



Journal of Business, Economics and Finance

Year: 2018 Volume: 7 Issue: 1



BENEFITING FROM COLLECTIVE LABOUR AGREEMENT BY PAYING SOLIDARITY DUE

DOI: 10.17261/Pressacademia.2018.791

JBEF- V.7-ISS.1-2018(1)-p.10-16

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To cite this document

Ozkaraca, E., (2018). Benefiting from collective labour agreement by paying solidarity due. Journal of Business, Economics and Finance (JBEF), V.7(1), p.10-16.

Permant link to this document: <http://doi.org/10.17261/Pressacademia.2018.791>

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ABSTRACT

Purpose- Paying solidarity due is one of the ways to benefit from collective labour agreement for labours who work in the workplace in scope of the collective labour agreement but not a member of the labour union who made the agreement. Benefiting from collective labour agreement by paying solidarity due could begin after the signature date of the agreement. Labours who pay solidarity due could not be benefitted from retrospective clauses of collective agreement.

Methodology- In our study, the scope and provisions to benefit from the collective labour agreement by paying solidarity due would be discoursed.

Findings- There is no difference in the scope of benefit from collective labour agreement between paying solidarity due and being a member of the labour union except benefiting the retrospective clauses of the agreement.

Conclusion- In order to establish a balance between collective union freedom and negative freedom of trade union, the amendment of the law that permitted labours who pay solidarity due to benefit from the retrospective clauses is needed.

Keywords: Collective labour agreement, benefiting from collective labour agreement, solidarity due, retrospective effect, labour union membership

JEL Codes: J50, J51, K31

1. INTRODUCTION

Paying solidarity due to benefit from the collective labour agreement is one of the ways that allow labours who work in the workplace in scope of the collective labour agreement but not a member of the labour union (Aktay, 1998: 1 etc.; Şahlanan, 1992: 140-142; Tuncay and Savaş Kutsal, 2017: 290 etc.; Narmanlıoğlu, 2016: 444 etc.; Aktay and Arıcı and Senyen Kaplan, 2013: 538 etc.; Andaç, 1989: 47-48; Ekmekçi, 1996: 149 etc.; Caniklioğlu, 2006: 123-124; Özkaraca, 2014: 183). Solidarity due is an amount of money given to the union by labours who are not a member of the labour union that is a party to the collective labour agreement (Tuncay and Savaş Kutsal, 2017: 291; Sur, 2017: 341; Andaç, 1989: 48-49. For the information about solidarity due in Swiss Law see also Geiser and Müller, 2012: Rn. 841-842; Portmann and Stöckli, 2007: Rn. 1095-1096; Streiff and von Kaenel and Rudolph, 2012: Art. 356b, N.6).

Benefiting from collective labour agreement by paying solidarity due has always been one of the crucial and controversial debate in collective labour law practice. The labour unions are against this institution because of the idea that trade unions might lose their members. Labour unions are opposed not only applying same rules to the union members and others pay solidarity due but also keeping solidarity due amount low. Even though the same discussions occurred in enacting Law on Trade Unions and Collective Labour Agreements Law No. 6356, the law regulates the right to benefit from collective labour agreement not only for members of the labour unions but also for the labours who pay solidarity due (For the further discussion in this topic see also Özkaraca, 2014: 183-184). However, labours who pay solidarity due could be benefitted from collective labour agreement only after the date of signature. In our study, the scope and provisions of the benefiting from the collective labour agreement by paying solidarity due would be discoursed.

2. REQUIREMENTS OF BENEFITING COLLECTIVE LABOUR AGREEMENT BY PAYING SOLIDARITY DUE

2.1. Being in Scope of Person or Workplace of the Collective Labour Agreement

Main principles to benefit from collective labour agreement are same for the members of the labour union that is a party to the collective labour agreement and for labours who pay solidarity due to benefit it. In this sense, to benefit from collective labour agreement the labour should be in the scope of application for person or workplace of the agreement. This rule is also valid for labours who pay solidarity due and become member of the labour union.

