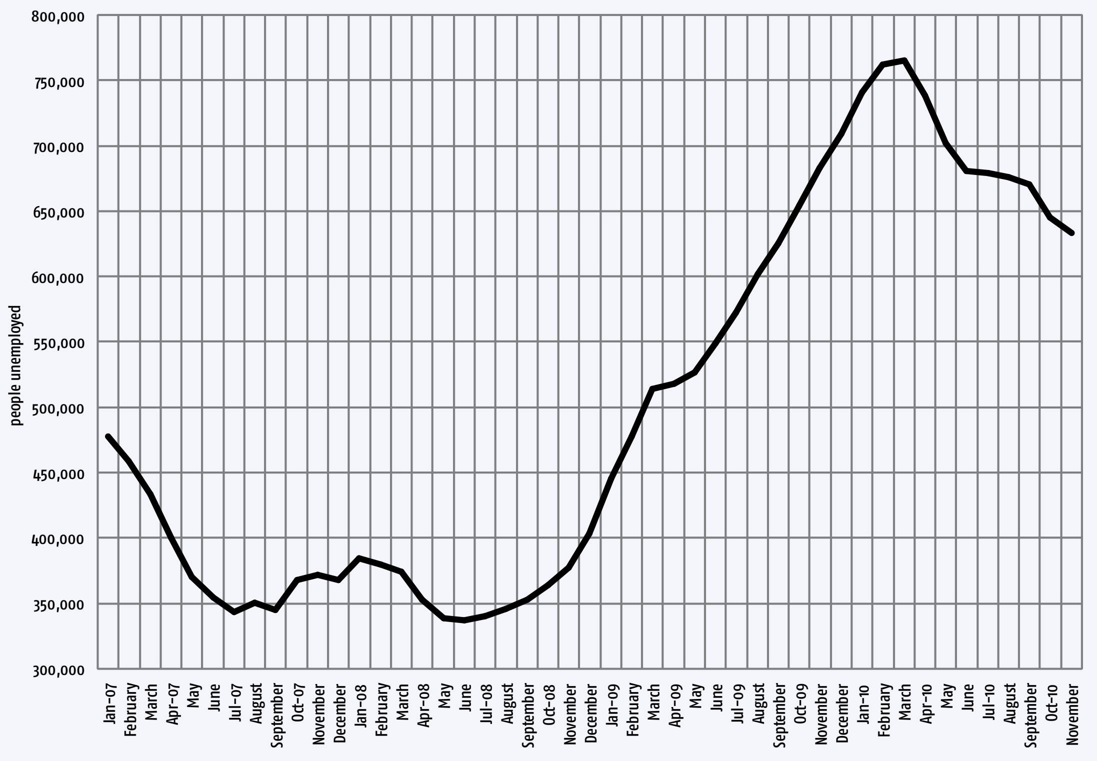
Category of act	Number
Subpoenas	22,395
Communications	24,345
Judgments	25,111
Other acts	746
Total	72,597

Source: Coface Romania, 2010.

Employees represent a special category of creditors in the event of employer insolvency. The increasing number of insolvencies has also contributed to mounting unemployment, with total unemployment rising from 367,839 persons in December 2007 to 403,441 in 2008 and 625,140 in September 2009. Figure 3 depicts the rise in registered unemployment between January 2007 and July 2009.

Figure 5 shows that total unemployment fell during 2007, from 477,309 persons in January to 367,838 in December.

FIGURE 5
DEVELOPMENT OF REGISTERED UNEMPLOYMENT, ROMANIA, JANUARY 2007 – NOVEMBER 2010



Source: Ministry of Family, Labour and Social Protection of Romania.

TABLE 5
DEVELOPMENT OF REGISTERED UNEMPLOYMENT, ROMANIA, JANUARY 2007 – SEPTEMBER 2010

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2007	477,309	459,013	433,023	400,339	369,832	354,714	343,163	350,420	345,012	367,375	371,969	367,838
2008	383,989	379,779	374,050	352,466	338,298	337,084	340,462	345,510	352,912	364,183	376,971	403,441
2009	444,907	477,860	513,621	517,741	526,803	548,930	572,562	601,673	625,140	653,939	683,123	709,383
2010	740,982	762,375	765,285	738,187	701,854	680,782	679,495	675,790	670,247	645,453	633,476	

Source: Ministry of Family, Labour and Social Protection of Romania.

The year 2008, however, was characterized by constantly rising unemployment, reaching 403,441 by December.

The total of 765,285 persons registered in March 2010, however, far exceeded all previous figures, highlighting the current precarious situation of the Romanian economy and its severe effects on employees, although figures have been slightly decreasing lately.

In the event of employer insolvency, employees whose wage claims cannot be met from the employer's assets are entitled to apply to the Wage Guarantee Fund. However, according to the information available, by September 2009 only 1,186 employees from 18 private enterprises had received payments from the Fund (National Employment Agency 2010).

One possible explanation of this is that employees and trade unions are still not sufficiently aware of Law No. 200/2006 on the establishment and use of the Wage Guarantee Fund. Another possible reason is the fact that, according to the law, the administrator or liquidator of an insolvent company has the primary responsibility to file an application with the National Employment Agency or territorial agencies for employees' claims. If the administrator fails to do this, the employees themselves or their trade unions may apply. However, this has rarely happened in practice.

A certain passivity may be noted on the part of the representative trade unions which, in accordance with Art. 19 para 2 of Law No. 200/2006, may file applications on behalf of their members for the recovery of payments from the Wage Guarantee Fund. It is worth pointing out that none of the trade unions or employers' organizations consulted in the course of this study have implemented a system for monitoring compliance with the law.

2. Analytical comparisons between European law, international standards and national regulations

In the European Union, the provisions regulating the protection of employees in the event of employer insolvency are Council Regulation 1346/2000 on insolvency proceedings – which contains the generally applicable norms in the case of insolvency[1] – and Directive 2008/94/EC[2] on the protection of employees in the event of the insolvency of their employer. Within the framework of the International Labour Organization, the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) is applicable.

2.1 The legal regime applying to employees' claims in accordance with Council Regulation 1346/2000

The law which shall apply to protect employees in the event of employer insolvency is stipulated in point 28 of the Preamble to Regulation 1346/2000, which declares that, in order to protect employees and jobs, the effects of the insolvency proceedings on the continuation or termination of employment and the rights and obligations of the parties shall be determined by the law applying to the relevant employment contract, in accordance with the general rules on conflict of law. Furthermore, other matters related to insolvency, such as whether and to what extent the employees' claims are privileged, shall be established in accordance with the law of the state which opens the proceedings.

