

# COLLECTIVE LABOR CONFLICTS IN COMPANIES AND PUBLIC INSTITUTIONS: SOME PROSPECTS\*

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## Abstract

Participation of the employees and of the public servants in collective labor conflicts constitutes a significant chapter regarding the concrete way in which the Romanian legislator implements the concept of flexicurity and re-defines labor relations. Indeed, the entire Romanian legislation on labor relations and dispute resolution has been tremendously changed in May 2011, and the impact of these changes is about to be very intense. The new law on collective labor conflicts, currently at crossroads, is rather susceptible to discourage the initiation of such conflicts and even to limit the freedom of strike.

The legislator adopted a unified regulation, applicable to both employees and public servants; as such individuals who work under an employment contract are governed by the same dispute resolution norms as those individuals who perform their professional activity under an administrative act.

Beyond the theoretical aspects that the new view of the Romanian laws on the labor conflict resolution raises, there are many direct, practical consequences, as well as difficulties that courts face since the entering into force of the new legislation. This study aims to analyze some of these practical consequences.

**Keywords:** flexicurity, collective labor conflict, Romania, labor relations, legislation on labor conflict.

## 1. The flexicurity paradigm in the new Romanian labor legislation

The entire Romanian labor legislation changed in May 2011. The Labor Code was practically written again, all laws regulating the collective labor relations were abrogated and replaced by a single law, Law no. 62/2011.

Some of the declared goals of the legislative changes were to render the labor market more flexible and to simplify the contractual procedures. This led, indeed, to simplified hiring and dismissal procedures and to a taking over – in an incipient form, for the moment – of the notion of flexicurity<sup>1</sup>. This process takes place at a moment when the European Union is searching for ways to avoid the crisis and to increase competitiveness while maintaining a high level of social protection within the framework of the European Social Model. Moreover, at this moment, the concept of flexicurity is indeed questioned by many authors, because of the economic crisis and implementation difficulties. Despite EU support for flexicurity, opposition to a flexicurity strategy is now seen, especially in developed countries such as Germany (Jørgensen, 2011, p. 9).

However, flexicurity is not for “good weather” only (Tangian, 2010, p. 27). It also seems to be the view of the Romanian legislators that changing “the rules of the game” of labor relations render the contractual arrangements more flexible and therefore they removed the national collective labor contract, thus decentralizing the collective bargaining process.

Unlike the Old Member States, in the New Member States the way to flexicurity started from full security (enjoyed by the workers before 1989), and not the other way around, from full flexibility (present in Western Europe as a result of the market economy) to flexicurity. As the paths are different, obviously, the implementation of this concept will be different as well. The New Member States have therefore their own particularities, imposing a specific legal approach to the flexicurity principles. The drive for flexibility will now have to start competing with an increasing demand for a certain degree of security for a labor force that is already being exposed to ever higher competitive pressures.

The concrete ways in which the Romanian legislator must refocus from the security of the employment contracts to flexicurity has been a concern for the Romanian doctrine even before the accession to the EU. Currently, however, the flexicurity paradigm could be configured in Romania by taking into account:

- a. The expectations of the workers regarding their labor security. The economic crisis certainly must trigger mutations in this respect but in an unpredictable and disorganized way, not as part of a strategy to modify the perception regarding the concept of job stability.
- b. Previous labor regulations, extremely protective for the workers, which often had the disadvantage of de-protecting those who were not under a labor contract.

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<sup>1</sup> In EU terminology, the concept of flexicurity is seen as an attempt to conciliate flexibility and security in the labor market.

Excessive protection for the insiders (the employees) can cause lack of protection for the outsiders, *who face an unbreakable wall when they want to get a job.*

- c. A security deficit in the case of migrant workers (Dimitriu, 2009, p. 9); and
- d. The restrictive regulations for labor conflict resolution and strike.

All these aspects made the legal situation in Romania look particular and gave the Romanian legislator a difficult task. Firstly, because the task belonged to the national legislator and not to the EU legislators, as flexicurity is not implemented through EU regulations. Secondly, because the Romanian legislator had to overcome a certain level of expectations regarding job security and the inertia of the labor force. Thirdly, because the experience of other law systems, including those of the New Member States, could be less useful in this area than one could desire or expect.

The participation of employees and public servants in labor conflicts – individual or collective – became, within this context, a significant chapter on the concrete ways in which the Romanian legislator redefined labor relations. According to the view of the Romanian law-maker (similar to the German system) the collective conflicts can only be initiated during the bargaining of the collective contracts. As long as such a contract is in force, the conflict does not have a collective nature and it cannot lead to a legal strike. It always has an individual nature and can only be solved by the courts of law. Strikes are, therefore, excluded as long as the collective labor contract is valid.