The one who demands to benefit from the collective labour agreement must be a labour that works in the workplace or one of the workplaces of the employer the party of the collective labour agreement (or member of the employer-union) (Şahlanan, 1992: 140; Tuncay and Savaş Kutsal, 2017: 292; Özkaraca, 2014: 111). Therefore, the ones who work in the workplace that is in the scope of application of collective labour agreement, yet not work based on the labour contract, could not benefit from collective labour agreement (Narmanlioğlu, 2016: 447; Tunçomağ and Centel, 2013: 380; Aktay and Arıcı and Senyen Kaplan, 2013: 544; Sümer, 2016: 254; Akyiğit, 2015: 602; Kandemir, 2013: 185; Subaşı, 2009: 180-181; Özkaraca, 2014: 185). Similarly to that, labours who work in the workplace of the employer who is a party to the collective labour agreement, but not work in a workplace which is the scope of the collective labour agreement, could not benefit from the collective labour agreement (Şahlanan, 1992: 140; Aktay and Arıcı and Senyen Kaplan, 2013: 543; Sur, 2017: 334; Tuğ, 1996: 189-190; Kandemir, 2013: 185; Özkaraca, 2014: 185).

Another subject about benefiting from collective labour agreement is that, the persons who considered as workers within the meaning of the Law No. 6356 but not work based on the labour contract could not benefit from the collective labour agreement. Labour, employer and workplace concepts are as defined in the Labour Law No. 4857 for the purposes of the implementation of the Law No. 6356 (Article 2/3). According to the Labour Law, the labour is a real person working under an employment contract. The ones who considered as labour despite not working according to the labour contract widened in the Law No. 6356 compared to Law No. 2821. According to Law No. 6356, a natural person who carries out his professional activities independently for a fee, apart from a labour contract and in accordance with a transport contract, work contract, attorney agreement, brokerage contract, publishing contract and a commission contract shall also be considered as workers within the meaning of from the second to the sixth part of this Law (Article 2/4). Explicitly mentioned in the Article 2/4, those people who do not work based on to the labour contract are considered as workers only within the meaning of from the second to the sixth part of the Law. In other words, they will be considered as workers only for the provisions about unions but for the provisions about collective labour agreements (Özkaraca, 2014: 112; Şahlanan, 2013: 15; Okur, 2013: 81 etc.).

In the same context, the one who works in the same workplace as a labour of sub-employer could not benefit from the collective labour agreement that signed from the primary employer by paying solidarity due (Şahlanan, 1992: 140; Çelik and Caniklioğlu and Canbolat, 2017: 889; Süzek, 2016: 173-174; Sur, 2017: 330; Gerek, 2009: 138; Akyiğit, 2015: 604; Sümer, 2016: 254; Canbolat, 1991: 107; Başbuğ, 2012: 182; Özkaraca, 2014: 111).

Labours who could benefit from collective labour agreement by paying solidarity due, described in three groups in Law. The first group is the labours who are not members of the trade union that is a party to the collective labour agreement at the date of signature. That labours work in the workplace that collective labour agreement is applied, but they are not members of the labour union which signed the agreement. The second group is the workers who are subsequently recruited but do not join the union. The last group is the workers who are expelled or resigned from the union after the date of signature (Article 39/4). As it seen above, the common trait of the three group is that those labours are not a member of the labour union which signed the collective labour agreement at the date agreement is applied. There is no difference among the three groups of labours in the sense of benefiting from collective labour agreement by paying solidarity due.

The labour who becomes member of the union after the date of signature, benefits from the agreement as of the date when the labour union notify this membership to the employer through the end of union membership. Benefiting from collective labour agreement as a member of the labour union finishes with the end of the membership for any reason (Narmanlioğlu, 2016: 441; Tunçomağ and Centel, 2013: 377; Ekmekçi, 1996: 130; Kandemir, 2013: 182; Özkaraca, 2014: 185).

The collective labour agreement could be signed by the parties or by the High Board of Arbitration. The right to benefit from collective labour agreement by paying solidarity due would not be effected by it (Akyiğit, 2015: 615).

2.2. Not Being Excluded from the Scope of the Collective Labour Agreement

2.2.1. Representative of the Employer and Those Who Participate in the Collective Labour Agreement Negotiations in the Name of the Employer

Another requirement to benefit from collective labour agreement in Law is not being excluded from the scope of the collective labour agreement. As in Law No. 2822, in Law No. 6356 it is predicted that some of the labours could not benefit from the collective labour agreement even though they work under the employer who is party of the collective labour agreement and they fulfil other requirements envisaged in Law. According to the Law No. 6356 "Employer's representatives within the meaning of this Law and those who participate in the collective labour agreement negotiations in the name of the employer shall not benefit from the collective labour agreement" (Article 39/7). Due to the article that accepts the employer's representatives as persons authorised to manage an entire enterprise in the name of the employer (Article 2/1, e) and the article considers employer's representative as an employer for the purposes of the implementation of the Law, it would be possible to reach the same conclusion predicted in Article 39/7. Because of that reason, Article 39/7 contributes for those who participate the collective labour agreement negotiations in the name of the employer but not considered as an employer's representative (Özkaraca, 2014: 113). Those labours would not benefit from the collective labour agreement.

