CORRECT INTERPRETATION OF ARTICLE 289 OF THE NATIONAL EDUCATION LAW NO. 1/2011 CONCERNING THE TERMS UNDER WHICH THE TEACHING AND RESEARCH STAFF IN HIGHER EDUCATION MAY CONTINUE THEIR ACTIVITY FOLLOWING THEIR RETIREMENT AGE[*)]

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Abstract

Law no. 1/2011 on the National Education, effective since February 2011, under Article 289 regulated anew the regime on the legal relationships of employment after retirement age for teaching and research staff in higher education in Romania (public, private or religious).

In this respect, the above mentioned bill, after having established the principle that this staff shall retire at the age of 65, sets to rights terms under which academics and researchers may continue their activity in higher education establishments, following retirement.

Study hereby is to review these terms.

Keywords: *Law no. 1/2011 on National Education; teaching and research staff; retirement age; activity developed after reaching the said age; terms; applicable legal regime*

1. Previous Teaching Staff Statute (Law no. 128/1997[1)]) established the following:

„Article 129 – (1) University professors and lecturers with a PhD title may preserve their position until reaching the age of 65.

(2) When reaching the retirement age, university professors and lecturers with a PhD title ... proving high professional expertise can be maintained in the teaching position as tenurials, upon request, with the approval of the faculty council and the annual university Senate vote, on a show of hands, up to reaching the age of 70."

The subject matter of wording cited above is resumed in a more complex manner, but with essential differences within Article 289 under the recently enforced National Education Law no. 1/2011, regulation stating as follows:

„Article 289 – (1) Teaching and research staff shall retire at the age of 65.

[*)] Article translated from the Romanian language by Cerasela Anghel (Casa de traduceri). It was published in „Dreptul" Magazine no. 4/2011, pp. 11-23; email office@ujr-dreptul.ro.

[1)] Law no. 128/1997 on the Teaching Staff Statute, published in the „Official Gazette of Romania", Part I, no. 158 of July 16th, 1997, as subsequently amended and supplemented, repealed by the National Education Law no. 1/2011, 30 days from the effective date of this Law, published in the „Official Gazette of Romania", Part I no. 18 of January 10th, 2011.

(2) In public, private and religious higher education, holding any management or administrative position at all university level following retirement is strictly prohibited. Terms of office of people holding management or administrative positions at all university levels cease by rights in terms of persons who have reached retirement age. By way of exception to these rules there are membership positions of private universities' board of directors.

(3) The university Senate in public, private and religious universities, based on criteria of professional expertise and financial position, may decide upon continuing the activity of a teacher or researcher after retirement, under a 1-year agreement, renewable annually under the Charter of the university, irrespective of age. University Senate may decide to confer the honorary title of professor emeritus, for teaching and research excellence, to teachers who have reached retirement age. Retired teachers may be remunerated under payment by the hour.

(4) Teaching and research staff in charge of doctoral studies shall retire at the age of 65 and:

a) may lead PhDs in progress at the date of retirement until reaching the age of 70;

b) after reaching the age of 65, they may act as advisors for new PhD students under the system of joint co-advisors along with a teaching and research staff who shall not reach retirement age over the course of the relevant doctorate.

(5) The legal regime of overlapping salary with pension shall not apply to teaching staff for whom provisions of paragraphs (3) and (4) are applicable".

Since the new regulation in the matter not only differs significantly from the previous one, but at the same time, raises, in our view, a number of interpretative issues, therefore we shall undertake to perform below an analysis of the litigious law.

