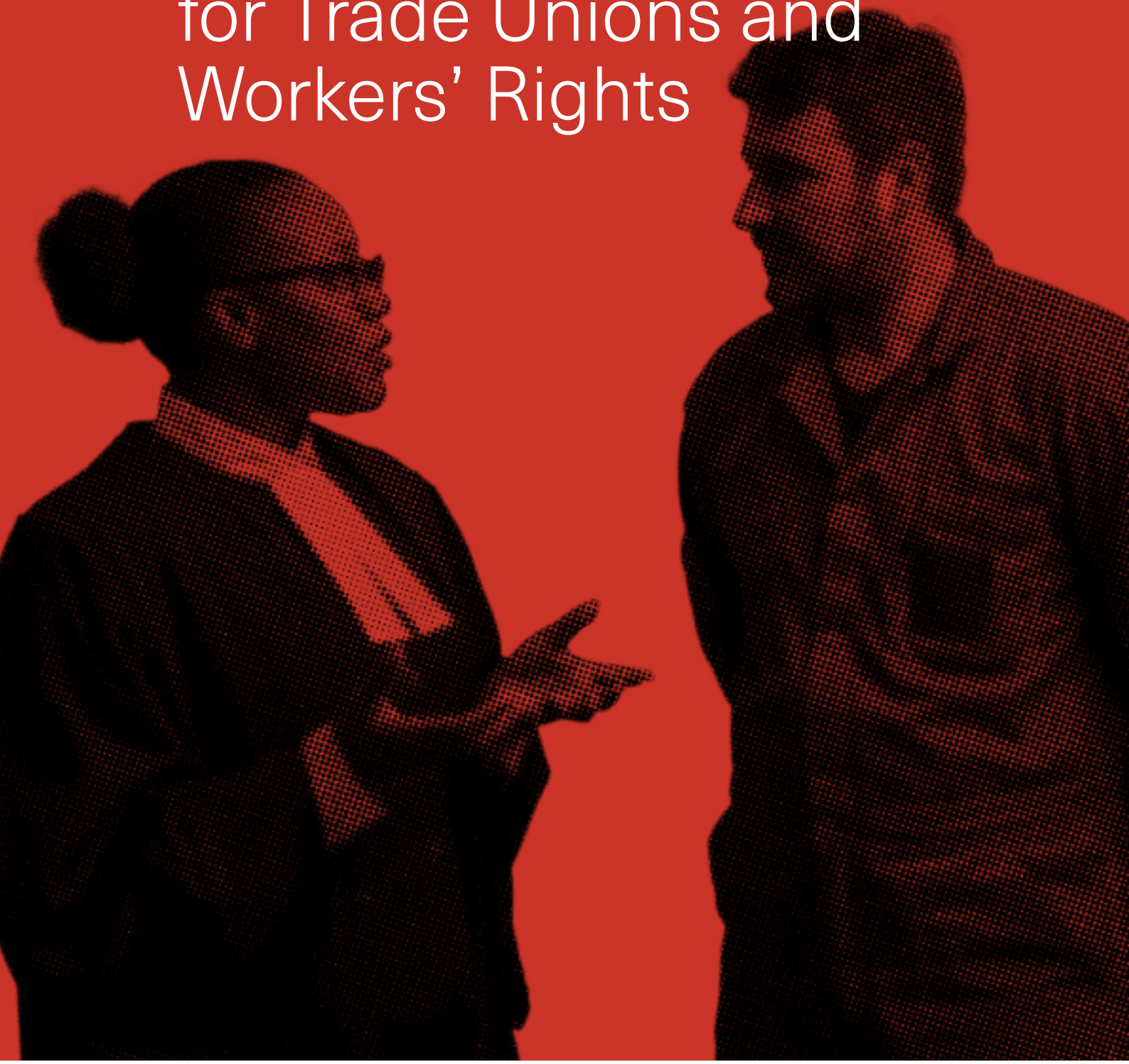
STRATEGIC LITIGATION GUIDE

for Trade Unions and Workers' Rights



CONFEDERATION SYNDICAT EUROPEÆEN TRADE UNION

ETUCLEX

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Acknowledgments

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Disclaimer

This document provides general information and guidance and is not a comprehensive treatment of the subject. It is not intended to provide legal advice. Readers are advised to consult ETUC and seek legal counsel before taking any legal action.

