Trends toward „individualization" of labour law[1]

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Abstract

The paper aims to identify the trends of labor law to return to the individual and the impact of such trends on the trade unionism and collective relations. Because, in relation to the trend of increased individual aspects of labor law, manifested in many fields, it appears legitimate the question: does the collectivist paradigm still meet the postmodern industrial relations? The question is especially relevant in the context of a difficult communication of trade unions with society as a whole, and also in the context of increased competitive relationship between employees - factors likely to hinder the scope of trade unions and even the collective dimension of labor law. The paper aims at finding answers, perhaps even useful in shaping the future labor law.

Keywords: *labour law; unionism; employment contract; workers*

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1. Preliminary remarks

In a postmodern world, where knowledge areas increasingly tend to address the individual and not groups of individuals, labour law theory seems to show in turn a new configuration. Indeed, "standard" employment contracts are often replaced with atypical contracts, which are specific and tailored to the individual needs of the employee or to the production requirements of the employer and the employees themselves are no longer speaking with one voice, they are no longer being driven by identical interests, but take advantage of a wide variety of possibilities and aspirations. It it still possible to cover all these satisfactorily and in full in a collective labour agreement? Today, in an era of individualism, an approach centred on the collective labour agreement, which involves expression by employees of shared choices in relation to the employer, no longer seems to fully cover the need for regulation.

The young, people at the end of their careers, people with disabilities, sole providers for their families etc. - have their own options in negotiating the employment contract, not necessarily identical with those of their peers. Moreover, these interests are not only different but sometimes even contradictory. For example, the establishment of social criteria for selecting employees prior to

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collective redundancies is to the advantage of certain workers and it goes without saying, to the detriment of others. The interests of women in employment relationships are sometimes different from those of men. "Virile" collective agreements as those we can find in Romania, often do not reflect the choices of female employees. Similarly, different religious affiliation of workers can generate special interests as regards working time or weekly rest days. The employee may have personal needs and interests that are not shared by his colleagues, stemming from his private life or his situation (in the case of workers with disabilities).

These examples still concern "categories" of employees. But further, if we get down to the individual level, the diversity of interests becomes endless. Singularity of employment, differences in biorhythm, different needs for leisure, family obligations, extra-professional concerns, specific types of activities – all determine increased particularities of each employment contract and the work and interests of every employee tend to resemble less and less those of his colleagues. A working relationship can thus acquire unique features.

No less, the management of labour relations in the new individualizing form, (individualized work rate, individualized working schedules etc.) produced mutations in terms of the legal regulation of labour and its specific contractual forms. The recent modular organizational structures of an information society make room today for a new type of worker autonomy.

2. Directions for "individualization" of labour law

Individualization[3] of labour law appears as the consequence of the developments in employment law that contribute to promoting each employee as an independent and unique human being. Individualization may consist in taking into account the personal characteristics of workers either to determine the scope of some rules or to determine the effects. Labour law thus contributes to ensuring the possibility that the employee live their individuality. Here are some of the means it uses to achieve this:

- **Individualization of the disciplinary action.** The legislator, by its nature, cannot act as a true agent of individualization, but can only impose to those who know concrete individuals (employers, for example) to take into account their personal characteristics. The law may require individualization, providing relevant factors, while delegating to others the actual implementation of these elements; it is a delegated individualization[4].

It is manifested for instance in the application of art. 250 of the Labour Code by imposing criteria for determining (thus individualizing, in a particular sense) disciplinary action. The individualization agent is the employer in this case,

[3] I use the concept of "individualization" as the tendency to shift the emphasis from the collective nature of labour law to the individual one. I do not have in mind here the usual meaning of the term, consisting in distinguishing an element or a person from another.

[4] Patrice Adam, *L'individualisation du droit du travail*, Librairie Générale de Droit et de Jurisprudence, Paris, 2005, p. 177

but it may be that the judge himself, noting that the action taken by the employer does not adequately reflect the seriousness of the misconduct, will perform the individualization of the penalty[5].

- **Training.** The education centred on the pupil/student is continued, in terms of employment, through individualized training.

Traditionally, the driving force of continuing education and training was collective bargaining. The training plan, mandatory for employers that are legal entities hiring over 20 employees, is developed in consultation with the trade union or, where applicable, employee representatives, and becomes an annex to the collective labour agreement.