2. A) The wording of Article 289 par. (1) of Law no. 1/2011[2)] can generate debates on the meaning of the text, under two perspectives, namely:

- whether it regulates or not *mandatory retirement*;
- consequence – *in terms of individual employment contract termination* – of „reaching the age of 65" by teaching and research staff in higher education.

a) *Prima facie*, par. (1) of Article 289 of Law no. 1/2011 could fancy that, *ope legis*, relating to teaching and research staff in higher education, there might

[2)] It is undisputed that Article 289 of Law no. 1/2011 covers *exclusively* retirement – at reaching the age of 65 – of „teaching and research staff *in higher education*" since the text is placed within Chapter II of Title IV entitled „Statute of teaching and research staff in *higher* education" (Articles 285-327 of the Law) and not within Chapter I (Title IV), respectively, Articles 232-284, entitled „Statute of teaching staff in pre-university education", chapter under which retirement of the latter category is differently regulated in Article 284, that we shall examine some other time and which is radically different in form as compared to Article 289 of Law no. 1/2011, undergoing reviewing *hic et nunc*.

be set up a (legal) retirement *obligation*, since the text establishes that the relevant staff „*shall retire* when reaching the age of 65".

In reality, though, such a legal duty does not exist and could not be enacted, either, since the Constitution of Romania (revised and republished) in Article 47 par. (2) provides that „Citizens are *entitled to retirement pension*".

Under the circumstances, *a right* set forth under the Fundamental Law can not be converted into a *legal duty*[3)].

Consequently, the acceptance of Article 289 par. 1 of Law no. 1/2011 is that, *unlike common law* (Law no. 263/2010, effective since January 1st, 2011), *old-age pension for teaching and research staff in higher education* is appropriate, both for women and men, only after reaching the age of 65 (instead of 65 years for men and 63 years for women, as *a rule*, from which there are some exceptions, under the system of Law no. 263/2010[4)]).

b) Neither Article 289, nor any other provision of Law no. 1/2011 provide retirement effects for teaching and research staff in higher education when reaching the age of 65 in terms of individual employment contract termination.

Therefore, considering Article. 1 par. (2) of Law no. 53/2003 (Labour Code)[5)], Article 56 par. (1) point d) of this Code turns into a point of law, under which „The individual employment agreement is terminated by rights: ... d) on cumulative fulfilment of conditions of standard age and the *minimum* contribution period for retirement"[6)].

Hence, fundamentally in this case, *not* retirement of the person concerned entails termination *de jure* of individual employment agreement, but only the cumulative fulfilment of (mandatory) retirement conditions relating to standard age and minimum contribution period.

Hereupon, it is hold aberrant the assertion, sometimes conveyed by some dilettantes, pseudo-legists and pseudo-specialists, under which, in the circumstances, the reason under the law of termination of employment agreements

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[3)] Therefore, the current law in the matter [Law no. 263/2010 on the unified public pension system („Official Gazette of Romania", Part I, no. 852 of December 20th, 2010, as amended and supplemented by Government Emergency Ordinance no. 117/2010, published in the „Official Gazette of Romania", Part I, no. 891 of December 30th, 2010)], unlike previous laws on pensions, does not cover any longer *at least by way of exception*, granting pension *on the employer's request*, Article 103 par. (a) of this law establishing, *without any limitations or waivers*, that „Pension is granted at the request of the entitled person, its guardian or custodian, foster care of minor child, if applicable, filed personally or by an agent appointed under special proxy".

[4)] See, on these lines, Article 53 et seq., in conjunction with Annex 5 of Law no. 263/2010.

[5)] Article 1 par. (2) of the Labour Code (Law no. 53/2003) states: „Code hereby shall also apply to employment relationships regulated by special laws, insofar as these do not contain any special derogations thereof".

[6)] The purport of Article 56 par. (1). d) of the Labour Code is rendered under the wording of Article IV, section 1 of Law no. 49/2010 („Official Gazette of Romania", Part I, no. 195 of March 29th, 2010).

would be even Article 289 par. (1) of the Law, since this text refers exclusively to (mandatory) retirement date of those concerned, and not to the *corollary* of this situation (termination of individual employment agreement).

Finally, we shall add that, under the exceptional situation in which the (higher education) teaching/research staff refuses to retire when reaching the age of 65 (irrespective of reason), *undoubtedly occurs* termination *de jure* of his individual employment agreement although, as already pointed out, in Romania application for old age pension is not mandatory, but optional[7)].