Author:	Dr Vigjilenca Abazi
ETUC Steering team:	Isabelle Schömann (Deputy General Secretary), Stefan Clauwaert (Senior Legal and Human Rights Advisor), Joakim Smedman (Legal Advisor), Thomas Taylor Di Pietro and Sarrah Bentahar (Project Officers), Esyllt Meurig and Bezaye Girma (Administrative Assistants)
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Procedure

Every step of the legal action is governed by a myriad of procedural rules; some are straightforward, others not as much; every forum has specific procedural rules, you may need to meet different requirements by each forum. Sounds obvious? Lack of compliance with procedural requirements is a common way to lose the opportunity to present the case before even entering the (court)room. Pay attention to procedural details. Part II of this Guide gives you the key rules, timelines, and dos and don'ts for the relevant procedures.

Efficacy

Faster results might mean selecting a forum that will render a legally non-binding decision, opting for judicial remedies at the European level will take significant time. Sometimes selecting one forum might preclude your case from admissibility in another forum (recall, procedures are key). Be advised to decide early in the case development what is the most pertinent issue for your case and the impact you seek to attain through its litigation. If you cannot make that determination from the commencement phase, then be mindful during the development of the case and ensure that deadlines are not missed or application stages in the case that would render a case inadmissible. Read Part I on how to adequately make these key decisions.

Resilience

Litigation is a process, not a single intervention. Finding the "right" case, case development, litigation and post-litigation, implementation of the decision...these and many more in-between phases each present a different set of challenges, working methodologies, and stakeholder alliances (or tensions). Laws and governments can change during (longer) litigation period. A solid strategy requires a long-term perspective and leaves room for manoeuvre. Assess whether the objective can be attained through iterative cases rather than aiming for a **landmark judgment** as the latter is more likely to be a longer and delayed process.

Expertise

Scholars, law clinics, experts, and colleagues at European level with similar cases and practical experiences and relevant knowledge can be helpful to you for case development and sometimes are critical partners for litigation. How a question is phrased can be a critical turning point for a case that will be referenced by a national judge to the Court of Justice of the European Union; whether there is sufficient data to back up a legal argument can be determined, or the gap filled, by the scholars active in the field. Keep in mind the diversity of scholarship and expertise and ensure that you are benefiting from arguments that most adequately help your case while anticipating counterviews.

Perspective

A solid strategy goes beyond a 'win or lose' mindset. A favourable judgment or decision can be a positive outcome towards the objective sought, but important impact can be attained even if there is a ruling against your case or the case was deemed inadmissible at the international/European fora. From the early stages of the case, clarify the implications involved for the strategic objective and for the plaintiff if the case is not won. The probability of a win is a consideration but should not be a predominant factor. Strategic value can also be derived after the case has been decided. Work with stakeholders in the field to maximise the impact of the case beyond the legal route. Engage with media to build factually correct understanding of the case (e.g., difference between inadmissibility and unfavourable judgment).

Introduction

Strategic litigation acts as an effective tool for protecting and advancing the rights and interests of workers and trade unions. However, the intricate nature of modern legal systems, the plethora of institutions, and the lengthy, convoluted processes can pose challenges for trade unions in leveraging the full spectrum of legal avenues. This Guide is designed to empower trade unions, lawyers, practitioners, and activists to adeptly use the law for the benefit of trade union and workers' rights litigation. It offers hands-on advice and legal insights on the mechanics of strategic litigation, the formulation of effective strategies, and the selection of suitable forums at the supranational level, both judicial and quasi-judicial.