Art. 10 expressly states that the effects of insolvency proceedings on a collective agreement and on an employment relationship shall be regulated exclusively by the relevant national law.

In conclusion, according to this regulation the effects of insolvency on the employees – in terms of any privilege which might apply to the employees' claims – shall be established by the terms of the applicable national law.

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1 Published in JOCE, L 160 din 30.06.2000, p. 1-18.

2 Published inn JO, L 283 din 28.10.2008, p. 36-42.

2.2 Legal regime applicable to employees' claims in accordance with Directive 2008/94/EC

Directive 2008/94/EC currently applies in Romania[3] (which includes the consolidated text of the Directive issued in 1980).

a) Directive 2008/94/EC lays down general principles concerning the protection of employees in the event of employer insolvency, including employees:
   - with individual labour contracts; and
   - employed by public bodies or institutions, whose employment is subject to an administrative agreement resulting in a labour relationship with special characteristics (such as public employees).

   The protection granted by the Directive is applicable to any type of labour contract, namely:
   - indefinite or fixed-term; and
   - full-time or part-time.

b) Member states may exclude from the Directive's field of application the claims of certain categories of employees based on the existence of other forms of guarantee, provided that protection is ensured which is equivalent to that granted by the EU regulation.
   Art. 1, para 3 of the Directive entitles the member states to exclude from its area of application domestic employees and share fishermen. Also, Article 6 of the Directive permits the member states to not consider statutory social insurance contributions or optional contributions as wage debts.

c) The protection granted by the EU provisions shall be ensured by means of a guarantee institution which, without being defined by the Directive, shall be regulated by each member state. However, the Directive requires that the guarantee institution complies with the following:
   - the assets of the institutions must be independent of the employers' operating capital and should be made up so as to prevent sequestration in the event of insolvency proceedings;
   - employers must contribute to financing the institution, unless it is fully covered by the state;
   - regardless of the fulfilment of the liability to contribute to the financing of the guarantee institution, the payment liability must exist.

d) In line with the provisions of the Directive, the period during which unpaid debts will be covered by the guarantee institution differs, depending on the reference period laid down by each member state, as follows:
   - for a minimum reference period of six months, the guarantee institution shall cover wage claims arising from the last three months of the labour contract;
   - for a minimum reference period of 18 months, the guarantee institution shall cover the wage claims arising from the last two months of the labour contract.

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3 The European Commission evaluated the implementation of the Directive into Romanian Law in 2009 through the Act 200/2006. It came to the conclusion that the Directive was overall adequately transposed, nevertheless a number of conformity problems remained. The problems mainly concern the non-inclusion of public employers into the scope of the law, the missing instruments for raising awareness among employees, employers, judicial administrators and liquidators as regards to cases in which the fund may be used and provision of specific sanctions to be applied to the judicial administrators and liquidators or territorial employment agencies, for failure to submit a request for the payment of the outstanding claims. Hence, the Commission recommends the law 200/2006 to be amended. Compare: Milieu LTD & Europa Institut, University of Edinburgh, 2008.

e) In Art. 4 para 3 of the Directive, member states are given the right to limit payments by the guarantee institution, provided the ceiling is not lower than that established in the Directive.[4]

f) With regard to the free movement of workers in the EU, the Directive regulates the individual labour contracts of employees who are employed in the territory of one member state, but who perform their duties in another member state. In this case, under the territoriality principle, the payment of unpaid debts is the responsibility of the member state in whose territory the workers perform their duties.

2.3 The legal regime applying to employees' claims under ILO Convention No. 173 (1992)

a) Convention No. 173 applies to all employees and fields of activity.

b) Certain categories of workers, mainly public employees, can be excluded due to the specific nature of their employment relationship or because they are granted other forms of protection equivalent to that established by the Convention.

c) The Convention regulates two ways of protecting employees with regard to their claims against their employer:
- granting the employees preferential rights; and
- establishing a guarantee institution to deal with employees' claims.

Thus, if preferential rights have been granted, employees' claims take precedence over the claims of other creditors with regard to the payment of wages from the insolvent employer's assets. In other words, the Convention considers the employees' claims as preferential debts and establishes a priority regarding their payment.

The Convention includes a priority list of employee claims considered as privileged debts to be covered by the employer:
- employees' claims for wages relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the end of the employment contract;
- employees' claims for holiday pay due as a result of work performed during the year in which the insolvency or the termination of employment occurred, as well as in the preceding year;
- employees' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which cannot be less than three months prior to the insolvency or the end of the employment contract;
- allowances due to employees on the termination of the employment contract.

To ensure at least a minimum level of protection for employees, the Convention grants the possibility of limiting the degree of preference of employees' claims to a reference value, which should be set at an acceptable level. Similarly, the Convention declares that employees' claims should be considered to have preference over other preferential debts, especially state debts. With regard to the protection of employees' claims by means of a guarantee institution, payment should be made from a special fund in the event of an employer's insolvency and insufficient assets.

4 As a result, the member states may set up a reference index according to which payments are to be made representing the gross minimum wage guaranteed at national level, the average or net wage, or the individual wage negotiated by the parties to the individual employment contract.

Similar to the list of preferential debts, the Convention provides a limited list of employees' claims to be paid from the Guarantee Fund, including:

- employees' claims for wages relating to a prescribed period, which should not be less than eight weeks prior to the insolvency or the termination of the employment contract;
- employees' claims for holiday pay due as a result of work carried out during a determinate period which shall not be less than six months prior to the insolvency or the termination of the employment contract;
- employees' claims for amounts due in respect of other types of paid absence, related to a determinate period which shall not be less than eight weeks prior to the insolvency or the termination of the employment contract;
- allowances due to employees on the termination of the employment contract.

Similar to the establishment of preferential rights with regard to employees' claims, in the case of a guarantee institution the Convention grants the possibility of limiting the degree of preference of employees' claims to a reference value, which should be set at an acceptable level.