Undoubtedly, this restriction causes a significant diminishing of the collective conflicts. However, does this concept reflect the goals of the implementation of flexicurity? The new laws have, unfortunately, been adopted without any impact study, and their consequences have not been estimated in advance.

The changes recently made to the labor legislation, regarding both individual and collective labor relations do not exclusively affect labor relations between employees and employers, but they also have an immediate impact upon the work relations between public servants and public authorities or institutions. The legislator wanted to adopt such a unitary regulation so that individuals who work under an employment contract are governed by the same dispute resolution norms as those individuals who perform their activity under an administrative act. Obviously, such an approach stirs again the debates regarding the nature of working relations – whether they belong exclusively to the administrative law or partially to the labor law (Beligrădeanu and Ștefănescu, 2009, pp. 77-80; Apostol Tofan, 2006, p. 163; Ranta, 2010, p. 127). However, beyond the theoretical aspects that the new view of the Romanian laws on the labor conflict resolution raises, there are many direct, practical consequences as well as difficulties that courts face since the entering into force of the new legislation. This study is focused on some of these practical consequences.

## **2. Collective conflicts**

The Law on Social Dialogue aimed to consolidate the following five acts into one law: Law no. 54/2003 on trade unions, Law no. 356/2001 on employers, Law no. 109/1997 on the organization and functioning of the Economic and Social Council,

Law no. 130/1996 regarding collective labor contracts, Law no. 168/1999 regarding the settlement of labor conflicts. The idea itself was welcomed, most authors admitting that such a consolidation will facilitate the proper implementation of the provisions of these five pieces of legislation by all users. However, the concrete way of regulating these relations between the social partners – in times of conflict or peace – leaves many practical problems unsolved.

Law no. 168/1999 regarding the settlement of labor conflicts divided collective labor conflicts into: (a) conflicts during the pre-contractual stage, bargaining conflicts, solved by conciliation, mediation, arbitration, strike, called conflicts of interests, and (b) conflicts during the execution of a collective or individual labor contract, solved by the court of law, called conflicts of rights. This is not a recent classification but it has been present in the Romanian law for a long time<sup>2</sup>. The conflicts of rights occurred because a right stipulated in the law or in the collective or individual contract was not complied with, whereas the conflicts of interests occurred in case of disagreement between the parties regarding a claim of the workers not yet stipulated by law, the collective or the individual labor contract. The conflicts of rights were usually solved by the court while the conflicts of interests were solved by specific, extra-jurisdictional methods (conciliation, mediation, arbitration, strike).

Against this logical approach already in place, which was perceived as fair by the doctrine and by jurisprudence, the new Law on Social Dialogue brings a fundamental change: it removes the difference between conflicts of rights and conflicts of interests (difference which is admitted either expressly in legislation or in the jurisprudence of almost every European law system) replacing it with the classification of the labor conflicts into collective and individual disputes.

Currently, therefore, if the collective contract cannot be concluded because the employer and the employees cannot reach a mutual agreement, a collective conflict can be initiated. However, which may be the nature of a conflict arisen as a result of non-compliance with a collective contract? Such a conflict can no longer have a collective nature (since the collective conflicts are defined exclusively in relation to the moment when the collective contracts are negotiated). It results, somehow surprisingly, that a dispute arisen from non-compliance with a provision in the collective contract can only have an individual nature (irrespective of the number of employees or public servants affected).

Another major novelty is the number of people who can be involved into a labor conflict. Thus, art. 3 of the Law no. 168/1999 stipulated that the “conflicts between employees and the organizations in which they work regarding professional, social or economic interests, or rights resulted from the execution of the labor relations, shall

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2 For instance, art. 52 in Law no. 711/1946 stipulated two types of collective labor conflicts: conflicts in which employees seek for joint demands, originated in the work done, and conflicts in which the employees seek to change the existing employment conditions or to ask for employment conditions.

be considered labor conflicts”. No references to public servants were made, fact that caused many speculations.

Neither Law no. 188/1999 regarding the Public Servants included provisions regarding the types of conflicts in which public servants could be involved. This law only mentioned the right to go on strike: “public servants shall have the right to go on strike, under the law” (art. 30 paragraph 1). Under these circumstances, it was accepted at that moment that, since public servants could initiate the strike, *a fortiori* they could be in a situation of conflict of interests (in the interpretation of Law no. 168/1999) with the public authority or the institution they unsuccessfully negotiated the collective agreement with (Dimitriu, 2010, p. 53). The procedure for solving such conflicts was taken over *mutatis mutandis* from the provisions of Law no. 168/1999 regarding the labor conflicts settlement (Țiclea, 2009, p. 462).