Strategic litigaton

Strategic litigation has garnered momentum across various legal domains, encompassing labour rights, anti-discrimination, and collective rights. Strategic litigation is commonly understood as advancing specific (legal) goals by litigating individual cases. For purposes of this Guide strategic litigation means the *use of law in a deliberate way* to achieve a *desired objective*. This working definition has three elements to be further explained: **use of law** refers to all activities you could take at various judicial or quasi-judicial fora. This Guide shows you the legal paths. **Deliberate way** means that the decision to start a case is intentional and all the steps along the way are planned and carefully considered, i.e., they are strategic. Yet, a case can also become strategic along its development even if its commencement does not begin deliberately. Further, a case may necessitate a defensive approach to counteract litigation. The purpose of this guide is to give you the tools and the know-how for you to build the best strategy that works for your goals and the case at hand. The Guide is equally relevant in the defence of a certain case, as a strategic case may be brought as a reaction to a situation, such as new legislation detrimental to worker rights, as opposed to gaining new rights. **Desired objective** refers to protecting and advancing trade union and workers' rights and interests. Winning a case could achieve that objective, but there is much more to strategic litigation than a win-or-lose mindset. The Guide shows you how and why you could have an important impact even if the ruling is not in your favour.

The word "litigation" may be misleading in thinking that courts should always be involved. No, as we explain, quasi-judicial fora can be equally valuable avenues to address your objective and in building a solid strategic litigation approach, possibilities for non-judicial remedies should be considered. Further, as most lawyers would argue, every case can be said to involve a "strategy", but this does not mean that each case is "strategic". The latter intends to have an impact beyond the facts of the case relevant for the plaintiff and utilises approaches that seek to achieve the objective of the broader cause. In rare

occasions, the underlying objective may be in tension with the interest of the plaintiff. This Guide provides helpful tips in how you can navigate this balance and reach adequate outcomes.

This Guide is structured in two segments: Part I imparts the essentials of strategic litigation. Part II delves into the judicial and quasi-judicial forums at the supranational level available for trade unions and the rights and interests of workers.

Aim of this guide

Litigation, and specifically strategic litigation, is already recognised by trade unions as an important, and sometimes the only, means to defend and advance trade union and worker's rights and interests. Efforts to engage in relevant cases to defend rights have increasingly benefited from legal savviness with many active stakeholders working together. The aim of this Guide is to build on existing knowledge on how strategic litigation is successfully used, or not, bringing together insights from trade unions and workers' rights and other related fields, such as human rights, to offer accessible legal and practical information that could benefit various actors in the field. The principal goal is to offer guidance in understanding and applying strategic litigation, and to offer considerations to help you deciding whether you should pursue strategic litigation. The Guide brings together insights from international and European level remedies of both judicial and quasi-judicial nature. In Part I, the Guide aims to help you assess the legal and practical considerations from initiating a case and all through the final decisions and its aftermath. Part II aims to assist with legal details in offering the main procedural details relevant in determining whether your case can and should be heard at a particular avenue.

Strategic litigation increases compliance with the law, strengthens existing rights by clarifying or filling gaps, and can be instrumental in overturning previous cases of detrimental effect for workers and trade unions. At the same time, it can be an expensive, time-consuming, and possibly a privileged avenue to defend or advance rights. This Guide seeks to show all the nuances of strategic litigation in relation to the bodies and institutions relevant for trade unions and allow for informed decisions to be taken by lawyers, practitioners, and others who seek to engage in strategic litigation in this field. Ultimately, the aim of the Guide is to facilitate your work in making decisions whether to initiate a case and if you do, how to strategically build a map to lead to the intended favourable results.

Concept Note – EUTC Strategic Litigation Guide

Litigation as a tool for trade unions and workers

Strategic litigation can be used to challenge laws and policies that are harmful to workers and to hold employers accountable for violating labour rights. It can be used to establish legal precedents that set standards for treating workers and guide future cases. Unclear laws can be clarified, and enforcement of laws can be enhanced. Strategic litigation enables to strengthen, clarify, or fill legal gaps at the national, international, or European level, challenge noncompliance, or overturn a damaging decision for trade union and workers' rights. Preventing or mitigating a potential negative outcome is also possible by intervening in an ongoing case brought forward by employers or other parties. Importantly, strategic litigation does not seek to replace or diminish other trade union strategies, but together with those, to enhance the position and rights of trade unions and workers.