2.2.2. Labours Who have Worked in the Workplace during the Strike

Another group that could not benefit from the collective labour agreement is the labours who have worked in the workplace during the strike except the ones who shall be required to work during the strike according to the Article 65 of Law No. 6356 (Article 39/8). On the other hand, parties could provide a provision that allows those labours benefit from the collective labour agreement. The article 39 in Law No. 6356 allows the parties to make provisions about those labours. In this sense, if the parties provide provision that allows those labours benefit from the collective labour agreement, those labours could benefit from the agreement; otherwise, they could not benefit even by paying solidarity due.

A right to join a strike is entitled not only to members of the labour union but also to the other labours. The provision of not to be worked during the strike is in force for every labour works in the workplace in the scope of the collective labour agreement (Tuncay and Savaş Kutsal, 2017: 309; Narmanlioğlu, 1991: 202; Şahlanan, 1992: 151; Aktay and Arıcı and Senyen Kaplan, 2013: 557; Ekmekçi, 1996: 174-175; Canbolat, 2002: 188; Özkaraca, 2014: 114). Because of that reason, labours who have worked in the workplace during the strike, regardless of being member of the labour union or not, could not be benefited from collective labour agreement (Sur, 2017: 338; Tuğ, 1996: 192; Başbuğ, 2012: 184). On the contrary to that, labours who requested to work in the workplace during the strike but not to be worked by the employer are out of the Article 39/8 of Law No. 6356 and they remain their right to benefit from collective labour agreement by paying solidarity due without the necessity of any other particular provisions (Şahlanan, 1991: 151-152; Tuncay and Savaş Kutsal, 2017: 309; Aktay and Arıcı and Senyen Kaplan, 2013: 557; Sur, 2017: 339; Canbolat, 2002: 189; Özkaraca, 2014: 114).

The reason of not to work during the strike have no precedence. It might be because of illness, annual paid leave, parental leave or etc. Regardless of the reason, labours could benefit from the collective labour agreement without restriction of Article 39/8 (Oğuzman, 1987: 79; Aktay and Arıcı and Senyen Kaplan, 2013: 557; Narmanlioğlu, 1991: 203; Reisoğlu, 1986: 330; Sur, 2017: 339; Tuncay and Savaş Kutsal, 2017: 309; Ekmekçi, 1996: 175; Canbolat, 2002: 188-189; Özkaraca, 2014: 115).

The voting request on a strike does not affect the right to benefit from collective labour agreement. Labours who demand to vote on a strike remain their right to benefit from collective labour agreement providing the other requirements envisaged in Law (Narmanlioğlu, 1991: 203; Reisoğlu, 1986: 330; Şahlanan, 1992: 151; Aktay and Arıcı and Senyen Kaplan, 2013: 557-558; Özkaraca, 2014: 115). Those rules implement to benefit from the collective labour agreement by paying solidarity due.

2.2.3. Labours Excluded from the Scope

In practice, parties of the collective labour agreement could provide provisions that exclude specific labours for the scope of the agreement such as managers, directors, chiefs or even entire office staff. The right of the parties to exclude labours from the scope of the collective labour agreement is accepted by the Supreme Court practice. In this sense, even union member labours could be excluded and they could not benefit from the collective labour agreement (Supreme Court 9. Civil Chamber, 11.07.2011, 26214/23303; also look Supreme Court 9. Civil Chamber, 18.06.2007, 9594/19481, www.legalbank.net. Discussions about the institution's compliance with laws Çelik and Caniklioğlu and Canbolat, 2017: 902-903).