Currently, Law no. 62/2011 on Social Dialogue expressly defines as labor conflicts both conflicts in which employees are involved and conflicts in which public servants are involved. Regarding the enforcement of the provisions for the public servants, art. 207 expressly stipulates that “the public servants shall initiate the collective labor dispute according to the procedure stipulated in this law”. Although the text exclusively refers to the “initiation” of the dispute, we can assume that the legislator also took into account the procedure following the initiation, which is the conflict settlement (although the wording of the law-maker is debatable from the point of view of the legislative technique).

Regarding the public servants, therefore, the collective conflicts can appear during the bargaining of the collective agreements. According to art. 139 in Law no 62/2011, “the bargaining of the collective agreements of the public servants shall be done in compliance with the legal provisions in the field”. This remark refers to Government Decision no. 833/2007 regarding the organizational and operational norms for the joint commissions and conclusion of collective agreements, adopted – as stipulated in art. 2 – in order to regulate the normative and organizational framework for ensuring the social dialogue in public authorities and institutions by participation of the public servants in joint commissions and by conclusion of collective agreements, under the law.

### **3. Limitations**

The initiation of a collective dispute shall be subject to the legal requirements; the non-compliance with these legal terms shall entail invalidation of the workers’ action. In addition, such collective conflicts can take place only within certain limits beyond which the employees or public servants can be sanctioned on grounds of lack of discipline, can be asked to pay back the damage caused and in certain cases, can go to court for criminal liability.

Collective conflicts can be initiated only if certain requirements are met. As long as they are reasonable, they will be acceptable from the point of view of the International Labour Organization (ILO). Thus, the Committee on Freedom of Association has

stipulated that the law may impose some requirements prior to the initiation of the collective conflicts and later on, of the strike, but these requirements “should be reasonable and in any case, they shall not have such a nature so as to considerably restrict the means of action available to the trade unions”. Moreover, “the legal procedures to declare a strike should not be complicated so that they make impossible the strike” (International Labour Organization, 2006, p. 119).

### ***3.1. The interdiction to initiate collective conflicts in order to change a normative act***

Art. 157 in Law no. 61/2011 retained the interdiction previously included in art. 8 in Law no. 168/1999 stipulating that: “the demands for which the adoption of a normative act is needed cannot be object of the collective labor conflicts”.

The main requirement for a dispute to be considered a collective conflict is the following: the employees unsuccessfully submit their grievances to the employer. In case that acceptance of the grievances requires the enactment of a law or of another normative document, a collective labor conflict cannot emerge, simply because the employer has no competence in changing the law. The workers should not ask the employer to violate or to change the law.

The matter becomes more intricate when it comes to public servants or to employees working in state-owned companies. Most of their rights – salaries, above all – are stipulated in normative documents. A case solved by the Bucharest Court of Appeal reflects this (Civil Decision no. 18866/R, 2005).

The Income and Expense Budget of the employer (the National Railway Company C.F.R.-S.A.) had been approved by Government Decision no. 145/2005. The employer could respond to the claim regarding salary increase only by changing the respective Government Decision. The first instance court decided that the Government Decision is in fact a management document of the unique shareholder – the Romanian state – by which the state manages its own interests on its property. The court took into account that seeing Government Decision no. 145/2005 as a normative document in the sense of art. 8 in Law no. 168/1999 means that the employees have no right to go on strike as the fundamental law stipulates, and any claim regarding a salary increase faces an “unbreakable obstacle” in art. 8 in Law no. 168/1999. While, in private companies – the court said – the owner decides by giving orders, or decisions of the Board, the Romanian state, through its Government, decides about its assets by Government Decisions that have the same nature as decisions made in the private sector and thus they are management documents. A Government Decision is a normative document in the sense of the art. 8 in Law no. 168/1999 only when its enforcement governs social relations with general applicability and is valid for all social categories.

The Court of Appeal accepted the appeal made by the employer and appreciated that the court cannot interpret the nature of a Government Decision as a management document and not as a normative document.

Obviously, there are no normative documents in a general meaning and normative documents in the sense of art. 8 in Law no. 168/1999. A Government Decision is a normative document. However, the solution of the Court of Appeal, a reasonable one actually, reflects the applicability of art. 8 (provision maintained currently by Law no. 62/2011) and the practical effects of the interdiction stipulated in this article, especially regarding the public servants. In fact, the Committee on Freedom of Association of the ILO has manifested prudence regarding this topic: “The Committee is aware that the collective negotiation in the public sector implies checking of the available resources in various bodies or enterprises and if these resources are linked to the public budget...” (International Labour Organization, 2006, p. 898). This does not lead to the conclusion that the right to collective negotiations may have a different content or meaning in the public sector as opposed to the private sector.