How could I use this guide?

I'm an experienced lawyer, I wonder if this Guide is useful for me…

Your experience in the field is evident from the many cases you have successfully defended. However, it's worth considering whether your strategy could be enhanced by increased collaboration with various stakeholders and by leveraging outreach for greater impact. For insights on this approach, refer to pages **20, 22, 28**. Additionally, staying current with the latest research is vital. For the most recent findings, consult pages **52, 53**.

I mostly work at the national level, why would this Guide be useful to me?

Working primarily at the national level, you may wonder about the utility of this Guide. Consider that cases can reach to the Court of Justice of the European Union if there is the need to interpret EU law. Some important trade union cases have suffered due to inadequate preparation for European judicial remedies. As a practicing lawyer in an EU Member State, it's crucial to be versed with the European judicial remedies detailed within this Guide.

I'm a lawyer who is passionate about trade union rights but how do I even get a case started?

As an advocate for trade union rights, initiating a case may seem daunting. For guidance on launching and building a case, please refer to pages **16, 22, 24**.

I'm interested in trade union and workers' rights, but I'm not a lawyer…why should I read this Guide?

Your interest in trade union and workers' rights doesn't require a legal background to benefit from this Guide. It offers a comprehensive overview of relevant institutions that could support your advocacy or research efforts. By understanding the active stakeholders in this arena, you can identify opportunities to contribute effectively. For detailed information, please refer to pages **33, 41, 58**.

I'm a researcher, will I find information relevant for research?

The Guide provides the latest updated procedural rules and uniquely brings together information about the judicial and quasi-judicial fora at the international and European level. The list of references could be very useful if you are starting research in this field.

Essential terms

Admissibility

A determination by a legal or adjudicatory body on whether a case or complaint satisfies the necessary procedural criteria, such as jurisdiction, standing, and timeliness. It focuses on whether the matter can be accepted for substantive review, ensuring that the formal prerequisites for the case to proceed have been properly met.

Amicus Curie

Latin term meaning "friend of the court." Refers to a party that is not involved in a case but offers information, expertise, or insight to the court on a particular matter.

Application

Filing a case through a specific form which contains the information that must be provided to the court and that format should be strictly followed.

Collective complaint

A legal mechanism allowing a group, organization, or collective body to file a complaint on behalf of a broader group of individuals, typically to address widespread or systemic issues. It aims to seek redress for collective rights violations or concerns.

Pleadings

The written documents filed by parties in court which state the positions, claims, defences, and replies in a legal case.

Preliminary reference

Type of judicial procedure where national courts submit questions to the Court of Justice of the European Union to facilitate the interpretation of EU law relevant for the case litigated at the national level.

Standing

Procedural rules which the organisation must meet to be allowed to file the case at the particular body. Without meeting such rules, thus without 'standing' the organisation cannot proceed further with the case.

Part I

Planning strategic litigation

Always remember to...

» Start the case with the ending in mind

» Double check procedural requirements

» Engage all possible partners and keep them engaged... it can be a long process

You will find the answers for:

1. How is a “strategic case” identified?
2. What approach can you rely on for fact-finding and evidence gathering?
3. What considerations are relevant in the early planning of the case?
4. How early in case development should you know which avenues to pursue?
5. How do you draft pleadings that are compelling for different avenues?
6. Which partners can be helpful, at what stage, and how can you establish these partnerships?
7. Can you rely on instruments beyond the law?
8. What steps are essential to prepare for possible unfavourable outcome?
9. How can you maximise the favourable outcome of the case?
10. The case is over, now what?

Initial stage

At the outset of building a case, you need to know how to 1. Identify a case, 2. Plan a strategy, 3. Identify partners, and 4. Raise awareness and galvanise support. The initial stage is the foundation of your case, and many important determinations and choices will already have to be made at this stage, shaping the development and course of the case. You will find the four elements explained in more detail below.