Indeed, the training plan corresponds to the interests of the company, but takes into account, more and more, the expectations of the trainees. Currently, training has an increasingly important individual dimension, the training pathway being customized. Established by training clauses, coupled with the right to leave for training or regulated as a pillar of the flexicurity concept, training acquires the shape of the professional aspirations of the employee, in order to maintain the current employment, advance in one´s career, or to identify a new job opportunity. The enterprise no longer provides professional training to collectives, but to individuals.

- **Working time** - it is also the field of individualization of labour law, according to the specific interests of each employee who will try to combine family and professional interests by using different methods: uneven distribution of hours during the working week, conclusion of a part-time employment contract, requests for unpaid leave on personal grounds etc. Imposing a common working schedule, therefore a collective time management in the enterprise is to require that all employees be subject to uniform time constraints, oblivious to individualities. In an area where all workers start and finish work in unison, stop for a lunch break, working the same number of hours every day - a form of mechanical discipline can be achieved, and control of labour administration may be easier, but individuality, biorhythms and even creativity of workers are suffering as a consequence.

On the contrary, the individualized working program is an acknowledgement of the singularity of the worker, the employee being treated[6] of as an individual.

- As noted[7], even **health and safety at work** is today an area for the manifestation of individual interests (personalized medical supervision, medical examination on employment and periodically, possibility of dismissal for physical

[5] We consider the decision of the High Court of Cassation and Justice no. 11/2013, published in the "Official Gazette of Romania", part I, no. 460 of 25 June 2013, according to which, the competent court to judge an appeal of the employee against a disciplinary action taken by the employer, upon finding that it is wrongfully individualized, may replace it with another disciplinary action.

[6] Art. 118 of the Labour Code.

[7] P. Adam, *op. cit.*, p. 112: "The worker is not included in an abstract category (the average person, normal, cautious or knowlegeable) that would overlook or reduce his individuality, but the particularities of each individual (health, for example) are taken into account".

and/or mental inability, based on the opinion of the occupational physician etc., medical examinations on request etc.).

It does not diminish the role of the Committee for Safety and Health at Work - a collective body - but highlights the special place of the individual, beyond his collective rights[8].

- Also, **anti-discrimination regulations**, including harassment, augment this new position of "the employee-individual". The criteria for distinguishing between employees must be objective, which reinforces the conditions of synchronic and diachronic equality. Equal situations must be treated equally, but treating different situations equally may amount to discrimination. As a result, the situation of each employee will be considered, distinctly, and not of that of employees, globally.
- **Wages** also tend to individualize. Individualized remuneration is opposed to remuneration practices based on seniority. Individualization will never go as far as to violate the principle of "equal work - equal pay", but may lead to differentiation of employees with similar education and age, but with varying degrees of competence. Equality does not preclude differences in treatment, and new forms of remuneration, where the variable component, dependent on performance, is significant, highlight such differences.
- **Dismissal for reasons related to the employee** - is decided in relation to the situation in which the employee, in particular, finds himself. Thus, for example, dismissal for professional inadequacy can be ordered as a result of the performance of the employee, following assessment, according to art. 63 para. (2) of the Labour Code.

It is the place to note a (regrettable) departure of the legislator from the logic of individualization when, in art. 64 para. (1) of the Labour Code, it requires the employer to offer the employee another job, "compatible with his professional background".

In reality, the job offered should correspond with the proven professional competence of the employee, with the results of the professional assessment.

These results no longer allow the employee to retain the original position, and this is the reason dismissal is considered under art. 61 let. d) of the Labour Code. The criterion should therefore be personal and specific, i.e. *competence*, not an abstract one as the professional *background*. In fact, the job the employee is to be fired from for professional inadequacy was compatible with his education and training in the first place (otherwise he would not have been hired for the job). Now, following the unsatisfactory result of the assessment, it is obvious that the employee's professional background is in contradiction with his actual performance at work. Thus, precisely this performance should be considered when the employee is directed to another vacant position.

[8] "Promoting the employee individual has not led to a decollectivization in this area; the individual only overlapped with the collective". *Ibidem*, p. 115.

- The attention focused on the personal characteristics of the employee is reiterated by the Labour Code when it establishes the rule of the selection of the employees after the assessment of the achievement of performance targets[9], in the case of **collective dismissals** (dismissal that occurs otherwise for reasons not related to the employee)[10].