3. National regulations

According to European and international regulations regarding the protection of employees' claims in the event of employer insolvency, the regulations governing this field in Romanian legislation (commercial and labour) include the following:

- Labour Code: Art. 156 ("wages are paid before any other monetary liabilities of the employer"); Art. 167 ("the setting up and use of the Guarantee Fund for the payment of employees' claims shall be regulated by a special law");
- Law No. 85/2006 on insolvency proceedings;[5]
- Law No. 200/2006 on the setting up and use of the Guarantee Fund for the payment of employees' claims;[6]
- Methodological norms regarding the application of Law No. 200/2006;[7]
- The Collective Agreement concluded at national level for 2007–2010,[8] including Art. 48 (1) ("All monies due with regard to employees' claims are paid before any other monetary liabilities of the unit") and (2) ("In the event of bankruptcy or judicial liquidation, employees have the position of privileged creditors, and their rights are categorized as senior debt and will be fully paid, prior to the claims of other creditors").

In accordance with Art. 3 of Law No. 85/2006, insolvency is defined as "a situation in which the debtor has insufficient assets to be able to clear their debts".

Private legal persons subject to insolvency proceedings entitled to act on behalf of the insolvent employer may be subject to general or simplified proceedings. Simplified proceedings apply when private persons do not own any assets, or when the administrator or constitutive actor cannot be found or does not meet the conditions for the simplified procedure.

In legal terms, insolvency is (Turcu, 2006):

- presumed when the debtor, after 30 days in arrears, fails to pay a debt to one or more creditors;
- imminent when it appears that the debtor is not able to pay their debt with the funds available.

Insolvency proceedings often involve the participation of creditors in order to track and recover their claims.

With regard to claims arising from individual or collective labour agreements, established between the employer (debtor) and their employees, Law No. 85/2006 contains special rules constituting the legal framework for this category of workers' claims and thus for this special category of creditor. Hence:

- In accordance with Art. 3 para 8 of the Law, employees have the status of creditor entitled to participate in insolvency proceedings without submitting individual claims.
- Employee's claims are, in accordance with Art. 10 of the Law, automatically recorded in the table of claims by the judicial administrator or the liquidator.
- The minimum amount of debt established by law that leads to the opening of insolvency proceedings is RON 30,000, for a firm creditor and in cases where the employees are the creditor the equivalent of six national average wages.

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5 Published in: Legea 85/2006 privind procedura insolventei, 2006.

6 Published in Monitorul Oficial al României, partea I, nr. 1038 din 28 decembrie 2006.

7 Published in: Hotărâre pentru aprobarea Normelor metodologice de aplicare a Legii nr. 200/2006 privind constituirea și utilizarea Fondului de garantare pentru plata creanţelor salariale, 2006.

8 Published in Monitorul Oficial al României, partea a V-a, nr. 5 din 29 ianuarie 2007.

- The employees are actively involved in instigating insolvency proceedings, as members of the creditors' panel before the court, alongside the judge, the judicial administrator and the liquidator.
- Employees must designate a representative or delegate who will attend creditors' meetings and have a vote weighted in proportion to the full value of the claims of the employees who they represent.
- In contrast to the provisions of the Labour Code on the individual termination of employment through the employer's initiative, the wage claims of employees whose employment contracts are terminated because of insolvency will be made a priority by the judicial administrator or the liquidator when insolvency proceedings are opened. These claims can be filed immediately and are not dependent on the completion of the collective dismissal procedure prescribed by law, following the requisite 15 day statutory notice period (Stefanescu, 2006) (20 working days, according to Art. 74 para 2 of the Collective Agreement concluded at the national level).
- The ultimate goal of insolvency proceedings is the satisfaction of creditors, based on an order of priority, as set out in Art. 123 of the Law. The order is as follows:
  - taxes, duties or any other costs related to the proceedings, as established by law, including costs necessary for the preservation and administration of the debtor's assets and the payment of the wages of persons employed to carry out the proceedings; claims arising from employment relationships;
  - claims related to loans, interest and expenses, provided by credit institutions after the opening of insolvency proceedings and also claims resulting from the work continuing after the opening of the proceedings;
  - budgetary claims;
  - claims related to amounts owed by the debtor to third parties, such as maintenance payments for children or others;
  - amounts established by the judge for the maintenance of the debtor and their family, if the debtor is a natural person; claims related to bank loans, with costs and interest, as well as claims resulting from the delivery of goods, services or other work, and rent;
  - other unsecured claims;
  - subordinated debt.
- According to Art. 36 of the Law, all legal actions or enforcement measures initiated against the debtor or their assets will be suspended on the date of the opening of legal proceedings, except appeals brought by the employer/debtor. Once insolvency proceedings have been opened, employees no longer enjoy other remedies against the employer/debtor in order to recover wages.

This regulation grants employees' claims the status of senior debt, establishing a higher degree of priority in relation to other claims secured by real or personal guaranties held by other creditors of the employer. It follows that, meeting the requirements of Convention No. 173 (1992), employees' claims have a higher level of privilege than most other senior debt and, in particular, before the debts of the state. Moreover, they are registered automatically by the administrator or liquidator in the final table of the employer/ debtor's claims, independently of the action or inaction of any individual employee in their capacity as creditor. Participation in the creditors' panel by an employee representative party to the insolvency proceedings is likely to protect the interests of this particular category of creditors.

The legal regime applicable to employees' claims is laid down in Law No. 200/2006 and by the methodological norms adopted for its implementation.[9]

According to Art. 125 para 1 of Law No. 85/2006 on insolvency proceedings, the creditors in a certain category may be allotted a particular sum only after the full satisfaction of the creditors ranking higher in

[9] See: Stefanescu, 2006, pp. 591–95; Ticlea, 2009, pp. 649–53; Tinca, 2005, pp. 51–59; Rosu, 2003, pp. 31–33.

the order of priority, in accordance with the order stipulated by the Law. In accordance with paragraph 2 of the same Article, if the assets are insufficient to cover the full value of the liabilities with the same degree of priority, the creditors with the same degree of priority shall receive a share of the assets in accordance with the proportion of the liabilities in their category. Employees whose financial claims remain unsettled can apply to the Guarantee Fund for their payment, within the limits laid down in Law No. 200/2006.