1. Identifying a case

"A case can be strategic, or a case can be turned into a 'strategic' case"

Niklas Bruun

What makes a case strategic is open to interpretation and imagination, particularly in what a lawyer can argue and the changes that might be achieved. There is no recipe on offer, and it is very much a case-by-case approach. You may be in a situation where the strategic value of some cases can be immediately apparent. For example, the case is a violation of a significant right, the employer is a major company, or the violation affects a high number of workers. Often, however, the strategic value is not limited to the individual case, this does not mean that there are no factors that could help you determine whether a case is or can be turned into a strategic one.

A strategic case would have a few or more of the following features:

First, ask whether the case that you are working with has the potential to bring about significant social or political change or influence policy decisions. A strategic case may involve an issue that is of significant public interest or concern, and that has the potential to generate media attention and mobilise support for the cause. Other factors that may make a case strategic include the potential for setting legal precedents that can be used in future cases, the likelihood of success, and the resources available for pursuing the case. Ultimately, a case's ability to effect positive change and advance a particular social or political objective determines its strategic significance. This is the primary consideration when selecting a case aimed at driving broader social change beyond the individual outcome.

Second, it is crucial to understand and evaluate whether going to court is the right way to achieve your goal. The first legal issue to assess is standing—whether the case can be pursued—and whether admissibility criteria can be met. It is important to consider who the relevant actors are and when the issue occurred in order to establish responsibility and assess the parties' interests.

Third, you should assess the difficulty to prove the case, and the likelihood to receive a favourable judgement. Strategic litigation requires commitment from all parties involved as it is a lengthy and time-consuming path to take. It is vital that the plaintiff, e.g. a worker whose rights have been violated, is aware form the outset of what participating in strategic litigation will entail for them personally. Depending on the chosen legal avenue, the process may last several years and there is the possibility that they become the centre of media attention. There is always the possibility that the affected worker on whose behalf the case is being brought may decide to interrupt the litigation by accepting a settlement. This of course does not thwart the overall effort of bringing attention to the matter at hand, however it does limit the legal impact of the case.

Finally, financial, and human resources will be required, and you must see whether the envisaged expenses and the potential change one can achieve are proportional. One should consider the time and money required to invest in pursuing certain legal avenues and the possibility that a negative outcome may result not only in the loss of that investment but also in bearing the costs of the adversary. Depending on whether the judicial proceedings are of a civil, administrative or criminal nature, this might also impact the distribution of costs among the parties involved at the end of a case. The descriptions in Part II of this Guide will help you understand which fora entail the greatest costs and which are more accessible, as well as the differences in impact.

Efficacy tip

Do you have a plaintiff, or can you identify a plaintiff to build a case?
The identity of the plaintiff can be an asset for the publicity of the case and galvanizing public support. For example, opting for a well-known and reputable plaintiff could easily garner media attention, the plaintiff could be comfortable and well-positioned to share what the case is about in simple and relatable terms.

2. Planning a strategy

"I find technical rules of procedure totally tedious but surprisingly often they provide useful weapons of both attack and defence."

John Hendy, KC

It is no overstatement that a solid plan for the strategic pursuit of your case will be directly outcome determinative. That might set in motion not only the case at hand you are working on but have implications for the development of the law and what further steps can be taken moving forward by other lawyers. Thus, you would need to know the relevant considerations for the case, how early and at what stages you could make deliberate decisions for European and international level remedies, and how you could draft your pleadings to meet such future remedy demands.

First, have in mind the following considerations in the early planning of the case:

- Is it the right time to bring a case?
- Cause vs. case: What might serve the cause, i.e., the protection and enhancement of trade union rights, might not be best achieved by pursuing a case. Be very critical and disciplined with identifying whether the cause is truly served by litigation or whether other legal routes or non-legal avenues could better serve the ultimate objective.
- Assess the readiness of the plaintiff to stay committed to the case.
- Assess the procedures involved and be very careful which procedures are against your interest; map all deadlines and all possible drawbacks using Part II below to navigate each possible forum.