B) a) Article 289 par. (2) of Law no. 1/2011 establishes the principle according to which holding any *management or administrative position at all university levels following retirement* in public, private and religious higher education is strictly prohibited. Of course, mandatory retirement is allowed for (and not disability grade III), whereas, further on, the text refers to *„reaching retirement age"* (which leads to the cessation of „term of office" of people holding management or administrative positions „at any university level"[8)]).

b) Of course, termination *de jure of the term of office*, under the aforementioned terms, as a result of reaching „retirement age", *on the one hand*, *for teaching and research staff in higher education*, entails – as already pointed out – *termination de jure* of the individual employment agreement [as per Article 56 par. (1) point d) of the Labour Code], and *on the other hand*, *the possibility of concluding a 1-year contract*, under Article 289 par. (3) of Law no. 1/2011[9)].

c) Finally, we also emphasize that, according to Article 215 par. 1 of the Law, although after reaching the retirement age *„holding" any management* position in public, private and religious universities is strictly prohibited[10)], there are though

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[7)] Obviously, the termination *de jure* of individual employment agreement *may not occur* [in terms of Article 56 par. (1) point d) of the Labour Code] should the person in question, on reaching the age of 65, fail to meet the condition of „minimum contribution period for retirement". Therefore, in this case, there may occur termination of agreement only for one of the other grounds set forth under the Labour Code (agreement of the parties; Article 61 or Article 65 of the Code; resignation).

The aforementioned references stand, in fact, for a school situation, being difficult to imagine that a higher education teacher or researcher, at the age of 65, does not *currently* have a minimum contribution period (10-15 years, see Annex no. 5 to Law no. 263/2010). We argue that in this case the individual employment agreement could not be terminated *de jure*, by analogy with Article 289 par. (2) of Law no. 1/2011, whereas this text (exception) refers only to termination *de jure* of the *terms of office* of those holding management or administrative functions, for those who have reached retirement age (65 years), and not the termination *de jure* in itself of *their individual employment agreement*.

[8)] *Ultimately*, to this rule, Article 289 par. (2) provides a *single* exception, namely applicable to those acting in the capacity as „member of *private* universities' board of directors".

[9)] See point 2 section C) in the study hereby.

[10)] It is indisputable the logical connection between Article 289 par. (2) and Article 215 par. (1) *in fine* of Law no. 1/2011.

exempted *ongoing terms of office* on the law's effective date (30 days after issuance of the law, which occurred on January 10th, 2011).

Therefore, with respect to such *„ongoing" terms of office* for management positions, their termination *de jure* is no longer operational (if those concerned have reached the age of 65), according to Article 289 par. (2) of Law no. 1/2011, but they *shall cease* (due to other grounds, including their expiry) *at a date subsequent to reaching the said age by holders of relevant terms of office*.

d) In this case, on our part, we also judge that, given the natural link between the management position within a university and the university teaching (research) position, it seems reasonable that, *in the relevant case*, termination *de jure* of employment agreements of individuals concerned, in accordance with Article 56 par. (1) point d) of the Labour Code, shall no longer occur upon the effective date of Law no. 1/2011, but on the date of termination of „ongoing terms of office" of people concerned [Article 215 par. (1), *in fine*], even if they have already reached or shall reach in the meantime the age of 65.

Indeed, we deem as *nonsensical* termination *de jure* of the employment agreement for the relevant university teaching (research) position of those who have been appointed to hold university management positions *in view of the quality of teaching (research) staff at the relevant university*, on the ground they have reached the age of 65, but for a longer period (until the termination *de jure* of the ongoing term of office) to preserve them in academic management positions, such as chancellor, vice chancellor, dean, vice dean etc. at the relevant university (higher education institution)

C) Under Article 289 par. (3) of Law no. 1/2011, first sentence, the university Senate is allowed under certain circumstances *to decide upon* „the continuation of the activity carried out by a teaching or research staff *following retirement, under a 1-year agreement*, renewable annually under the Charter of the university, *with no age limit thereto*".