### ***3.2. The interdiction to initiate collective conflicts during the existence of a collective contract***

A collective conflict has a pre-contractual nature, and it can only be initiated in the preliminary stage, the bargaining stage. The consequence of this major restriction is that, while the law imposes additional requirements for collective bargaining, this automatically implies restrictions on the possibility to initiate collective conflicts. In other words, the more difficult it is for the workers to take part in collective bargaining, the more difficult it will be for them to initiate a collective labor conflict. Once the collective contract concluded, the collective conflict will be excluded. From this moment on, only the issue of non-compliance with a provision of the contract may arise, which may only generate a conflict of rights (or, in the wording of the current law, which we consider inappropriate, an individual conflict). Individual conflicts can never be solved by collective means of action such as the strike; the strike is, therefore, excluded as long as a collective contract is underway.

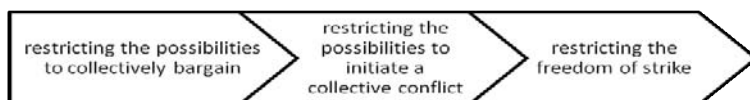
Consequently, although the condition regarding the initiation of the collective conflict during the negotiation of the collective contract/agreement existed before Law no. 62/2011, the increased number of requirements imposed upon the lawful negotiation results into less legal possibilities to initiate collective conflicts.

In fact, we should consider that previously (under Law no. 130/1996, currently abrogated) collective bargaining was conducted every year for certain aspects of labor relations such as salaries, working time, working hours and employment conditions. The annual collective bargaining took place even if there was a multiannual collective contract underway. In other words, even if a collective labor contract was concluded for four years, the parties would still have the possibility to re-negotiate annually the above-mentioned aspects and the employees could initiate a labor conflict when their demands were not met.

In Law no. 62/2011 the provision regarding the annual negotiation was removed. Consequently, as long as a collective labor contract or agreement is underway, the labor conflicts are excluded. As such, the possibility of the employees to strike,

according to the constitutional provision, has been limited since the strike can only be initiated when a collective labor conflict is initiated.

Indeed, as the strike is the ultimate step in a collective conflict, the chain of effect is the following:



**Figure 1:** Chain of legal restrictions of the freedom to strike

The German model – considered by the Romanian legislator – is the most restrictive in Europe in terms of collective conflicts. However, Law no. 62/2011 has brought even more restrictions regarding the legal requirements imposed on the initiation of the collective conflicts and of the strike.

### **3.3. *Limitations of unions' representation***

Art. 3 in Law no. 62/2011 stipulates the right of the employees and public servants to set up and/or become members of a union. The freedom of trade union association becomes, however, a form without content in case the union is not allowed to effectively represent its members, especially during collective bargaining and the initiation of collective conflicts.

In collective labor conflicts, the employees shall be represented by their unions or their representatives, as the case may be, which shall take part in the collective negotiations of the applicable collective labor contract or agreement.

Therefore, the employees or public servants that do not belong to a union or belong to a union without representativeness and have not nominated representatives for the collective bargain shall not be able to negotiate the collective contract and consequently, shall not be able to initiate a collective conflict. This solution is not different from the solution given in the past by Law no. 168/1999. The problem in the new law is that it imposes very severe requirements upon the way the unions can obtain representativeness and upon the way the representatives of the employees can be nominated. In principle, we can agree that the employees that are not organized should not be allowed to initiate collective conflicts and that the form of organization is a legitimate requirement in order to trigger a collective action. However, when the form of organization itself becomes difficult to initiate because of legal requirements that exceed the acceptable limits from the point of view of the Committee on Freedom of Association of the ILO, the very freedom to initiate collective conflicts is affected.

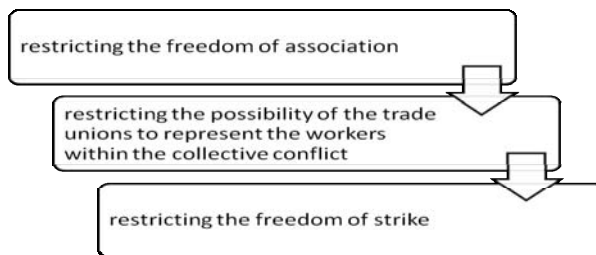
Thus, representativeness is defined in the law as the capacity of the unions or employers' associations, acquired under the law, to be a social partner designated to represent its members in the institutionalized social dialogue.

According to art. 55 in the Law on Social Dialogue, there shall be considered as representative at national level, branch level, group of enterprises or enterprise level those unions that meet certain requirements. For instance, in each enterprise,

representativeness shall be granted if the representative union:

- a. is a lawful union;
- b. has independent organization; and
- c. has a number of members representing at least half plus one of the total employees of the company/public institution.