According to Law No. 200/2006:

a) The key condition for the applicability of the Law is the insolvency of the employer, based on a final court decision regarding the opening of insolvency proceedings and determining the full or partial cessation of the employer's administrative rights.

b) Protection measures apply to employees upon termination of their employment contract.

c) The only way to guarantee employees' claims is to establish a guarantee institution or fund, operating on the following principles:
   - the fund shall be based on employers' contributions;
   - employers are responsible for establishing the fund;
   - payments will be made from the fund to cover the wage debts of insolvent employers;
   - wage liabilities will be paid regardless of whether or not an employer has paid their contributions;
   - the fund will be independent of the other resources managed by the institution responsible for its administration.

d) In compliance with the Law No. 200/2006 (Art. 7 para 1), employers are obliged to pay a monthly contribution of 0.25 per cent of the employer's contribution to the unemployment fund to the wage guarantee fund.

e) The wage guarantee fund shall be managed, in accordance with Art. 10 of the Law, by the National Employment Agency through its territorial agencies established in each county and in the city of Bucharest. In managing the fund, the Agency:
   - receives, examines and settles claims regarding the payment of wage debts resulting from individual and/or collective contracts;
   - determines the amount of the wage debts due and ensures their payment;
   - recovers debts, not including those arising from contributions to the guarantee fund;
   - represents the interests of the guarantee fund in relations with central and local government institutions, courts, enterprises or organizations;
   - exchanges information with competent institutions from EU or EEA member states.

f) The categories of employees' claims to be paid from the Fund's resources include:
   - residual wages;
   - holiday payments, but only those due for the last year of employment;
   - outstanding payments in the amount specified in the collective agreement and/or individual employment contract in the event of termination of employment;
   - outstanding payments under the collective agreement and/ or individual employment contracts related to work accidents or occupational diseases;
   - outstanding payments that employers are obliged to pay employees during temporary interruptions of work.

   The social contributions paid by employers subject to insolvency proceedings are excluded from the provisions of the Law.

g) The total amount of outstanding claims to be covered by the guarantee fund may not exceed, according to Art. 14 para 1 of the Law, the equivalent of three times the gross nationwide average wage for each employee.

h) Except for compensation for outstanding annual leave owed to employees, all other wage claims must refer to a period not longer than three calendar months preceding the filing of the claim, prior to or after the opening of insolvency proceedings.

i) With regard to claims related to annual holiday payments, employers are liable to pay amounts for up to 12 months prior to the opening of insolvency proceedings.

j) Determination of the amounts and the payment of outstanding claims are carried out by county agencies:
   - at the written request of the administrator or liquidator of the insolvent employer; or
   - at the written request of the relevant employees or legally constituted organizations representing their interests.[10]

   The administrator or liquidator is responsible for the accuracy and truthfulness of the data contained in documents sent to the Agency.

   Applications shall be settled within 45 days of the date of registration with the competent territorial agency.

   In accordance with the law, before filing a claim with a territorial agency, the employees or their legal representatives must notify, in writing, the administrator or liquidator to enable the latter to take the necessary steps to pay the employees' claims. A copy of this notification is attached to the request made to the territorial employment agency.

k) In the case of a transnational employer being subject to insolvency proceedings, applications for the payment of the wages for employees who normally perform their work in Romania is made to the employment agency of the territory in which the employee works.

l) In order to establish the insolvency of an employer, the decision of the competent authority of the EU or EEA member state which opens insolvency proceedings, or which declares that the employer has no assets or that their assets are insufficient to justify the initiation of insolvency proceedings and demands that the company name is deleted from the special bankruptcy register, shall be taken into account.

m) Finally, a decision is issued by the territorial employment agency stating the total amount of wage debts to be paid by the Guarantee Fund. The administrator or the liquidator is notified of the decision. This decision represents a debt instrument which is enforceable after six months, as provided for in Article 17 of the Law.

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[10] Written requests must be accompanied, in accordance with Art. 10 pararaph 1 of the detailed rules, by the following documents: copy of the final court decision to open insolvency proceedings; copy of the final court decision ordering the total or partial removal of the right of administration; a list of employees' claims drawn up by the administrator or liquidator; copies of the time sheets of employees; copies of the payroll proving the existence of outstanding claims; copies of collective agreements applicable to the employer; copies of the individual employment contracts of employees who suffered work accidents or occupational diseases; copies of medical certificates that grant compensation for temporary disability due to occupational accidents and diseases; copies of investigation reports of accidents prepared by the competent authority; copies of the final declarations of illness made by the competent authority; copies of the personnel files of persons whose employment has been terminated.

n) A key provision of Art. 11 para 2 of the detailed rules is that, where individual contracts and/ or collective agreements concluded between employees and their employers establish that payment in kind, in the form of full or partial wages, is to be given in cases of insolvency and such payment proves to be impossible, such payment in kind must be converted into its monetary equivalent.[11]

[11] Wage debts denominated in foreign currencies will be converted into Romanian lei at the exchange rate of the National Bank of Romania (BNR) at the date of the opening of insolvency proceedings. The debts will be paid in lei in one instalment, in accordance with the system used for the payment of unemployment benefits.

4. Comparative analysis of international and national documents[12]

European and international norms take different approaches to covering employees' claims in the event of insolvency, whether in terms of preferential rights or by means of a guarantee institution. Within the EU, the guaranteeing of employees' claims by means of preferential rights is regulated by EC Regulation 1346/2000 and the guarantee institution is regulated by Directive 2008/94/EC, whereas the ILO regulates both issues in Convention No. 173 (1992).

In Romanian legislation, which corresponds to the current approach of the EU:

- the establishment of preferential rights with regard to employees' claims is accomplished by Law No. 85/2006 on insolvency proceedings; and
- the Guarantee Fund is established by Law No. 200/2006.[13]

Consequently, we shall present the following, in comparative terms:

a) the extent to which Law No. 85/2006 – as it relates to employees' claims – is concordant (or is not concordant) with EU Regulation 1346/2000 and with Part II of the Convention No. 173 (1992);

b) the extent to which Directive 2008/94/EC, Part III of Convention No. 173 (1992) and Romanian legislation are concordant with one another.

12 See: Duccase, Roset, & Tholy, 2003, pp. 997–1011; Voiculescu, 2003, pp. 33–36; Voiculescu, 2006, pp. 33–38.

13 It is worth mentioning, by way of example, that in France both legal institutions are regulated under the Labour Code. See: Lardy-Pelissier, Pelissier, Roset, & Tholy, 2009, pp. 1133–50.