Some explanations are required.

Thus:

a) Obviously, the *conclusion* of a similar agreement is always *optional*, as the annual extension thereof is also optional, the wording referring to the university Senate being *able to decide* upon activity resumed, with the *possibility of annual extension* of the agreement;

b) Article 289 par. (3) regulating the possibility of concluding „a 1-year agreement, renewable annually ..." raises the question whether such an „agreement" should necessarily be exclusively a labour one or, should parties agree, it could be also/or civil (civil service agreement).

On our part, we argue that the second solution is applicable and that therefore, under the relevant assumption, the possibility of concluding a civil service agreement appears to be legally (instead of an individual employment agreement), as wording of Article 289 par. (3) of Law no. 1/2011 makes *exclusive use of the*

term agreement, and not the phrase individual employment agreement. We doubt we have to do with some inaccuracies in the text, but with the *will of the legislature* which, when it held that in a given situation the conclusion of an individual employment agreement is required *exclusively*, it *expressly* stated so. Therefore, Article 166 par. (3) under the Law provides that „With the view to lead doctoral studies, teaching and research staff having been granted this right must have an *employment agreement*" concluded with an establishment „entitled to set up a doctorate program".

It is no less true that the wording of Article 289 par. (3) *under this perspective* reveals to us at least arguable, as there is no justification, legal or rational, that, under the assumption covered by Article 289 par. (3), those concerned, as appropriate, shall be able to develop their activity either under an individual employment agreement or a civil service agreement, but, conversely, under the case covered by Article 289 par. (4) – following reemployment subsequent to retirement people in question are *PhD advisors* – performance of the activity may occur exclusively under an individual employment agreement [as the same law provides under Article 166 par. (3)];

c) Article 289 par. (3) provides that the conclusion of agreements to which we referred to occur for the *continuation* of the activity performed by the teacher/researcher *„following retirement"*, upon the decision of the university Senate.

It rests ambiguous whether such a „continuation" of activity may occur *exclusively at the higher education institution within which the person concerned used to activate until retirement* or *within any other higher education institution*.

We appreciate that the phrase „*activity carried on* by a teaching or research staff following retirement" may be applicable not only within the higher education institution where the person in question used to be employed until reaching the retirement age (65 years), *but also within any other*, whereas, on the one hand, purport of Article 289 par. (3) *does not* provide for such a limitation, and on the other hand, *the activity* of the teacher/researcher (and not, strictly speaking, the employment agreement) may be *carried on*, at any time, without distinction as one such „activity" shall be performed in the future (further on), within the same or another higher education institution;

d) Admittedly, the provisions of Article 289 par. (3) of Law no. 1/2011 – on agreements concluded on fixed-term of one year, renewable – as far as they are individual employment agreements, are *overriding* rules from the provisions of Article 80 et seq. in the Labour Code, which governs the principles of concluding fixed-term individual employment agreements;

e) Article 289 par. (3), providing that such agreements shall be concluded *„irrespective of age"* and only after *the retirement* of the person in question, leads to the conclusion that these can be concluded by higher education teaching/ research staff *at any age* (over 65) and not only until the age of 70, as was

heretofore set forth under Article 129 par. (2) of the previous Teaching Staff Statute (Law no. 128/1997).

Consequently, it can be argued that, *in this regard*, the current regulation provides, in better conditions, elimination of discrimination (in relation to age) prohibited under Article 2 par. (2), Article 3 letter a and Articles 5-8 of the Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination[11)].

On the other hand, the text explicitly stating that such agreements shall be concluded only *after the retirement* of the teacher or researcher, hence it appears that, where such an „academic", although his employment agreement was terminated „when reaching the age of 65" [under Article 56 par. (1) point d) of the Labour Code], however, for whatever reason, *he has not yet been „retired"*, he *can not conclude a fixed-term agreement* of one year, under Article 289 par. (3), such conclusion being possible only *subsequently*, after the „academic" in question finally „retires".

f) Since Article 289 par. (3) of Law no. 1/2011 expressly provides that, according to the relevant text, there may be concluded fixed-term agreements of one year, renewable annually, it is inferred that such agreements could not be concluded for a shorter or longer term.