The previous law, Law no 130/1996 regarding the collective labor contract stipulated in art. 17 that a requirement for the union's representativeness at the level of the enterprise is to have as members a third of the total number of employees in that enterprise. Since the current law (abrogating Law no. 130/1996) imposes a requirement that is so difficult to meet, to have as members more than half of the employees or public servants, most unions will lose their representativeness and consequently, it will become impossible to negotiate the collective contract or to initiate a collective conflict, and *in extremis*, the freedom of strike will be restricted.



**Figure 2:** Chain of trade union restrictions

### **3.4. Specific limitations for the public sector**

The public employees and the public servants have even more limited possibilities of collective bargain and consequently of triggering collective conflicts.

Thus, according to art. 138 in the Law on Social Dialogue, the collective labor contracts concluded in the public sector cannot include provisions regarding wages and other material benefits, others than those stipulated in the legislation in force for the respective category of staff.

The collective labor contracts in the public sector shall be bargained after the approval of the income and expense budgets of the public authorities, within the limits and under the terms and conditions stipulated in laws. Salaries in the public sector shall be established by laws within certain limits which cannot become object of negotiations and cannot be changed by collective labor contracts. Where salaries are established by special laws within maximal and minimal limits, the concrete salaries shall be established by collective negotiations within legal limits.

## **4. Frequency of collective labor conflicts: a diagnosis attempt**

Collective labor conflicts trigger, by definition, certain economic costs supported by the parties but also by society. However, to define the collective conflicts exclusively as undesirable circumstances that must be avoided by any means represents an omission of the reason why they have been regulated, their usefulness and the motivation

based on which the freedom of strike has been declared one of the fundamental constitutional rights.

Consequently, the conflicts' frequency may be a significant indicator about the status of the social dialogue in a given law system and about the potential of a society to solve its disputes – peacefully or by conflicts.

As mentioned before, in the case of public servants, the collective labor conflicts have not been expressly regulated so far. As a result, in the few cases where the issue of these conflicts arose, the solution was to enforce, by analogy, the rules regarding the collective conflict resolution (called conflict of “interests” at that time) in which the employees were involved.

Regarding the collective labor conflicts between employees and employers, statistics can provide interesting sources of analysis, useful to understand what are the prospects opened by the new Law. As the critics of the new law mentioned several times, there was no impact study done before it's entering into force and the consequences of this law had never been estimated. Legitimate questions arise: can we expect less labor conflicts starting with 2011? Can we expect a larger involvement of employees and public servants in labor conflicts, once a conflict has already been initiated in their company or public institution? Can we expect a proliferation of the collective labor conflicts of the public servants?

The trend of the collective labor conflicts (of “interests”, according to the wording of the previous law) is shown and analyzed in the table and figures presented below (Table 1, Figure 3 and Figure 4).

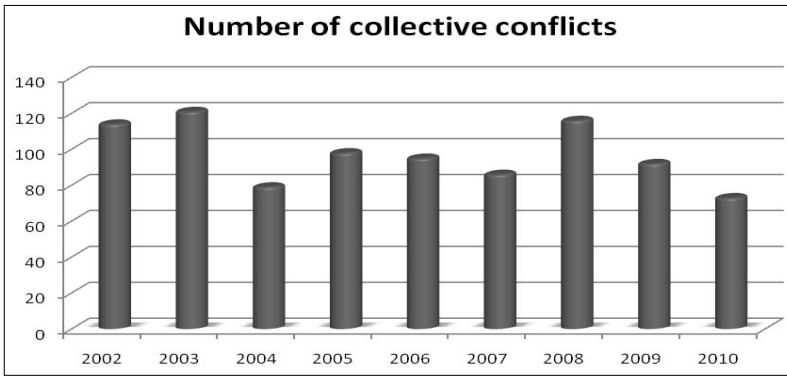
**Table 1:** Evolution of collective labor conflicts and number of employees involved

Year	Number of collective labor conflicts	Total number of employees involved in collective conflicts
2002	114	165,492
2003	121	141,509
2004	79	177,582
2005	98	184,072
2006	95	79,736
2007	86	103,552
2008	116	204,798
2009	92	104,701
2010	73	61,682

Source: Data provided by the Territorial Directorates of Labor and Social Protection

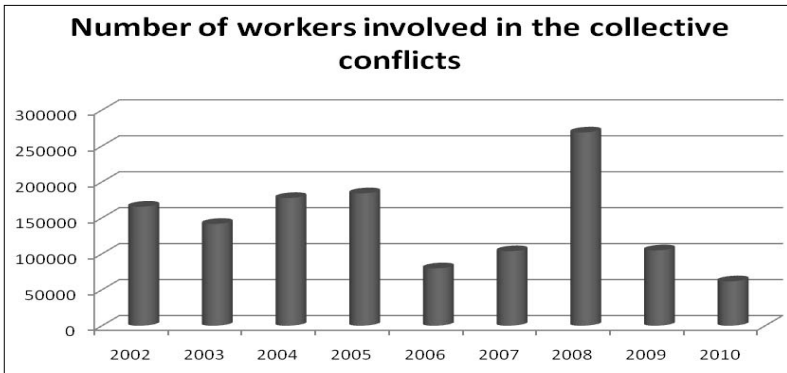
When analyzing these data, we must take into account that:

- a. They only reflect the number of labor conflicts defined as such upon registration with the Territorial Directorates of Labor and Social Protection.
- b. Spontaneous strikes, strikes initiated as a result of failure to pay salaries, political strikes, conflicts initiated for demands that require the adoption of normative documents, strikes not preceded by conciliation, conflicts initiated without complying with the many procedural requirements imposed by the law



Source: Ministry of Labor, Family and Social Protection (author's calculation)

**Figure 3:** Trend of the collective labor conflicts registered with all the Territorial Directorates of Labor and Social Protection



Source: Ministry of Labor, Family and Social Protection (author's calculation)

**Figure 4:** Trend of the number of employees involved in labor conflicts registered with all the Territorial Directorates of Labor and Social Protection

(requirements which the Committee on Freedom of Association of the ILO called “excessive”) – are not included in the database regarding the labor conflicts, since they are considered to be illegal.

- c. During the period under scrutiny, the legislation on settlement of labor disputes remained unchanged. Indeed, although the current Labor Code was adopted in 2003 and repeatedly changed ever since, Law no. 168/1999 on the labor conflicts was not modified.
- d. After a period of time characterized by numerous labor disputes (2002-2005), the number of conflicts diminished once a certain level of economic growth was attained. Such economic growth allowed for salary increases and compliance with the requirements regarding the working conditions which resulted into less labor conflicts.

- e. 2008 was a record in terms of employees' involvement in labor conflicts, as a result of the unions growing mature and of the first measures taken by employers to prevent the economic crisis; and
- f. 2009-2010 marked a decrease in the number of conflicts and this trend may continue in 2011 as a result of simplified dismissal procedures and of a growing fear of the employees that they may lose their jobs.

We can notice therefore a decrease in the number of collective conflicts that may have totally different causes: either the economic growth and improved working conditions or the economic crisis and the fear to lose one's job.

Given this context, an important goal of the current law on labor conflicts should have been not to discourage the involvement of workers in collective actions and the expression of collective grievances even during economic crises. Since employees and public servants feel rather discouraged to initiate labor conflicts during economic crises, the law should have compensated by simplifying the procedure to initiate such conflicts and not by making the procedure more difficult.

Instead, as we already mentioned, the procedure to initiate collective labor conflicts and the requirements imposed to initiate such a conflict were not simplified. In fact, one could notice some additional requirements. For instance, the warning strike, which before was not a condition to initiate the strike has become compulsory and its absence invalidates the strike.

It is also interesting to analyze the level of workers' participation in the collective conflicts initiated in their companies or in public institutions. If we follow this trend in time, we can see a constant descending slope regarding the involvement of the workers (irrespective of the total number of labor conflicts per year). This trend occurs at the same time with a lower participation of the workers in the collective actions – in a broader sense – organized by the trade unions.

The trend of the participation of workers in collective conflicts in their enterprises is analyzed below.

**Table 2:** Data on the participation of workers in collective conflicts at their workplace

Year	Total number of workers in the enterprises where collective disputes took place	Workers effectively involved in collective conflicts at the workplace	Percentage of workers effectively involved in collective conflicts at the workplace
2004	221,369	177,582	80.2
2005	190,200	141,509	74.4
2006	109,969	79,736	72.5
2007	103,552	72,767	70.3
2008	268,732	204,798	76.2
2009	163,820	104,701	63.9
2010	114,408	61,682	53.9
2011 1st quarter	106,608	44,669	41.9

Source: Data provided by the Territorial Directorates of Labor and Social Protection

We can notice a reduction by half in the participation of workers to labor disputes initiated at their workplace. We consider that this aspect should constitute a concern for the Romanian legislator, correlated with the tremendous decrease of the unionization rate, which is a major indicator in assessing the participation of the employees in collective conflicts. There is indeed a correlation between the rate of unionization and the number of labor conflicts. As it has been stated, strike affinity indicates the unions' willingness to enforce their claims; if they do not use their full power to enforce claims, they lose credibility and membership declines (Lesch, 2004, p. 16). On the other hand, when going on strike becomes much more difficult because of the legal requirements, this may have an impact on the unionization rate.