TABLE 6
1 ENSURING WAGE CLAIMS BY MEANS OF PREFERENTIAL RIGHTS
1.1 EUROPEAN AND INTERNATIONAL NORMS WHICH HAVE BEEN INCORPORATED INTO ROMANIAN LEGISLATION

EC Regulation 1364/2000	ILO Convention No. 173 (1992)	Law No. 85/2006	Conclusions
Art. 2 let. a: "Insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A. **Art. 1**: This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.	**Art. 1 par. 1**: For the purposes of this Convention, the term "insolvency" refers to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors. **Art. 1. par. 2**: For the purposes of this Convention, a Member may extend the term "insolvency" to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer, for example, where the amount of the employer's assets is recognized as being insufficient to justify the opening of insolvency proceedings.	**Art. 3 pct. 1** Insolvency is the condition of the debtor's assets which is characterized by the insufficiency of pecuniary funds available for the payment of certain, liquid and payable claims. Insolvency is presumed to exist when the debtor, after 30 days have elapsed, has not paid its debts to one or more of its creditors. Insolvency is imminent when it is proven that the debtor cannot pay its debts on the due date with the funds it has available.	• EC Regulation 1346/2000 and ILO Convention No. 173 are concordant in defining insolvency proceedings as collective proceedings opened for the purpose of recovering debts to creditors. • Romanian legislation is concordant with EC Regulation 1346/2000 and ILO Convention No. 173.
Point 28 of the Preamble: In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the state.	**Art. 1 par. 3**: The extent to which an employer's assets are subject to the proceedings referred to in paragraph 1 above shall be determined by national laws, regulations or practice. **Art. 5**: In the event of an employer's insolvency, workers' claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share. **Art. 6**: The privilege shall cover at least: (a) the workers' claims for wages relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment; (b) the workers' claims for holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year; (c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment; (d) severance pay due to workers upon termination of their employment.		• Whereas the EC Regulation leaves it entirely to the discretion of national legislation to establish how employees' claims shall be privileged, Convention No. 173 – which, by and large, provides for the same solution – specifies categories of employees' claims which are to be subject to privilege and the minimum level of coverage attached to that privilege.

TABLE 6
1.1 CONTINUED

EC Regulation 1364/2000	ILO Convention No. 173 (1992)	Law No. 85/2006	Conclusions
Art. 10: Contracts of employmentThe effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.	**Art. 8**: par. 1: National laws or regulations shall give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system.	**Art. 123**: Claims shall be paid, in the event of bankruptcy, in the following order: 1. (...); 2. claims resulting from employment relationships; 3. budgetary claims; (...)	• Romanian legislation gives employees' claims priority over other categories of claims, including those of the state. At the same time, Romanian legislation, without enumerating the categories of claims referred to by Art. 6 of Convention No. 173, uses generic terminology, namely that of "claims arising from employment relationships", which leads one to conclude that it covers all employees' claims.

TABLE 6
1 ENSURING WAGE CLAIMS BY MEANS OF PREFERENTIAL RIGHTS
1.2 NORMS IN ROMANIAN LEGISLATION IN ADDITION TO EUROPEAN AND INTERNATIONAL NORMS

Law No. 85/2006	The national-level collective agreement for 2007–10	Conclusions
Art. 3 point 8: (...) The debtor's employees shall have the capacity of a creditor entitled to join the insolvency proceedings without personally submitting individual claims.	**Art. 48 paragraph 1:** All pecuniary rights, as owed to the employees, shall be paid prior to any other pecuniary obligations of the company. **Paragraph 2:** In case of bankruptcy or liquidation, the employees shall have the capacity of privileged creditors, and their pecuniary rights shall represent privileged claims to be paid in full prior to the claims of other creditors.	• Romanian legislation contains a number of additional norms related to practical implementation, which do not raise any specific problems in terms of their application. • The national-level Collective Agreement for 2007–2010 establishes that the said claims shall be paid prior to any other claims, in contrast to Law No. 85/2006, which ranks them second in terms of degree of preference. This is also stipulated by Art. 156 of the Labour Code.
Art. 3 point 10: Employees' claims are those claims resulting from employment relations between the debtor and the debtor's employees. The said claims are registered ex officio in the table of claims by the legal administrator or liquidator.		
Art. 3 point 12: The minimum amount of a claim, if filed by a firm creditor, is 30,000 lei, and if filed by an employee six average wages		
Art. 14 para 5: At meetings of the creditors, the debtor's employees may be represented by a delegate whose voting rights shall be proportionate to the total value of employees' claims for wages and other payments.		

TABLE 6
2 ENSURING WAGE CLAIMS BY MEANS OF A GUARANTEE INSTITUTION
2.1 EUROPEAN AND INTERNATIONAL NORMS WHICH HAVE BEEN INCORPORATED INTO ROMANIAN LEGISLATION

EU Directive 2008/94/EC	ILO Convention No. 173 (1992)	Law No. 200/2006 and related methodological norms	Conclusions
Art. 1 para 1: This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency.	**At. 4 para 1**: Subject to the exceptions provided for in paragraph 2 below, and to any limitations specified in accordance with Article 3, paragraph 3, this Convention shall apply to all employees and to all branches of economic activity.	**Art. 2**: Provision shall be made from the guarantee fund for the payment of employees' claims arising from contracts of employment and collective agreements concluded by the employees with their employer, against whom final judgment has been issued.	• With regard to employment relations, the EU Directive has a wider scope, reaching beyond individual contracts of employment, while Convention No. 173 applies only to workers employed on the basis of such contracts (in all branches). • Like the EU Directive, Romanian legislation focuses exclusively on employees' claims arising from individual contracts of employment and collective agreements, although some categories of employees are excluded (such as public employees).
Art. 1 para 2: Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the existence of other forms of guarantee, if it is established that these offer the persons concerned a degree of protection equivalent to that resulting from this Directive. **Art. 1 para 3**: Where such provision already applies in their national legislation, Member States may continue to exclude from the scope of this Directive:(a) domestic servants employed by a natural person;(b) share fishermen.	**Art. 3 para 3**: A Member which accepts the obligations of both Parts of this Convention may, after consulting the most representative organizations of employers and workers, limit the application of Part III to certain categories of workers and to certain branches of economic activity. Such limitations shall be specified in the declaration of acceptance. **Art. 3 para 5**: A Member which has accepted the obligations of Parts II and III of this Convention may, after consulting the most representative organizations of employers and workers, exclude from the application of Part II those claims which are protected pursuant to Part III. **Art. 4 para 2**: The competent authority, after consulting the most representative organizations of employers and workers, may exclude from Part II, Part III or both Parts of this Convention specific categories of workers, in particular public employees, by reason of the particular nature of their employment relationship, or if there are other types of guarantee affording them protection equivalent to that provided by the Convention.	- -	• Both the EU Directive and Convention No. 173 allow for the exclusion of certain categories of employees from their application. In addition, Convention No. 173 refers, by way of example, to public employees. • Unlike the EU Directive, which grants the right to member states to exclude certain categories of employees exclusively, Convention No. 173 lays down an obligation to first consult the social partners. In this respect, Convention No. 173 is to be preferred to the EU Directive. • Romanian legislation excludes public employees from its field of application, but not domestic staff or share fishermen (in contrast to the Directive). • Romanian legislation does not expressly lay down an obligation to consult the social partners on which categories of workers may be excluded from the scope of the legislation.