Second, you need to make a very clear map of what avenues you could or should pursue. And this part of the plan should be mapped early in the case. Ideally, you should know which international and European legal avenues you

might pursue beyond the national remedies even before you commence the case at the national level. Why? Because the decision of what legal routes you would take further down the legal road determine how you build your legal arguments, what procedural deadlines would be relevant for you to follow, and what stakeholders would be most helpful in steering your case forward.

Third, be sure to draft pleadings that are compelling not only for the early stage of the case at the national level, but also considering the remedies stage you could be seeking at European or international level later on. For example, already at national level you should ensure that you also refer to the relevant legal statues and case law of the supra-national avenue you might later seek remedy from, while still writing the pleadings in the manner required by national law.

Familiarity with national law is not always sufficient. A solid grip of international and European norms pertinent for your case is essential to successfully build a strategic case. Yet, this does not mean that you need to be an expert in all the applicable international or European rules. Rather, engage with experts and actively seek legal input from scholars, law clinics, and other experts active in the field, as well as international networks and stakeholders who have the resources to facilitate the knowledge gap. Turn to page **33, 41, 58** of the Guide to find out more about where to look for adequate expertise, network, and stakeholders.

If you cannot determine at the early stage of the case which international and/or European legal fora you will pursue for your case, then drafting the legal arguments must be done in a manner that provides a basis for all those remedies to be available. Such a comprehensive approach will help you at appeal stages internationally because arguments only based on national law and only based on national understanding of certain concepts could be deemed not sufficiently compelling at the European or international level or might even preclude you from raising those questions of law since they have not been addressed priorly at the national level. For example, it could be viewed that you are bringing new issues of law not settled by national court and hence inadmissible for review at the European Court of Human Rights for the case at hand.

Procedure Tip

Draft your national legal arguments with the possible future avenue in mind. Legal arguments solely based on national law and national understanding of certain legal concepts might be less compelling at the European or international level.

Explore the possibility of using human rights language to find a sympathetic audience in case you are operating in a political environment in which trade unions are viewed negatively or if there are political discourse efforts to represent trade unions as regressive.

When considering the points above and determining how best to achieve your objectives, assess which approach is most suitable for your case: a landmark judgment or an iterative approach. In the landmark judgment strategy, a single, high-profile case is pursued with the goal of establishing a substantial, far-reaching legal precedent that can be applied in subsequent cases. This strategy is often used in situations with broad national or global implications, where the case has the potential to bring about major social or political change. The iterative approach, on the other hand, involves pursuing several smaller cases, each addressing a particular issue or combination of concerns. Rather than relying on one high-profile case, the aim of this strategy is to gradually build momentum and establish legal precedents through a series of smaller victories. This approach is commonly used in situations where the issues are complex or evolving, or when the outcome of a single high-profile case is difficult to predict. Both strategies have their strengths and weaknesses, and the choice between them depends on the specific goals of the case and the circumstances of the situation.