In the current view of Supreme Court practice, provisions that exclude labours in specific status from the scope of the collective labour agreement would be valid. As a result of that, those labours' rights would be determined only by their personal labour contracts. Those labours could not be benefited from the collective labour agreement by being a member

of the labour union or paying solidarity due (Şahlanan, 1992: 143; Tuncay and Savaş Kutsal, 2017: 292; Sur, 2017: 342; Akyiğit, 2015: 605; Tuğ, 1996: 193; Sümer, 2016: 255; Özkaraca, 2014: 115-116).

2.3. Making a Request

Labours who demand to benefit from collective labour agreement by paying solidarity due should make a request for it. Even though the solidarity due would be paid to the labour union, the request would be directed to the employer (Tuncay and Savaş Kutsal, 2016: 281; Şahlanan, 1992: 144; Narmanlioğlu, 1991: 210-211; Aktay and Arıcı and Senyen Kaplan, 2013: 546; Gerek, 2009: 138; Sur, 2017: 342; Ekmekçi, 1996: 154-155; Akyiğit, 2015: 605; Başbuğ, 2012: 183; Caniklioğlu, 2006: 125; Canbolat: 2002, 176; Özkaraca, 2014: 186). Without any request, the employer could not deduct solidarity due from labours wage (Şahlanan, 1992: 143; Centel, 2003: 1 etc.; Sur, 2017: 342; Tuğ, 1996: 193; Supreme Court 9. Civil Chamber, 04.03.2003, 16415/2828). Any specific form for the request is not arranged. However written requests provide convenience for the proof (Sur, 2017: 342; Tuncay and Savaş Kutsal, 2017: 293; Şahlanan, 1992: 144; Gerek, 2009: 139; Akyiğit, 2015: 617). According to the Supreme Court, labours are responsible for proving that request is reached to the employer (Supreme Court 9. Civil Chamber, 17.3.1997, 4335/5219).

Labour's request is sufficient to begin to benefit from the collective labour agreement. The fact that employer did not send solidarity due to the labour union does not make any effect to the benefiting (Şahlanan, 1992: 146; Narmanlioğlu, 1991: 211; Sur, 2017: 343; Tuncay and Savaş Kutsal, 2017: 295).

The consent of the trade union or the employer shall not be required to benefit by paying solidarity due. That point clearly envisioned in the Law (Article 39/4 s. 2). This article brings a mandatory rule and contrary provisions could not be agreed by the parties. Provisions contrary to that is not valid (Tuncay and Savaş Kutsal, 2017: 293; Sur, 2017: 342; Sümer, 2016: 257).

When the new collective labour agreement is signed, the labour must re-establish his/her request (Şahlanan, 1992: 144; Sur, 2017: 342; Tuncay and Savaş Kutsal, 2017: 294; Gerek, 2009: 139; Akyiğit, 2015: 617; Sümer, 2016: 256). Benefiting from the previous collective labour agreement is not sufficient to sustain benefiting to the following one.

3. THE AMOUNT OF THE SOLIDARITY DUE

In abrogated Law No. 2822, the amount of the solidarity due is envisaged lower than the membership due as a two out of three of it (Article 9/4). However, in Law No. 6356, it is envisaged that the amount of the solidarity dues shall be determined by the trade union statute, provided that the amount is not above of the amount of the membership dues (Article 39/5). Also in Law, any limit for the membership dues is not provided.

Under the Law No. 6356, the amount of the solidarity due could be equal to the membership due. A great number of labour unions that are against the provision that allows to benefit from collective labour agreement by paying solidarity due, redispersed provisions that accept the solidarity dues which are equal to the membership dues by their regulations (Centel, 2013: 60).

As it stated in doctrine, this provision is a result of the underdevelopment in labour unions other activities rather than making a collective bargaining and collective labour agreement. However, this article is unsuitable to the context of the negative freedom of trade union. The labour who will pay the same amount of money as a solidarity due could feel himself/herself under the pressure of becoming a member. There isn't any special provision for the condition that labour who wants to pay solidarity due to the labour union, despite s/he is already a member of another labour union. In this condition, labour could stand with economical struggle and might resign from his/her membership to the labour union (Tuncay and Savaş Kutsal, 2017: 295; Çelik and Caniklioğlu and Canbolat, 2017: 897-898; Aktay, 1998: 6; Tuncay, 2013: 84; Akyiğit, 2015: 621-622; Canbolat, 2013: 76-77; Özkaraca, 2014: 186-187; See also the issue in Swiss law. Streiff and von Kaenel and Rudolph, 2012: Art. 356b, N. 6; Geiser and Müller, 2012: Rn. 841-842; Portmann and Stöckli, 2007: Rn. 1095-1096).