TABLE 6
2.1 CONTINUED

EU Directive 2008/94/EC	ILO Convention No. 173 (1992)	Law No. 200/2006 and related methodological norms	Conclusions
Art. 2 para 2: However, the Member States may not exclude from the scope of this Directive: (a) part-time employees within the meaning of Directive 97/81/EC; (b) employees with a fixed-term contract within the meaning of Directive 1999/70/EC; (c) employees with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC. 3. Member States may not set a minimum duration for the contract of employment or the employment relationship in order for employees to qualify for claims under this Directive.	- -	**Art. 1 para 2 of the Norms of Application**: Employees employed on the basis of an individual contract of employment shall be understood, as stipulated under paragraph (1) and Art. 7 paragraph (1) of the Law, to be employees hired on the basis of an individual contract of employment concluded on a full-time basis or for home working, a part-time employment contract or an apprenticeship agreement, irrespective of the latter's duration, including employees cumulating their pension with the salary, in accordance with the law.	• The EU Directive stipulates that it applies to all categories of individual contracts of employment, as does Convention No. 173, although it does not contain any concrete provisions in this respect. • Romanian legislation is concordant with European and international provisions related to all types of individual contracts of employment.
Art. 2 para 1: For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employers assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:(a) either decided to open the proceedings; or(b) established that the employers undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.	**Art. 1 para 1:** For the purposes of this Convention, the term "insolvency" refers to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors. **Art. 1 para 2:** For the purposes of this Convention, a Member may extend the term «insolvency» to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer, for example where the amount of the employer's assets is recognized as being insufficient to justify the opening of insolvency proceedings. 3. The extent to which an employer's assets are subject to the proceedings referred to in paragraph 1 above shall be determined by national laws, regulations or practice.		• Both the Directive and Convention No. 173 declare that insolvency is to be understood in accordance with the member state`s legislation and practice. • Romanian legislation covers all situations stipulated in the Directive and the Convention.

TABLE 6
2.1 CONTINUED

EU Directive 2008/94/EC	ILO Convention No. 173 (1992)	Law No. 200/2006 and related methodological norms	Conclusions
Art. 3: Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships. The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.	**Art. 12**: The workers' claims protected pursuant to this Part of the Convention shall include at least: (a) the workers' claims for wages relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of the employment; (b) the workers' claims for holiday pay due as a result of work performed during a prescribed period, which shall not be less than six months prior to the insolvency or prior to the termination of the employment; (c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than eight weeks prior to the insolvency or prior to the termination of employment; (d) severance pay due to workers upon termination of their employment.	**Art. 13 para 1**: The Guarantee Fund shall be used to take over, in accordance with the provisions laid down in this Chapter, the following categories of employees' claims: a) outstanding wages; b) claims for amounts due for other types of paid absence, but only covering up to a maximum of one year; c) claims for amounts due under the collective agreement and/or individual contracts of employment on the termination of employment relationships; d) claims for amounts due under collective agreements and/or individual contracts of employment in the case of accidents at work or occupational disease; e) claims for amounts due as a result of temporary interruption of work.	• At the EU level, EC Regulation 1346/2000 establishes a privilege for employees' claims, while the Directive refers only to the possibility of ensuring the payment of employees' claims by establishing a guarantee fund. • Convention No. 173 regulates both ways of covering employees' claims. • However, the Directive refers to all employees' claims, whereas Convention No. 173 is more analytical and enumerates such claims. • Romanian legislation does not contain all employees' claims. It excludes, for instance, claims for paid holidays other than annual paid leave.
Art. 6: Member States may stipulate that Articles 3, 4 and 5 shall not apply to contributions due under national statutory social security schemes or under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes.		**Art. 13 para 2**: The guarantee fund may not be used to cover the social contributions owed by insolvent employers.	• Unlike the EU Directive, Convention No. 173 does not refer to the social contributions owed by insolvent employers. • Romanian legislation stipulates, in accordance with the Directive, that employers' outstanding social contributions shall not be covered by the guarantee fund.