Source: Data provided by the Territorial Directorates of Labor and Social Protection (author's calculation)

**Figure 5:** The trend of participation of Romanian workers to collective conflicts at the workplace

### 5. An endless range of options: a short comparative view

We can state that labor law is a law branch that allows the national legislators significant freedom with regard to EU regulations. The strike is expressly excluded from the competences of the EU in this field, while the collective conflicts in general are seen as a subject too delicate to be regulated at supranational level. Regarding individual labor relations, largely accepted concepts such as flexicurity (present in the EU documents since 2007) are implemented in the most diverse ways. We can even say that there are 27 different meanings for flexicurity as far as terminology is concerned.

Given this implementation diversity, an overview of the most frequent options regarding the participation of the employees and of the public servants in collective labor conflicts may provide a context for the new Romanian solutions and may configure possible consequences of these options.

### **5.1. Collective conflicts: unionized or non-unionized?**

If we simplify the analysis we can say that, regarding the possibility to initiate collective conflicts and strike, Europe has two extremes:

- the right to initiate the strike recognized exclusively for the members of the unions (Germany); and
- the right to initiate the strike recognized for workers, without considering union membership (Poland).

Most of the European systems are toggled in between, and give more or less importance to union membership in settling collective conflicts. In France, for instance, only a trade union can legally initiate a strike in the public sector, while in the private sector even the non-unionized employees may go on a legal strike.

However, in a comparative analysis, we can notice that the non-unionized strike, also called *wildcat* (*sauvages*) or informal, enjoys legitimacy only in a few law systems. The weight is placed closer to the regulations stipulating the possibility to initiate the strike exclusively for union members. No international document encourages states to declare as lawful the non-unionized strikes. The Committee on Freedom of Association of the ILO would certainly not do it, since it interprets the right to strikes as a consequence of the unions' freedom.

A general analysis of the regulations governing the non-unionized collective conflicts in the law systems of European member states leads to the conclusion that the strike is lawful only:

- a. in law systems where the collective contract can be negotiated by non-unionized employees as well;
- b. in law systems where the strike can be initiated irrespective of the bargaining of a collective contract; and
- c. in law systems where the strike is considered an individual right, not a collective one, and union membership is not relevant for the lawfulness of the strike.

In the Romanian law, the legislator did not only choose to accept the lawfulness of the non-unionized collective conflicts and non-unionized strikes but also to encourage them, to the detriment of those organized by unions. Indeed, a union needs at least half plus one of the workers in the company in order to be legally established, so it is easier for the workers to act outside a union.

### **5.2. The interdiction to replace workers on strike**

The interdiction to replace the employees on strike, largely accepted in the European states' law systems, does not exist in other law systems. In the U.S. system, the employer is entitled to replace with full-time or temporary substitutes the workers only during the strike. The workers on strike can be replaced in order to avoid company's bankruptcy and losing the jobs for good (Roukis and Farid, 1993, pp. 82-83). The practice of substitute employees seems to gradually spread as, on the one hand, the unionization rate decreases (it becomes easier for the employer to find non-unionized employees) and on the other hand, hiring a person to replace an

employee on strike is no longer sanctioned by society. However, if the strike takes place in an area with a strong pro-union community, or for reasons that may affect the sensitivity or the morals of the community, finding substitute employees can be a problem. On the other hand, nothing prevents the new employees to be members of the very union that organized the strike. This creates difficulties in practice and doctrine regarding the competence of the union to represent the employees on strike and the new employees at the same time, since these two categories have opposite interests (Sherman, 1996, p. 179).

A different approach is adopted by the Committee on Freedom of Association of the ILO which stated that “if a strike is lawful, using of workforce brought from outside the company to replace the workers on strike for an indefinite period of time implies the risk of waiving the right to strike which can affect the free exercising of the union rights” (International Labour Organization, 2006, pp. 132-133).

Beyond the issue of lawfulness in hiring replacements, a totally separate issue is whether such a practice is efficient. As the union represents the workers on strike, the management represents the investors and must do their best to avoid collapse. However, experience proved in many cases that hiring substitutes did not avoid bankruptcy but it caused deeper conflict of interests and often degenerated in violence (between workers on strike and substitutes), thus breaking any communication paths and negotiation between management and the workers on strike.

In Europe, it is generally forbidden to dismiss the workers on strike and replace them with other employees under full time contracts. However, only few states forbid temporary replacement of the employees that stopped working during the strike (among which Spain and Portugal).

Romania has one of the strictest law systems from this point of view, as the law forbids the employment of substitute workers even during the conflict, and forbids the employer to take any action meant to minimize loss and save the business. The employer has no right to ask the workers that are not on strike to work extra hours or to take over the positions of the workers on strike, but it shall bear the entire chain of negative effects of the strike for as long as the strike is lawful. It is a more severe option than ILO's recommendations, and perhaps not a very prudent one from an economic perspective.

### ***5.3. Lawful goals of collective conflicts***

What are the goals of the employees that initiate a collective conflict?