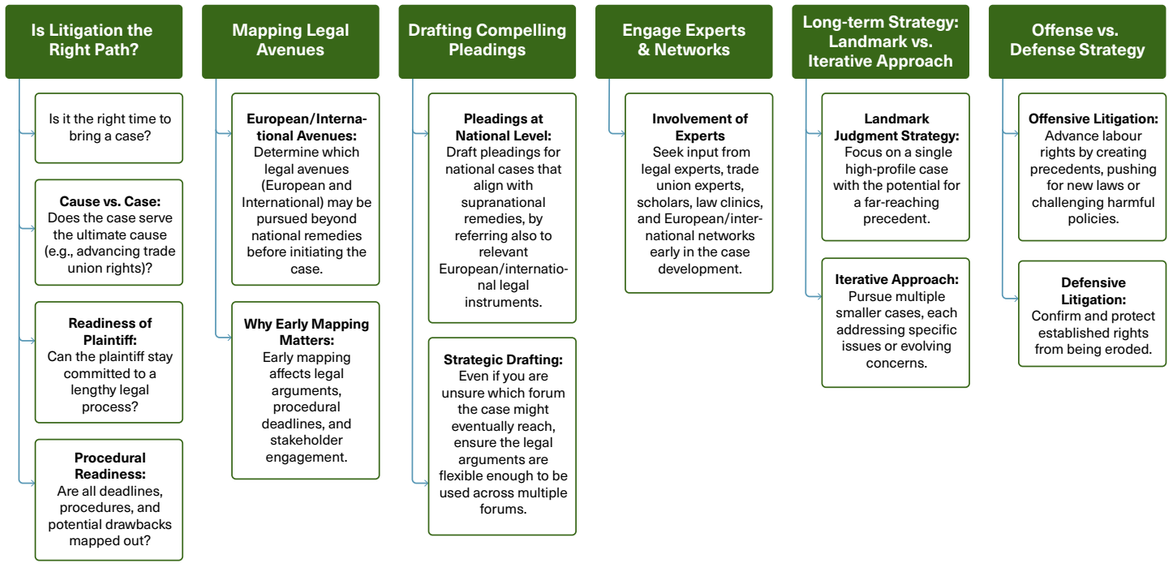
Efficacy tip

Strategic litigation is more effective when it is combined with other instruments of advancing trade union and workers' rights. Assess what other tools are available for your case and how you should integrate them to your long-term strategy.

Lastly, are you dealing with a case of offense or defence? Strategic litigation can be an effective tool for both defending and advancing labour rights. When planning a strategy, it is the goal intended to be achieved that should help determine whether labour rights are being defended or advanced, or in some manner both aspects are intertwined. Defending labour rights entails an aim to use legal action to protect the rights of workers that are already established by law. One might think about challenging policies or practices of companies that violate such rights, for example, discrimination cases. Advancing labour rights refers to the goal to establish or expand labour rights. For example, by pushing for new laws that improve working conditions.

Strategic litigation may also be borne out of a reaction to a decision taken by an adversary (this could be government legislation restricting the rights of workers or trade unions, or a company's decision to proceed with a collective dismissal). It is important that trade unions react quickly to such situations and include, where possible, a legal element in their strategy.

Planning a strategy



Concept Note – EUTC Strategic Litigation Guide

3. Fact-finding and evidence gathering

Providing evidence can be extremely costly and challenging. Having the facts set straight and evidence gathered, will allow you to contextualise the case and find the best strategy more easily. Gathering the relevant documents, interviewing the relevant parties, conducting research, and analysing the information is key to being able to move forward with a strong strategy. Yet, this is recognised to be one of the most demanding parts of the case development.

In setting up your plan (see below), identify which aspects of the case can be facilitated by other stakeholders and identify what the key sets of facts and evidence are that you need to have from the very beginning of the case, and what other evidence gathering can be delayed; this will depend very much on which legal fora you will opt for in the later stages of the case. For example, you may require a lower threshold of evidence if you are pursuing non-judicial avenues that involve recommendation-based remedies. In such cases, the emphasis may be less on meeting strict legal standards of proof and more on demonstrating a clear pattern of wrongdoing.

4. Identify partners

Once a case has been identified, and an overall strategy has been chosen, it is important to identify partners that can support your strategic litigation case. Different kinds of support shall be considered, ranging from financial to logistical or legal. There are multiple different ways one can seek help.

Possible partners can be the following entities:
- Trade unions
- Academics
- Pro-bono lawyers
- NGOs
- Human rights specialists
- Media agencies
- Politicians
- Public figures

Different sets of actors can provide financial support, help with legal representation, and/or help mobilise public support. Colleagues within trade union networks can be helpful in sharing experiences from similar cases, as well as organising media campaigns or demonstrations. Academics can provide help by gathering information, researching legal issues, campaigning for your case in their network, or even raising awareness by using their online platforms. Pro-bono lawyers represent another avenue of support, as they can offer legal representation without imposing fees. This can be crucial for entities with limited financial resources. NGOs can also provide financial support or help from their community power. Their involvement can lend credibility and gravitas to your case. Human rights specialists constitute another important resource. Their expertise can be invaluable in networking and proffering general counsel. Their knowledge of human rights law can also provide depth and context to your case, particularly if it intersects with human rights issues. Media agencies are integral to broadening the reach of your case. Through their platforms, they can disseminate information, enlighten a diverse audience, and galvanise public support.