TABLE 6
2.1 CONTINUED

EU Directive 2008/94/EC	ILO Convention No. 173 (1992)	Law No. 200/2006 and related methodological norms	Conclusions
Art. 4 para 1: Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3. **Para 2**: If Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in the second paragraph of Article 3. **Para 3**: Member States may include this minimum period of three months in a reference period with a duration of not less than six months. **Para 4**: Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee shall be used for the calculation of the minimum period.	**Art. 12**: The workers' claims protected pursuant to this Part of the Convention shall include at least:(a) the workers' claims for wages relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of employment;(b) the workers' claims for holiday pay due as a result of work performed during a prescribed period, which shall not be less than six months prior to the insolvency or prior to the termination of employment;(c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than eight weeks prior to the insolvency or prior to the termination of employment;(d) severance pay due to workers upon termination of their employment.	**Art. 5 para 1 of the Methodological Norms**: The employees' claims stipulated under Art. 13 para 1 letters (a), (c), (d) and (e) of the law are related to the period of three calendar months stipulated in Art. 15 para 1 of the Law, prior to the month in which the claims are made. **Par. 2**: The employees' claims stipulated under Art. 13 para 1 letter (b) of the Law arise upon the termination of individual contracts of employment and are related to the last 12 months prior to the date referred to in Art. 5 para 1. **Art. 7 para 1**: If the employees' claims relate to a period prior to the month in which insolvency proceedings are opened, the period of three calendar months stipulated under Art. 15 para 1 of the Law shall precede the date of the initiation of the said procedure. **Par. 2:** If the employees' claims relate to a period subsequent to the month in which the insolvency proceedings are opened, the period stipulated under Art. 15 para (1) shall be subsequent to the date of the initiation of the insolvency procedure.	• Both the Directive and Convention No. 173 establish minimum periods for the calculation of employees' claims. The periods for which employees' claims are to be covered are usually longer in the Directive. However, in terms of claims related to annual paid leave, Convention No. 173 is more favourable, since it establishes a minimum period of six months (as compared to the three months laid down in the Directive). • While the EU Directive refers to a minimum period of three months for covering employees' claims, Romanian legislation establishes a fixed three month term. However, no reference period is established. Likewise, the Romanian legislation does not establish a reference period of 18 months with regard to which the guarantee institution should cover a period of eight weeks. • By way of exception, Romanian legislation establishes a period of 12 months for the calculation of employees' claims with regard to paid annual leave (which is in accordance with Art. 4 para 3 of Convention No. 173).
Art. 4 para 3: Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive.If Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.	**Art. 7**: National laws or regulations may limit the protection by privilege of workers' claims to a prescribed amount, which shall not be below a socially acceptable level. **Art. 13 para 1**: Claims protected pursuant to this Part of the Convention may be limited to a prescribed amount, which shall not be below a socially acceptable level.	**Art. 14 para 1**: The amount of employees' claims paid out of the Guarantee Fund may not exceed three times the national average wage.	• Both the Directive and Convention No. 173 impose compliance with social objectives. They leave it to the member states to determine what the relevant payment ceilings should be, although they stipulate that they must not be below a "socially acceptable" or "socially compatible" level. • Romanian legislation qualifies the socially acceptable level referred to in the Directive and Convention No. 173 as three times the national average wage.

TABLE 6
2.1 CONTINUED

EU Directive 2008/94/EC	ILO Convention No. 173 (1992)	Law No. 200/2006 and related methodological norms	Conclusions
Art. 5: Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:(a) the assets of the institutions must be independent of the employer's operating capital and be inaccessible to proceedings for insolvency;(b) employers must contribute to financing, unless it is fully covered by the public authorities;(c) the institutions' liabilities must not depend on whether or not obligations to contribute to financing have been fulfilled.	**Art. 11**: The organization, management, operation and financing of wage guarantee institutions shall be determined pursuant to Article 2.	**Art. 3**: The establishment, management and use of the Guarantee Fund is based on the following principles: a) the contribution principle, according to which the Guarantee Fund shall be established on the basis of employers' contributions; b) the obligation principle, according to which employers are obliged to establish a guarantee fund; c) the repartition principle, according to which the guarantee fund shall cover wages owed by insolvent employers; d) payment must not depend on whether or not employers' obligations to contribute to financing have been fulfilled; e) the assets of the guarantee fund must be independent of the employer's operating capital; f) the assets of the guarantee fund must not be accessible in any insolvency proceedings. **Art. 5**: The assets of the guarantee fund shall be provided through: a) employers' contributions; b) revenues accruing from interest rates and penalties for late payment of contributions to the guarantee fund, as well as from other sources, in accordance with the law; c) revenues from the recovery of debts arising under the current law, other than those accruing from contributions to the guarantee fund.	• Unlike the EU Directive, Convention No. 173 does not enumerate the principles governing the establishment of the guarantee institution, leaving the latter to the discretion of the member states. • Romanian legislation stipulates that the guarantee fund shall be established entirely from employers' contributions. This is unlike the European norm, which establishes, although not as an obligation, the possibility that state contributions may also be provided for such funds.

TABLE 6
2.1 CONTINUED

EU Directive 2008/94/EC	ILO Convention No. 173 (1992)	Law No. 200/2006 and related methodological norms	Conclusions
Art. 9 para 1: If an undertaking with activities in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(l), the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work. **Para 2:** The extent of employees' rights shall be determined by the law governing the competent guarantee institution. **Para 3:** Member States shall take the measures necessary to ensure that, in the cases referred to in paragraph 1 of this Article, decisions taken in the context of insolvency proceedings referred to in Article 2(1), which have been requested in another Member State, are taken into account when determining the employer's state of insolvency within the meaning of this Directive.	- - -	**Art. 20** (1) In the event of the insolvency of a transnational employer, employees who habitually work on Romanian territory shall file their claims with, and receive subsequent payment from, the territorial agency in whose jurisdiction the employees work. **Para 2:** Upon establishing that a company is in a state of insolvency, account must be taken of the decision issued by the competent authority from an EU or EEA member state, which either led to the opening of the insolvency proceedings, or which establish that the debtor has no assets or that the latter are insufficient to justify opening insolvency proceedings, and the debtor shall be removed from the company register.	• Unlike Convention No. 173, Romanian legislation – in accordance with European regulation – also deals with cross-border insolvency.

TABLE 6
2 ENSURING WAGE CLAIMS BY MEANS OF A GUARANTEE INSTITUTION
2.2 EXISTING NORMS IN ROMANIAN LEGISLATION IN ADDITION TO EUROPEAN AND INTERNATIONAL NORMS

Law No. 200/2006	Methodological Norms	Conclusions
Art. 7: Employers are obliged to pay a monthly contribution to the guarantee fund in the amount of 0.25% of the employees' contributions to the unemployment insurance fund, including those employees who are employed on the basis of individual contracts.	**Art. 1 para 1**: The proportion of contributions to the guarantee fund set up to cover the payment of employees' claims – hereinafter: the guarantee fund – against their employers in accordance with Art. 7 para (1) of the Law shall apply to the basis for calculation of employees' – working on the basis of an individual contract of employment – contributions to the unemployment insurance fund. **Art. 2 para 1**: The monthly basis for calculation in accordance with which (...) contributions to the unemployment insurance fund are worked out is that stipulated in Art. 14 of the Methodological Norms for the Application of Law No. 174/2002 on the unemployment insurance system and the stimulation of employment, as approved by Government Decision No. 174/2002, with subsequent amendments and adjustments. **Para 2**: The level of contributions owed by employers to the unemployment insurance fund under Art. 7 para (1) of the Law shall be that established by the Law on the social insurance fund, in accordance with Art. 29 of Law No. 76/2002 on the unemployment insurance fund and the stimulation of employment, with subsequent amendments and adjustments.	• Romanian legislation contains, in addition to the European and international regulations, a number of precise norms regarding the establishment and use of the guarantee fund which have proved to be extremely useful in practice.
Art. 15 para 1: The employees' claims stipulated in Art. 13 para (1) letters (a), (c), (d) and (e) shall be borne for a period of three months. **Par. 2**: The period stipulated in paragraph 1 shall be the period prior to the date when the claims were filed, either before or after the date of the opening of insolvency proceedings. **Para 3**: Further employees' claims may be made only if the period as stipulated under paragraph 2 is less than three months.	**Art. 7 para 1**: If employees' claims refer to a period prior to the opening of insolvency proceedings, the three-month period stipulated in Art. 15 para 1 of the Law shall precede the date of opening the insolvency proceedings. **Para 2**: If employees' claims refer to a period subsequent to the month in which the insolvency proceedings are opened, the period stipulated in Art. 15 para 1 of the Law shall also refer to the date on which the insolvency proceedings are opened. **Art. 8**: Employees' claims made in accordance with the conditions stipulated in Art. 15 para 3 of the Law shall be borne for the time remaining until the expiry of the period stipulated in Art. 15 para 1 of the Law.	