The regulation is fair, in our view, considering the particularity of educational activities taking place scheduled for one *academic year* (school, university).

g) Since provisions under Article 289 par. (3) of Law no. 1/2011 keep general interest in view[12)], we hereby judge that non-compliance of provisions relating to the fixed period of the agreement (one year) makes them absolutely void, obviously with the possibility of their review.

Such being the case, we argue that an agreement concluded either for indefinite term or for fixed term, but longer or shorter than one year, is null and void.

However, we emphasize that the regulation is *extremely rigid as we may judge it*, as there may be situations where it is necessary to conclude the agreement on terms of more or less months, so as the relevant period overlaps the length of the academic year or, conversely, are not necessary during an entire year.

D) Article 289 par. (4) covers some special regulations relating to teaching and research staff in higher education acting as „PhD advisors".

In this respect, the aforementioned regulation, after reaffirming the provision of Article (1) (and these „academics" shall retire „on reaching the age of 65"), contains two particular regulations, namely:

[11)] Republished in the „Official Gazette of Romania", Part I, no. 99 of February 8th, 2007, subsequently amended/supplemented.

[12)] In respect of such general interest, see provisions of Article 2 par. (1)-(3) and (7) of Law no. 1/2011.

People concerned [obviously if they have concluded fixed-term (individual employment) agreements for one year, according to Article 289 par. (3), as Article 289 par. (4) does not cover separate regulations in this regard], can lead *further on* doctoral studies *„in progress at the date of retirement"*, but no later than advisors we refer to *reach the age of 70*.

Compared to the wording of Article 289 par. (4) point a), it appears that starting with that time (the PhD advisor reaching the age of 70) the incidence of purport ceases, even if the activity of PhD advisor is „in progress" is not completed yet (the PhD student not having defended his doctoral thesis yet, for which he is still on term).

Consequently, two solutions can be applied, namely: either the existing PhD advisor is changed (him reaching the age of 70) or the PhD „in progress" advisor is further preserved, but under „the system of joint co-advisors", as per the terms set forth below, point b) of study hereby.

It goes without saying that regulation under Article 289 par. (1) point a) can exclusively cover PhD advisors that *„carry on"* their business within the same higher education institution and not another, whereas within a *different* establishment they can not act as PhD advisors for doctorates „in progress".

b) According to Article 289 par. (4) point b) of the law [if there is not the case for the assumption covered by point a) of the text, therefore, doctoral programs *„in progress on the retirement date"*], after reaching the age of 65 (and, obviously, following their *retirement*) people concerned may also advise „new PhD students", but only „under the system of *joint co-advisors*", therefore *along with* a teacher/researcher, but who shall *not* reach retirement age (i.e. the age of 65) „over the course of the relevant doctorate".

In relation to Article 289 par. (4) point b) of Law no. 1/2011, we must underline that the purport *no longer* provides [in contradistinction to point a)] that a similar system (*joint co-advisors*) can last only until the retired person [having reached the age of 65 and having concluded an agreement under Article 289 par. (3)] reaches the age of 70.

Therefore, *„under the system of joint co-advisors"*, „for *new* PhD students", the relevant person may carry its advisory business in respect of the latter ones also *after reaching the age of 70*, whereas, *notwithstanding any express contrary provisions thereto* [as under Article 289 par. (4) point a)], the principle enshrined in Article 289 par. (3) becomes a point of law, so the annual conclusion of contracts for carrying work further following retirement is possible „without *age* limit". In other words, applicability of Article 289 par. (4) point b) is admissible *until any age reached by the retired person*, but obviously only as long as this person is *allowed to conclude* the agreement, drawn up annually, on fixed term, unlike the situation covered by Article 289 par. (4) *point a)*, when point of law of that purport is limited, expressly, only until the said person previously retired *reaches the age of 70*.