Most law systems in Europe admit that any goals related to the conditions of employment are legitimate. Moreover, in Italy, Spain and Denmark not only is every strike seeking for better employment conditions permitted, but also strikes that have as object the overall legal regulation of employment conditions are lawful, thus some political strikes are also accepted (Rebhahn, 2004, p. 111).

By exception, in Germany only the conclusion of a collective agreement can be a lawful objective, whereas all other objectives lead to the illegality of the strike. The

Romanian legislator adopted this solution which is in fact unique in Europe; the collective conflicts lose their legitimacy as soon as a collective contract is concluded, irrespective of the demands of the employees or public servants.

#### **5.4. The obligation of social peace**

The source of the obligation of social peace can be the contract or the law. The source of the social peace obligation is legal in systems where the law prohibits strikes during the term of the collective labor contract, regardless whether or not the parties have included a social peace obligation in their agreement. This is the case in Romania: the strike can only be initiated during a collective conflict, and a collective conflict can only occur during the bargaining of a collective contract. As long as the collective labor contract is still in effect, social peace is compulsory.

In other law systems, the obligation of social peace has as source the contract and the social partners agree on it. In this case, the obligation of social peace can be:

- implicit, where jurisprudence has stated that it would be automatically implied from the collective labor contract concluded between the parties, based on the principle *pacta sunt servanda* (it is the case of the German law system); and
- express, compulsory (in order to trigger effects) in law systems where the strike can be initiated at any time, including during the execution of the collective labor contract (it is the case of the Belgian law system).

On the other hand, there are law systems, as the French one, in which the social peace clause cannot trigger legal effects in any case, not even if the parties expressly stipulated the triggering of these effects. As the French Constitution stipulates the right of the employees to go on strike, the waiving of such a right by concluding a social peace convention is considered to be null and no collective agreement can forbid the right to go on strike (Rebhahn, 2004, p. 108). There are, therefore:

- a. law systems in which the social peace agreement is useless since the collective contracts include *ex legem* such an effect;
- b. law systems in which the express social peace agreement between the partners leads to the legal obligation of social peace. We can differentiate here:
  - the relative obligation of social peace aiming only at the aspects stipulated in the agreement;
  - the absolute obligation of social peace, forbidding any strike-related action irrespective of reasons;
- c. law systems in which the social peace agreement causes mainly moral effects, unless otherwise agreed by the parties; and
- d. law systems in which the social peace agreement cannot cause any effects since the right to go on strike cannot be waived in a contract.

Failure to comply with the social peace obligation and the initiation of the strike can have various effects depending on the source of the obligation, be it the law or the contract. If the source of the social peace obligation is the contract, however, the strike may be considered to be lawful, the employees on strike may not be sanctioned

but the employer may be entitled to damages for non-compliance with the social peace agreement (Goldman and Corrada, 2011, p. 414). If the source of such obligation is the law – as it is in Romania’s case – non-compliance with this obligation entails the unlawfulness of the strike.

Under Romanian law, in case of collective conflict, the workers (unionized or not) only have the possibility to go to trial in order to be reinstated. It is noteworthy the fact that the Experts Committee of the ILO has shown that “such restrictions must be compensated by the right to have recourse to impartial and rapid machinery for individual and collective grievances concerning the interpretation or application of collective agreements” (ILO, 1994, p. 73). It is still questionable whether the Romanian legal system equally offers all the guaranties for a fast and fair settlement of the process, which represents an ILO requirement.

## 6. Conclusions

The Romanian legislation on collective labor conflicts, currently at crossroads, is rather susceptible to discourage the initiation of such conflicts. Considering the facts we have presented so far, such a situation looks alarming since the absence of conflicts does not in fact mean social peace. Irrespective of the law system, social peace is a result of a conscious and voluntary effort, never imposed upon the potential actors.

Furthermore, does this approach sustain flexicurity? We incline to say no. In the last years, for the New Member States the utmost urgency was to render as much flexibility as possible so as to complete the process of transformation of the economy. Within the concept of flexicurity, the focus was on the flexibility component rather than on security. One could even ask if the new members are competitive enough to afford a high level of job security. But were indeed the strictness of employment protection legislation and the freedom of strike obstacles for enterprises in a highly competitive Europe? In fact, according to the research conducted by the ILO, increasing flexibility alone and limitation of the collective conflicts have never improved labor market efficiency or labor relations within public institutions or public authorities (Cazes and Nesporova, 2007, p. 20).

Before being enforced, the concept of flexicurity must be organically assimilated by the society’s structures. Flexicurity does not only imply flexibility of the contractual arrangements (for implementing this, the legislator faces social difficulties rather than economic difficulties), but also enhanced opportunities for lifelong professional training, development of active policies on the labor market, and implementation of modern systems of social security. All these measures shall be accompanied by simplified conflict resolution mechanisms in case of both employees and public servants.

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