Thus, a shift from the collective to the individual and from the abstract to the concrete is made, through the mechanism of the selection of employees, a process during which the individuality of the employee and his own attributes have priority: firstly competence, then, according to the collective agreement, social considerations.

Examples for the individualization of labour law and the focus of the legislator on the employee-individual can go on. It makes us ask ourselves if the collectivist paradigm corresponds any longer to contemporary labour law.

3. The dissolution of solidarity

The foundation of trade union organization, which is essentially voluntary, is solidarity. Employees cannot be forced to unionize; they will willingly do so to the extent that it corresponds to their own interests and to their own vision on labour relations.

However, the solidarity that characterized for a long time relations between workers, appears to be increasingly diminished. In the context of an ideology that is rather hostile to unionization, some authors have started to wonder whether employees should seek post-union organization strategies. *Online* solidarity, discussion forums (sometimes anonymous) and the groups formed within social networks are often perceived as better tools to bring together individual energies and ideas.

In some legal systems, one option for the preservation of solidarity, independent of trade union association - is the works councils. An analysis conducted in 2014[11] on the extent to which they exist and operate in Central and Eastern European countries, as in a number of former Soviet republics, brought to light some of the avatars of these forms of association[12]. The German model, considered inspirational for the works councils in most legal systems, as well as that of the European Works Councils, governed by European Directive 2009/38/EC - do not seem to address all the issues related to workers' representation in the states analysed.

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[9] Art. 60 para. (3) of the Labour Code.

[10] Furthermore the decision to dismiss is individual even in the case of collective redundancies.

[11] Nikita Lyutov, Roger Blanpain, (eds.), *Workers' Representation in Central and Eastern Europe*, Wolters Kluwer, The Netherlands, 2014. The analysis carried out by a team of Est European experts focused on the following countries: Belarus, Bulgaria, Czech Republic, Croatia, Estonia, Latvia, Lithuania, Poland, Romania, Russia, Serbia, Slovenia, Hungary.

[12] For example, everywhere (including in the German system) a partial overlap of responsibilities between the unions and the works councils is reported. *Ibidem*, p. 3

Indeed, on the altar of "trade union struggle," workers have traditionally been taught to sacrifice their individual interests to those of the majority, thus submitting to a union democracy which usually does not preserve the identity and interests of sub-groups and does not protect the options of minorities. In time, this divergence between union interest and the individual has undermined some of the power of the union, because it led to some frustration among members, who saw personal interests (often more important to everyone than those of the group) under-represented or completely ignored.

The issue of the trade union agenda is indeed discussed throughout the European and American literature on labour law. It is thus pointed out that collective bargaining is constantly focused on pay and redundancies, rarely having regard to other interests, such as the human need for self-affirmation, respect and dignity at work[13]. These interests remain individual problems for each to deal with, managed by individual negotiation or, worse, left entirely to the management[14].

Some sociological research shows the existence of a number of reasons for the reluctance to unionization, expressed particularly in terms of cultural identity. Thus, for example, women of Latin origin in the United States are reticent to the invitation to become union members, on the one hand due to lack of time (because of the "double working day" - at home and at work) but also due to a cultural model according to which such activities are perceived as more "manly"[15].

In these circumstances, there are many legal systems in which trade union organization does not have the workplace as the sole criterion, but also the cultural identity (ethnicity), gender (unions of women, for example) or religion (one of the three representative confederations in Belgium is *Algemeen Christelijk Vakverbond* - Confederation of Christian Trade Unions, established in 1912, on the foundation of the doctrine of the Catholic Church). In this way, unions can act as vehicles for broader objectives than those strictly regarding the salary, namely to promote a way of life, eliminating discrimination and removing exploitation of those belonging to a particular ethnic or gender minority. In some cases, this approach leads to a deeper integration of trade unions in the community, because often the failure of their approaches might have been determined by a narrow and specific agenda, not broad enough to reflect the complex and diverse interests of those represented. However, industrial action is (still) perceived as being directed to the employer and its main objective is, worldwide, the collective bargaining. This limits by definition the possibility of trade union action, although there are

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[13] H. Collins, *Flexibility and Empowerment*, in T. Wilthagen (coord.), „Advancing Theory in Labour Law and Industrial Relations in a Global Context", Royal Netherland Academy of Arts and Science, Amsterdam, 1998, p. 117.