c) Finally, we remind that, as *PhD advisors* are concerned, having regard to the provisions of Article 166 par. (3) of the Law, the activity regulated under Article 289 par. (4) [either point a) or point b)] can occur *exclusively* under an *individual employment agreement*, concluded for a fixed-term for one year (and not under a civil service agreement) and that even if the relevant PhD advisor, in addition to such activity, performs a (regular) teaching/research activity [under Article 289 par. (3) of the Law].

E) Lastly, under Article 289 par. (5) of the Law, „the legal regime of overlapping salary with pension shall not apply to teaching staff for whom provisions of paragraphs (3) and (4) are applicable".

It is beyond any doubt that, under the regulation cited herein, Article 289 par. (5) waives from the provisions of Articles 17 to 19 of Law no. 329/2009[13)] on the ban of overlapping salary with pension by those who, earning wages within budgetary authorities (as are public higher education institutions), also benefits from a pension exceeding the amount of gross median household salary (income) used in substantiating the state social security budget for the current calendar year, approved under the state social security budget law[14)].

Therefore, even if the staff under Article 289 par. (3) or par. (4) of Law no. 1/2011, for the year 2011, employed within *public* higher education institutions (universities) state, enjoying a net pension (in 2011) over 2,022 lei (RON) per month, receive (thus aggregating) salary rights from a *public* higher education institution, people concerned have the full rights to both pension and „budgetary" salary, notwithstanding the prohibition of such aggregation set forth under Article 17 et seq. of Law no. 329/2009[15)].

With reference to the purport of Law no. 1/2011 analyzed hereby, two mentions are imperative, namely:

a) Article 289 par. (5), expressly stating to be applicable only to those who „benefit from the provisions of par. (3) and (4)" (under Article 289), no doubt that the purport's gain *can not be raised by those concerned by par. (2) of Article 289*

[13)] Law no. 329/2009 on the reorganization of public authorities and institutions, rationalizing public spending, business support and compliance of framework agreements with the European Commission and International Monetary Fund was published in the „Official Gazette of Romania", Part I, no. 761 of November 9th, 2009.

[14)] For 2011, this gross median household salary (income) amounts to 2,022 lei, according to Article 15 of Law no. 287/2010 on social security budget for the year 2011, published in the „Official Gazette of Romania", Part I, no. 880 of December 28th, 2010.

[15)] For details on ban on this aggregation, see also Ş. Beligrădeanu, I. T. Ştefănescu *Consideraţii referitoare la unele dispoziţii în legătură cu salarizarea personalului plătit din fonduri publice, cumulul pensiei cu salariul şi la negocierea colectivă înscrise în Legile nr. 330/2009 şi nr. 329/2009, precum şi în Ordonanţa de urgenţă a Guvernului nr. 1/2010 (Approaches on certain provisions relating to remuneration of staff paid from public funds, overlapping pension with salary and collective bargaining enshrined in Laws no. 330/2009 and no. 329/2009, as well as in Government Emergency Ordinance no. 1/2010),* in „Dreptul" *(„Law")* no. 4/2010, pp. 31-35.

(people holding management or administrative offices in higher education, the public one indeed), even if, temporarily, they still pursue their „term of office in progress" for a while, subsequent the effective date of Law no. 1/2011, pursuant to Article 215 par. (1) last sentence of the relevant law;

b) Although Article 289 par. (5) sets forth that the legal regime of overlapping salary with pension „does not apply to *teaching staff* covered by the provisions of par. (3) and (4)", we hereby argue that this is another case where we have to do with a wording inconsistency. Indeed, since provisions under Article 289 par. (1)-(4) are points of law, *invariably, for both* teaching staff and *research* staff in higher education, it appears incomprehensible (absurd) that the regulation's benefit [Article 289 par. (5)] be applicable to teaching staff exclusively, excluding *research* staff.