Solidarity dues shall not be paid to the trade unions barred from carrying on any activity (Article 39/6). A collective labour agreement shall not cease to have an effect because the trade union which is a party to the agreement loses its legal personality, is barred from activity, or has lost its competence (Article 37/1). In these cases, labours who pay solidarity due keep benefiting from collective labour agreement without having to pay solidarity due (Şahlanan, 1992: 146, 149; Tuncay and Savaş Kutsal, 2017: 295-296).

4. FORWARD EFFECT OF BENEFITING FROM COLLECTIVE LABOUR AGREEMENT BY PAYING SOLIDARITY DUE

To benefit from the collective labour agreement by paying solidarity due begins at the date on which such request is made. The requests before the date of signature shall be valid starting from the date of signature (Article 39/4 s. 3-4). The difference of that provision in Law No. 6356 from abrogated Law No. 2822 is that provision accepts requests before the date of the signature valid starting from the date of signature.

With this regulation two issues are enlightened. Firstly, sustainability of the Supreme Court decisions that declare requests made before the date of the signature invalid (even after the date of signature), is no longer sustainable. In the period of Law No. 2822, Supreme Court decided that the labours who made request before the date of signature, neither benefit from the collective labour agreement's retrospective clauses nor their request could not be interpreted as a request to benefit from the collective labour agreement after the date of signature (Supreme Court 9. Civil Chamber, 15.02.2006, 20647/3670, Tühis, C. 20, N. 3, 101-102, Caniklioğlu, 2006: 123 etc.). After the Law No. 6356 came into force, the requests before the date of signature shall be valid starting from the date of signature. So, the labour should benefit from the collective labour agreement without have to repeat request (Özkaraca, 2016: 295).

With the article 39/4, the doctrinal discussions about benefiting from the retrospective clauses of collective labour agreement by paying solidarity due came to the end. Due to the lack of legal regulations about benefiting retrospective clauses of collective labour agreements by paying solidarity due in Law No. 2822, the majority of the doctrine argued that labours who make the request to pay solidarity due could benefit from collective labour agreements' retrospective clauses. However, in Law No. 6356, those doctrinal arguments are not taken into consideration and Supreme Court decisions about that discussion became a legal provision. As a result of this, when parties of the collective labour agreement accepted a commencement date before the date of signature, only labours member of the labour union in the date of signature could benefit from the collective labour agreement from the date of commencement. However, the labours pay solidarity due could not benefit from the retrospective clauses (Çelik and Caniklioğlu and Canbolat, 2017: 896-897; Centel, 2013: 60; Özkaraca, 2014: 188).

According to our opinion, the regulation should be amended in a way that labours who are not members of the labour union can benefit from the collective labour agreement by paying solidarity due from the commencement date.

The justifications expressed in the period of the Law No. 2822 for the necessity of amendment about that issue are still valid. In order to preserve a balance between collective trade union freedom and negative freedom of trade union, the equality should be formed among the labours who have paid solidarity due and labours who are the member of the labour union in terms of benefiting from the monetary provisions of the collective labour agreement. If the equality is broken in favour of labours who have paid solidarity due, it would be against collective trade union freedom; if the equality is broken in favour of the members of the union, it would be opposed to the both positive and negative freedom of trade union. In order to be able to mention the existence of such equality, it is necessary that labours who pay solidarity due could benefit from the retrospective provisions of the collective labour agreement as the union members (Çelik and Caniklioğlu and Canbolat, 2017: 896-897; Ekmekçi, 1996: 162; Subaşı, 2009: 190; Özkaraca, 2014: 191).