[14] For instance, we can think of the elements which fall within the regulatory framework of the Internal Rules and Regulations in relation to those that are the subject of regulation by collective labour agreements.

[15] Maria L. Ontiveros, in *Identity-Based Organizing*, Conaghan, J., Fischl R.M., Klare, K. (coord.), „Labour Law in an Era of Globalization. Transformative Practices & Possibilities", Oxford University Press, 2005, pp. 420 and ff., outlines the case of some large industrial actions organized by taking into account the cultural identity of the participants.

industries in which gender, ethnicity, cultural or religious identity of the workers themselves is crucial for labour relations.

In the legal literature, however, criticism on the postmodern view on unions appeared, starting from the reality that increased identity differences among workers make solidarity impossible and even a simple alliance between them (between members of sub-groups) and, furthermore, that the definition of the person strictly by its elements of identity (ethnicity, gender, religion, culture) situates it for good in a fixed, pre-determined place, that leaves no room for evolution or development[16]. In response, there is the attempt to apply to the reality of the trade union relationships a theory called "cosmopolitanist", centred on an alliance between difference and solidarity, a theory which supports the uniqueness of each individual, but also the ability to understand others and empathize with them[17]. Cosmopolitanism accepts and celebrates differences, having a great tolerance to conflict and criticism, but supports the existence of a common transcending foundation, based on which solidarity can re-bloom.

Indeed, trade union organization on the basis of identity, around some ethnic, religious, gender or cultural identity criteria carries the risk of fragmentation of the union movement and, essentially, diminishing its force. For although trade union pluralism would have been a factor for progress, encouraging competition and trade union democracy, fragmented organization, according to different criteria, mainly concerning identity, de-structures industrial action, as we know it. It reinforces the view of those who continue to claim (somewhat defensively): "Worker collectivism is an effective and situationally specific response to injustice, not an irrelevant anachronism"[18].

4. Unions and the community

Unions could play the role of agents of social solidarity, integrating in their demands the interests of those who do not have the chance of a standard employment contract, representing schools of democracy and development of civic virtues among citizens. In fact, however, most often unions are not perceived as representatives of the active population, not even of all the employees, but only of their own members. This has a certain bearing even on the list of demands; since jobs are insufficient, unions tend to struggle to maintain the contracts of their members rather than for the access on the labour market of persons looking for a job.

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[16] See Michael Selmi, Molly S. McUsic, *Unions in a Postmodern Age*, in Conaghan, J., Fischl R.M., Klare, K. (coord.), *op. cit.*, p. 439.

[17] In political science, cosmopolitanism is defined "*as a global politics that, firstly, projects a sociality of common political engagement among all human beings across the globe, and, secondly, suggests that this sociality should be either ethically or organizationally privileged over other forms of sociality*" (James Paul, *Globalization and Politics, Vol. 4, Political Philosophies of the Global*, London, Sage Publications, 2014, p. X).

[18] J. E. Kelly, *Rethinking Industrial Relations – Mobilisation, Collectivism and Long Waves*, London, Rontledge, 1998, p. 1.

On the contrary, as an active social player in the life of the community, union strategy might be carried on multiple levels:

- In relation to the employer (or employers´ organisations, at superior levels);
- In relation to its own members;
- In relation to the employees that are not union members;
- In relation to the members of other trade unions;
- In relation to non-salaried workforce;
- In relation to the Government (within the National Tripartite Council for Social Dialogue, in social dialogue committees, in social dialogue relations when the public institutions are the employers, in proposing legislation etc.);
- In relation to other unions (in competition but also cooperation, both with national and European trade unions);
- In relation to international organisations (International Labour Organization);
- In relation to civil society (especially within the Economic and Social Council, but also informally);
- In relation to the media (by use of better communication services to make trade union actions known to the broad public).

But often, some of these relations are ignored in practice, trade unions lacking the strategic and financial resources for articulating such a wide relational network.