TABLE 6
2.2 CONTINUED

Law No. 200/2006	Methodological Norms	Conclusions
Art. 16: Claims arising from paid employment relationships in the event of bankruptcy shall be reduced in proportion to the amounts paid out of the guarantee fund.	-	
Art. 19 para 1: The establishment of what proportion of employees' claims is to be paid, and the actual payments themselves, shall be carried out by the territorial agencies in whose jurisdiction the head office, domicile or residence of the employer is located.	**Art. 14 para 1**: If the amount of an individual employee's claims under Art. 10 para 1 (c) is less than three gross national average wages, the amount of the employee's claim to be paid out of the guarantee fund shall be equal to that stipulated in Art. 10 para 1 (c). **Para 2**: If the amount of an individual employee's claims under Art. 10 para 1 (c) is higher than three gross national average wages, the amount of the employee's claim to be paid out of the guarantee fund shall be the equivalent of three gross national average wages.	

5. Views of the Social Partners

With the aim of presenting an accurate picture of the legal implementation of employees' claims in case of employer insolvency, we consulted some of the representative social partners at the national level.[14]

5.1 The point of view of workers' organizations

a) The national legal framework is regarded as favourable in terms of the protection it offers to those employees whose claims are covered by the specially established fund.

b) The period for which the payment of employees' claims is to be covered out of the guarantee fund, namely three calendar months, usually meets the needs of employees, although not when the employer's debts relate to a longer period. It is perceived that this period should be extended in the future.

c) The calculation of the period of three months for which the payment of employees' claims is to be covered consists of calendar days, not working days. This may be an advantage for the employees, bearing in mind that wages are typically calculated on the basis of working days, not calendar days.

d) The procedure established by law for the payment of employees' claims out of the guarantee fund makes bringing a claim extremely difficult, since it involves:
   - filing an application and submitting numerous documents, after which a decision is reached no sooner than 45 days later regarding the payment or non-payment of the employees' claims; and
   - priority status being given to applications filed by the administrator or liquidator of the estate of the debtor employer, and only subsidiary status being given to the applications filed by employees or their union. This may mean that employee or union claims are given a lower ranking.

5.2 The point of view of employers' organizations[15]

a) The contribution to be paid towards the establishment of the guarantee fund – 0.25 per cent – does not represent, at present, an additional burden for employers, given that this percentage is deducted from the unemployment contribution. It is seen as a form of employer protection when insolvency proceedings are opened.

   However, the fact that the guarantee fund must cover employees' claims regardless of whether their employer has in fact contributed to the fund is unfair to those employers who duly pay their contributions. The lack of serious penalties against employers who fail to meet their legal obligation to contribute to the Wage Guarantee Fund provides them with little incentive to comply.

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[14] The views of the national trade unions (National Union Block, ALFA Cartel, Romanian Confederation of Democratic Trade Unions, Meridian and CNSLR Fratia) were presented by representatives of their Legal Departments.

[15] The views of some of the employers' confederations that are representative at the national level (National Association of Entrepreneurs in Construction ARACO, National Council of Romanian Private Small and Medium-Sized Enterprises, National Council of Romanian Employers) were presented by their representatives.

Conclusion

Generally speaking, Convention No. 173 (1992), EC Regulation No. 1436/2000 and Directive 2008/94/EC are in accordance with one another.

At the same time, a number of their respective provisions diverge. This can be explained by differences in the orientation (regional versus international, with different levels of development and legal traditions) and membership of the two organizations, as well as the fact that the instruments were adopted on different dates (Convention No. 173 in 1992, EC Regulation No. 1346 in 2000 and the Directive [consolidated version] in 2008).

Some provisions of Directive 2008/94/EC are more favourable for employees than those of Convention No. 173 (1992). These include provisions relating to the period during which the employees' claims are to be covered (except for those claims related to unpaid rest leave).

It is important to note that ILO Convention No. 173 (1992) does not prevent ratifying states from providing higher protection for employees, in accordance with the principle of the pre-eminence of more favourable law, common to all international labour standards. In other words, ratification of the Convention does not mean that national legislation cannot comply with the provisions established by virtue of Directive 2008/94/EC. On the other hand, Convention No. 173 (1992) contains a series of provisions which are more favourable to employees than those of the Directive. These include:

- The obligation of member states to consult the most representative workers' and employers' organizations with a view to establishing the categories of workers who may be excluded from the application of the provisions on the payment of employees' claims arising from insolvency;
- The existence of additional categories of claims which are to be covered (other forms of paid leave);
- The lack of an explicit reference to specific types of individual labour agreements, which leaves open the possibility that, in the future, in accordance with the requirements of flexicurity, other types of individual agreements may be added or integrated.

Based on the findings of the study and in accordance with Law No. 109/1997,[16] the Economic and Social Council should consider discussing and forwarding to Parliament the proposal to ratify Convention No. 173 (1992). Subsequently, *de lege ferenda* ("instead of what shape the law ought to take") a number of appropriate amendments should be made to Law No. 200/2006 on the establishment and use of the Wage Guarantee Fund for the payment of employees' claims.

In the author's opinion, the view that the ratification of Convention No. 173 (1992) is not currently justified because Romanian law is already aligned with Directive 2008/94/EC is invalid. It is clear that both the social partners and the government would benefit from ratifying the Convention.

16 Published in Monitorul Oficial al României, partea I, nr. 141 din 7 iulie 1997, cu modificările şi completările ulterioare.

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