The interpretation of Law No. 6356 Article 39/4, the last sentence, from this perspective, it is stated that the equality between the labours is deteriorated in favour of members of the labour union, and the benefit from the retrospective clauses of the collective labour agreement restricted with the members of the labour union. Thus, it is prevented to benefit from the retrospective clauses of the collective labour agreement to the labours who do not want to become members of any trade union, or who are members of another trade union are taken back to the beginning of their enforcement. The labours who are not a member of the labour union which signed collective labour agreement feel themselves under the pressure to become a member of the labour union to benefit from the retrospective clauses of the collective labour agreement. Due to the delays in the binding process of the collective labour agreements in our country, it is very frequent to determine a commencement date before the date of signature. Agreements can sometimes be put effective backwards for about a year. Considering the contracts are usually made for a period of two years, the worker is only able to benefit half of the time of the collective labour agreement by paying a solidarity due. If the parties agreed on the put into the force only for the previous period the workers could not benefit from the agreement by paying solidarity due. As long as the length of the retrospective effect increases, the pressure on labours to join the party labour union would be increased. This result does not coincide with the existence of the institution of benefit by paying solidarity due. Indeed, solidarity due has been recognised in order not to create such oppression on labours, and parallel to this purpose, the consent of the trade union shall not be required in this matter (Ekmekçi, 1996: 162-163; Özkaraca, 2014: 191-192).

On the other hand, while there is no difference in benefiting between being member or paying solidarity due when the collective labour agreement put into force in the date of signature, it is inconsistent to provide a difference when the collective labour agreement put into force before the date of signature (Özkaraca, 2014: 192; Oppositely Narmanlioğlu, 2012: 152; Taşkent, 2004: 263).

Because the new collective labour agreement shall not enter into force before the expiry of the previous agreement, an amendment must be made that allows labours to make a request to pay solidarity due after the expiration date of the previous agreement. In the case that a collective labour agreement lasting at the workplace, request to pay the solidarity due would be made at the end of the expiration of the agreement. So, the labours who pay solidarity due could benefit from the collective labour agreement from the commencement date. On the other hand, when the labours make a request after the commencement date, right to benefit starts at the date of request (Ekmekçi, 1996: 168-169; Özkaraca, 2014: 194).

If an amendment made in this direction, the question about the payment time of the solidarity due would be raised. As it stated in the doctrine, the labour who demand to benefit from the collective labour agreement should not have to pay solidarity due to begin benefiting in the date of request is made. Because of that, it would be appropriate to regulate an article that presumes full payment of the solidarity due should be accepted so that labour would be benefited from the retrospective effects of the collective labour agreement. A regulation could be envisaged in the regulation of the check-off system (Ekmekçi, 1996: 168; Özkaraca, 2014: 194-195). Because the labours who pay solidarity due could only benefit from the collective labour agreement not the other activities of the labour union, there wouldn't be any contradiction in the system that predicts the obligation to pay the solidarity due at the beginning of the utilisation.

5. THE SCOPE OF THE BENEFITING BY PAYING SOLIDARITY DUE

There is no difference in the scope of benefit from collective labour agreement between paying solidarity due and being a member of the labour union except benefiting the retrospective clauses of the agreement. Labours who pay solidarity due could also benefit from all monetary terms of the collective labour agreement.

After the termination of the collective labour agreement, solidarity due would not be paid. The provisions of a collective labour agreement that has expired and that are related to labour contracts shall continue to be binding in the form of a contract of employment until a new collective labour agreement enters into force (Article 36/2). In order to benefit from the following effect of the collective labour agreement, the labour must be benefiting from it at the expiration date. There isn't any difference between members and the labours who paid solidarity due about benefiting following effect of the collective labour agreement. In other words, labours who benefit from collective labour agreement by paying a solidarity due could benefit the following effect, like the labour union members (Narmanlioğlu, 2016: 466, Tuncay, 2013: 84, Şahlanan, 1992: 149, Tuğ, 1996: 198-199, Sumer, 2016: 257, Sur, 2017: 322-323, 344, Ekmekçi, 1996: 172, Özkaraca, 2016: 307). In order to benefit from the following effect, solidarity due payment is not required (Tuncay and Savaş Kutsal, 2017: 296; Narmanlioğlu, 2016: 467; Tuncay, 2013: 84, Ekmekçi, 1996: 172, Sumer, 2016: 257).

6. CONCLUSION

Labours who are not member of the labour union could benefit from the collective labour agreement by paying solidarity due to the union. However as in Law No. 2822, in Law No. 6356, it is stated that benefiting by paying solidarity due could begin only after the date of signature of collective labour agreement. When the collective labour agreement comes into force before the signature date, those who have paid solidarity due could not benefit from the retrospective provisions. In order to establish a balance between collective union freedom and negative freedom of trade union, the amendment of the law that permitted labours who pay solidarity due to benefit from the retrospective clauses is needed. In the same way, regulations that allow the amount of the solidarity due equal to the amount of the membership dues should be amended.

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