Some authors point out, for example, to the relationship between the union and the retired as a strategic weakness. The US Supreme Court ruled that the decision of the management to reduce the benefits granted to persons who have retired in the past from that establishment are not subject to trade union action. The court held that the retirees, no longer part of the employment relationship, cannot be legitimately represented by the trade union set up in the establishment where they used to work. In legal literature, such an approach is considered to break the trade union away from the community[19]. To note that the Romanian law contains some regulation to this effect, Law no. 502/2004 on the associations of pensioners providing in art. 25 that "federations of pensioners (...), in a spirit of solidarity between generations, can be supported in their activity by employees' trade union confederations." Moreover, the citizens' initiative promoted by the National Trade Union Bloc includes proposals for the right of pensioners to join constituted unions[20].

But the main controversy in the analysis of contemporary trade unionism, in its relation with the "agora", is focused on the economic role of the trade unions.

[19] Maria L. Ontiveros, *op. cit.*, p. 425.

[20] Even now, for certain categories of staff, it is provided the right to remain union members if at retirement they had this quality. See, I.T. Ştefanescu, *Tratat teoretic şi practic de drept al muncii [Theoretical and Practical Treatise on Labour Law]*, Ed. Universul juridic, Bucureşti, 2014, p. 117.

The primary objective itself of the unions, consisting in the negotiation of the collective labour agreement and protecting the rights of employees, seems to include seeds of de-unionizing. The paradox is that:

- Applicability of *erga omnes* of collective labour agreements may discourage unionizing (why should I become a member of a union, if I enjoy the results of the collective bargaining anyway?),
- Applicability of the collective agreement only to the signatory companies can put them at a disadvantage in an economically competitive environment (by increasing the cost of production which the superior protection of employees implies), which ultimately would lead to the elimination of their respective companies from the market (together with the union!).

In an industry based on competition, in which some companies are unionized while others are not, companies where there is a trade union could be disadvantaged against companies where there is no union, until the unionized companies are, over time, taken off the market because of the higher, in principle, cost of the workforce[21].

Naturally, the role of unions goes beyond negotiation of collective labour agreements and the protection of their members' interests. They are involved in drafting regulations of employment law, social legislation, which brings them in the position of community actors, beyond their own employment relationships. But in this respect some authors raised an eyebrow in disbelief: such a social legislation would also apply to non-members; what is therefore the interest of the trade union in promoting it? Or, moreover, some authors note[22], adopting some specific legislative measures that are fully satisfactory on the social level could make the very existence of the union that proposed it superfluous!

5. Competitive relations between workers

In the traditional landscape of labour relations, employees are working shoulder to shoulder, pursuing interests even if individual, they have nonetheless common components, working together for the good of the company and, ultimately, for their own benefit. Together with their colleagues, they do not allow standards of protection or wages to be pushed down because they are ready for

[21] To note in this context certain benefits of extending the application of the collective labour agreement, regulated in our law in art. 143 para. (5) of Law no. 62/2011, which may reduce the competitive pressure in one or another branch of the economy. In fact, earlier in Romania an "automatic extension" operated by the effect of the Collective labour agreement at national level, which "levelled", at least in broad lines, the rights of employees, removing the tension in the competition between unionized and non-unionized companies. Thus, if the legal conditions are fulfilled, "the application of the Collective labour agreement registered at the level of a sector shall be extended to all undertakings in the sector by the order of the Minister of Labour, Family and Social Protection, with the approval of the National Tripartite Council, based on a request by the signatories of the collective labour agreement at sectoral level".

[22] G. Lester, *Beyond Collective Bargaining*, în „The Idea of Labour Law", coord: G. Davidov, B. Langille, (coord.), *The Idea of Labour Law*, Oxford University Press, 2013, p. 342.

collective action. Overall, if they are diligent workers - they have nothing to fear: their contract is indefinite. They look over the fence at the unemployed with very small chances of employment as to a completely different social category. Conversely, however, their own colleagues are on the "same side": they will negotiate together; they will protest together, they will fight together, if necessary.

I must admit that this description is rather idyllic, but it still corresponds to a certain mood that defined for a long time relations between workers.

And, indeed, it can be said that competition rules cannot be (fully)[23] implemented in the sphere of employment, because since labour is not a commodity, workers cannot be regarded as sellers of their workforce, who would compete with each other to get the price (wage) offered by the buyer (employer). Moreover, after conclusion of employment, the role of labour law is not only to distort market rules, by protecting the worker, but sometimes even to completely remove these rules. In other words, even if the selection of the applicants for employment has a certain competitive character, the competition can no longer continue after the conclusion of employment; workers could not be in competition with their peers, with people looking for a job or workers in precarious or seasonal jobs.