In other words, in this particular case, a rational interpretation must prevail, instead of a Talmudic one.

3. *In conclusion*, although a number of provisions under Law no. 1/2011 may be construed, sometimes, as at least questionable, we argue that, despite some wording inconsistencies, Article 289 of the Law should be considered as *positive* law, due to at least two reasons, namely:

- It allowed further maintenance of teaching and research staff (on the strength of concluding annual agreements) *irrespective of age* (so also after reaching the age of 70[16)]), should they continue to achieve „performance criteria" and financial resources of the higher education institution authorise it;

[16)] We hereby remind (see above, section 1 of this study) that, according to Article 129 par. (2) of Law no. 128/1997 (the previous statute of teaching staff, fully repealed by Law no. 1/2011), university professors and lecturers with a PhD title could be maintained in the teaching position as tenurials, *by way of exception, up to reaching the age of 70 at most*.

Please also note that under Law no. 481/2006 („Official Gazette of Romania", Part I, no. 1025 of December 22nd, 2006) Article 129 of Law no. 128/1997 *was supplemented with a par. (3)*, under which professors, *members of the Romanian Academy or the Academy of Sciences*, could be hold in office *over the age of 70 also*, „with the agreement of the institution they are employed with, on account of annual extensions". Though, the Constitutional Court held by majority that this text was *unconstitutional*, regulating an unjustifiable discrimination in relation to Article 129 par. 2 of the same law (Constitutional Court, Resolution no. 599/2009, published in the „Official Gazette of Romania", Part I, no. 329 of May 18th, 2009).

Finally, we point out that under Article 10 par. (2) of Law no. 264/2004 on the organization and operation of the Academy of Medical Sciences („Official Gazette of Romania", Part I, no. 605 of July 6th, 2004) it is provided that *after reaching the age of 70, members of this academy, in their capacity as full or corresponding members*, „are maintained in holding office only on account of agreement of the institution they are employed with, by way of annual extensions under a health certificate". Article 10 par. (2) of Law no. 264/2004 was deemed constitutional under Resolution no. 654/2007 issued by the Constitutional Court, published in the „Official Gazette of Romania", Part I, no. 582 of August 24th, 2007.

We hereby emphasize that in relation to the *generality* of Article 10 par. (2) of Law no. 264/2004, it appears, in our view, that it stands for a point of law also in regard of members (full

- It dropped out the prohibition of overlapping salary with pension for those who fall within the provisions of Article 289 par. (3) and (4) of Law no. 1/2011.

Not less but in our view, implementation of Article 289 (par. 1-4) of Law no. 1/2011 of February 9th, 2011 proved to be an improper legislative solution likely to seriously disrupt the educational process as a result of termination *de jure*, *ex abrupto*, of individual employment agreements for many academic teaching staff having reached on the law's effective date the age of 65 (usually professors or associate professors).

Therefore, it would have been reasonable that the implementation of this purport, notwithstanding the rule, to have occurred a few months later, namely on the last day of the academic school year 2010-2011, so that this legislative measure not to have awaken serious disruptions in Romanian higher education, as it actually did happen[17)].

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or corresponding) of the Academy of Medical Sciences who *act as teaching staff in medical higher education*.

On the other hand, *in relation to Article 289 of Law no. 1/2011*, Article 10 par. (2) of Law no. 264/2004 *as an exceptional text*, in our view, *it is currently still effective*, based on the principle that change in general law or adopting any other *general* law (Law no. 1/2011) does *not* alter the *special* law (Law no. 264/2004), considering that *specialia generalibus derogant*, respectively, *generalia specialibus non derogant*.

No doubt, those mentioned in the end of this note shall be applicable, for the identity of reason, also in cases of exceptional (special) regulations *in the field* (academic teaching or research staff, members *of other academies*) covered in other *legal regulations*.