But in reality, this is exactly what is occurring. The new management of human resources has an impact on the relations between workers who often perceive themselves as competitors, and industrial relations get atomized. Further, internal competition undermines solidarity and therefore the inclination to unionize. Working well is no longer enough; you have to work *better* than those who might replace you (any time). Certainly, in many legal systems (including the Romanian one) there are legal rules on dismissal and employment of personnel, and such replacements are not simple, but even here it is still possible.

On the transnational level – the relation based on competition is even more evident. The internationalization of the labour market expands and amplifies the intensity of the competition. "Work is not a commodity" - is the assertion that is linked to the genesis of this branch of law. Today, however, it seems equally appropriate to say "labour law is not a commodity"[24] because globalization and the economic crisis often cause legal systems to lower the standards of protection of employees, as competitive advantage.

In the European Union, for example, subsidies, tax breaks and other fiscal incentives to attract investment are in principle prohibited. European regulations prevent almost any instrument of this type. What can be done then to increase the level of attractiveness for investors? Just one thing lowering protection standards

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[23] On the application in employment relationships of some of the competition rules, see A.G. Uluitu, Consequences of the application of competition rules on the labour market, M. Tichindelean, George M. (eds), "Controversial issues in interpreting and applying the provisions of the Labour Code and of the Social Dialogue Law", Ed. Universul juridic, Bucharest, 2013 p . 99-103. Competition Law no. 21/1996 was republished in the "Official Gazette of Romania", part I, no. 153 of 29 February 2016.

[24] J. Conachan, R.M. Fischl, K. Klare (coord.), *Labour Law in an Era of Globalization. Transformative Practices & Possibilities*, Oxford University Press, 2005, p. XXVII.

for workers in places where the intervention the union legislator is much more restricted.

The very concept of "social dumping" used in European labour law to support the need to impose certain standards of social protection for all workers - is reminiscent of competition. And internationally, beyond the borders of Europe, the practice of reducing labour law standards to create a competitive advantage becomes ever more present.

This development has led some authors to consider that labour law tends to turn in reality into "social competition law"[25], putting the worker in a competitive position in relation to other workers, just like a company is in a position to compete against other companies.

Which obviously affects solidarity; competitive relationships are not conductive to solidarity, which is seen as weakened not only at the international or national levels, but even at the level of a single establishment.

Competition characterizes not only relations between employees, but also those between unions, which often act as entities competing in attracting members. And this has a certain impact on the trade union movement as a whole.

Conclusions

For a long time, labour law has been tailored to suit the interests of "the universal worker" - the prototype of an employee presenting the most common features, and thus an exponent of the (identity, ethnic, gender, age etc.) majority, rather than of a minority. Naturally, the universal worker is a fiction, any regulation starting automatically from its representation sacrificing many (most) of the real attributes of each individual worker.

The current trend seems to be, on the contrary, to rediscover the real worker, different from his colleagues, characterized by a series of specific interests that confer specificity to the negotiation of his employment relationship. From here - the idea of "individualization" of labour law, as a form of recognition of the individual rights of the employee, independent of the employee's affiliation to a particular community. The focus on the individual and his personal interests and aspirations, distinct from others, was sometimes borrowed and adapted in labour law from other fields.

Faced with this trend toward an increased individual perspective in labour law, manifested in many ways, the question I addressed in the beginning appears legitimate: does the collectivist paradigm corresponds any longer to postmodern industrial relations? The question arises especially in the context of the difficulties of unions to form relations with society as a whole, as well as the emergence and amplification of competition between workers - factors described in the preceding

[25] Having as instruments, among others: the austerity policies (impacting salaries), flexibilization of labour relations, intensive use of atypical contracts etc. - Schubert, J.M., *Instruments of Labour Law*, în Rigaux, M., Buelens, J., Latinne, A., (editori), *From Labour Law to Social Competition Law?*, Ed. Intersentia, 2014, p. 29.

chapters, that hinder the scope of trade union action and even the collective dimension of labour law.

For an affirmative answer, faced with such problems, of legal and ideological nature, unions are forced to reinvent themselves. As the trend towards individualisation of employment law – which we are witnessing - can be a real danger.

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