17) On these lines, we hereby point out that, aiming probably to alleviate some of the consequences of such disruptions, by Order of the Minister of Education, Research, Youth and Sport no. 3753/2011 on approving transitional measures in the national education system („Official Gazette of Romania", Part I, no. 104 of February 9th, 2011) it is provided (Article 12, Annex 2 of the Order) as follows:

„Article 12 – Higher education teaching staff who retire in accordance with Article 289 par. (1) (of Law no. 1/2011, parenthetically – Ş.B) before completing the academic year 2010-2011 may carry further their activities relating to the academic year 2010-2011 following retirement, *without the approval of the university Senate* (s.n. – Ş.B) under Article 289 par. (3) of Law no. 1/2011, pending completion of the academic year 2010-2011.

Prima facie, the text cited above seems *contra legem* because Law no. 1/2011 does not allow the relevant Minister the right to grant exemptions to the rule of approving activity carried further by those concerned, following retirement, *by the university Senate*. However, we judge hereby that the litigious rule could find its legal basis under Article 361 par. 6 of Law no. 1/2011, text holding that „Within eight months after the effective date of this Law, the Ministry of Education, Research, Youth and Sports shall draw up methodologies, rules and other regulations deriving from the implementation of this law and shall *set up transitional measures for its implementation*" (s.n. – Ş.B). However, ruling out the need for approval by the university Senate for the period between February 2011 and the end of the academic year 2010-2011 (*i.e.*, a few months), in this case, we argue that it may be regarded as a *transitional measure* for the implementation of Law no. 1/2011, within the meaning of Article 361 par. (6) thereof (purport cited in the preamble of the Order of the Minister of Education, Research, Youth and Sport no. 3753/2011).

4. Last, but not least, a clarification appears to be imperative. Indeed, there is no doubt that Article 289 of Law no. 1/2011 is a special rule, designed exclusively for teaching and research staff in higher education. This being the case, interpretations, solutions and conclusions set forth in this study can not be, in principle, applied *tale quale*, to other staff categories, even if these persons, regardless of sex, „retire at the age of 65". So, for example, according to Article 385 par. (1), Article 484 par. (1) and Article 565 par. (1) of Law no. 95/2006 on healthcare reform („Official Gazette of Romania", Part I, no. 372 of April 28th, 2006), in the version given to these texts under Law no. 264/2007, doctors, dentists and pharmacists respectively, „shall retire at the age of 65 regardless of sex". Although aforementioned purports are entirely consistent with Article 289 par. (1) of Law no. 1/2011, interpretations, solutions and conclusions set forth in this study can not be, as a rule, applicable to doctors/dentists/pharmacists, since wordings under Article 289 par. (2)-(4) of Law no. 1/2011 differ quite significantly from those recorded in the remaining paragraphs of Article 385, Article 484 and Article 565 of Law no. 95/2006. Hence *eadem, sed aliter*. That being so, application *tale quale* of interpretations and solutions set forth in this study in relation to doctors/dentists/pharmacists (who, like teaching and research staff in higher education, retire at the age of 65, regardless of sex) is legally obviously excluded.

On the other hand, the three purports of Law no. 95/2006, hereby reviewed, failing to establish the non-implementation of the legal regime of overlapping salary with pension in case of doctors etc., as well, [as set forth under Article 289 par. (5) of Law no. 1/2011 in relation to higher education teaching staff] it is beyond any doubt that the doctors/dentists and pharmacists can not legally benefit from such an advantage [derogatory regime from relevant common law (Articles 17-19 of Law no. 329/2009)], although such exclusion from the said benefit appears to be, on our part, signally unnatural and, above all, unfair.

Obviously, even under the terms of this Order, „activity carried further" by those who fall under provisions of Article 289 par. (3) of the Law is possible only if the „financial standing" of the higher education institution allows it, whereas the terms specified under Article 289 par. (3) *are cumulative (Senate approval, fulfilment of performance criteria and financial standing).*

Or, the transient removal of the exigency for the university Senate's approval does not entail failure to comply with the other two conditions (performance criteria and financial standing).