Expertise tip

Maintain all the partners up to date throughout the process on how the case is developing to keep them engaged and to benefit from their input throughout the case (including after the judgement has been rendered).

5. Raise awarness and galvanise support

Strategic litigation on trade union and workers' rights is more effective when it is combined with other strategic instruments. There are numerous ways to promote media and political attention.

Utilising media	By involving journalists or bloggers, one can secure the media coverage of the case, in an effective and somewhat formal way (compared to social media).
Using social media	Spreading information online is one of the fastest ways to reach out to people and raise awareness to the widest audience possible. This can be done on different platforms, depending on the target audience.
Advocacy	Communicating either directly or through specialised entities with politicians, policymakers, and governmental agents to promote the issue and help to advocate for change.
Demonstrations	Organising public protests is a way to increase attention and visibility. It can also help mobilise support by bringing together people who share a level of passion for the issue at hand

Case development

After setting up the steps above, now you have a case, you have your map, you know what aspects you will need to tackle. Case development is all about going to the court or other fora that you identified for your case. How the case will develop will depend on which fora you have selected. Detailed information on the main legal fora at supra-national level is provided in Part II, however the table below gives an overview of what avenues will look like for the case

Case development: main insights overview

1. Case reference:
The Court of Justice of the European Union and the European Court of Human Rights may often rely on their own previous decisions and legal reasoning as authoritative references in their rulings. This means that the body of case law developed by them can be repeatedly cited in future cases. Know and reference the cases of the court you hope to have the case heard at already at the stage when presenting the case at the national level.

2. Legal arguments:
Incorporate arguments from the relevant case law of the European court (CJEU or ECtHR) where you hope the case will ultimately be heard as early as the national level. This ensures that the issues are framed in a way that aligns with the body of law that the European court will consider (e.g. EU law for the Court of Justice of the European Union, and the relevant Articles of the Convention for the European Court of Human Rights). Failing to raise these arguments at the national stage may prevent you from bringing them up during later stages of review, as courts may limit their consideration to points already addressed in the initial proceedings.

3. Know the Judiciary:
Insight into the judge or judges in your case can be a valuable factor in assessing your chances of success. Enquire who the judges are and adapt your style to suit the court that will decide your case. For example, if a particular judge is known to value concise, well-structured arguments, focus on clarity and brevity in your submissions. On the other hand, if the court has a reputation for favouring thorough, detailed legal reasoning, you may need to provide more comprehensive elaboration. In some fora, it might be challenging to familiarise yourself with individual judges due to frequent changes. Nevertheless, it is important to be generally aware of the court's tendencies and what it prioritises, based on previous rulings. Researching past judgments or speaking with legal professionals familiar with the court's style can provide insights into whether the court prefers concise argumentation or values more detailed legal analysis. When operating in supranational legal fora, it is also crucial to consider the language aspect. The language and concepts used must be clear, coherent, and accessible, particularly as judges come from various legal systems and backgrounds and submissions are often translated as part of the court's internal processing.

4. Communication:
Avoid complex legal arguments when delivering messages to the media. Convey the importance of the case and focus on what value is being violated, e.g., the rights of workers as well as the impact of the decision for workers in practical terms. Convey the message via storytelling rather than legal analysis. Explore together with academics whether they would be willing to contribute to the wider debate around the case by e.g. producing a scientific article on relevant doctrine, with a view to raise awareness in the scientific community, among policy-makers and the judiciary.

5. Build sympathy:
Public sympathy as well as sympathy in the courtroom are essential for the perception of the case and likelihood of favourable outcome for the case. Compelling and clear arguments adjusted to the audience are essential in a litigation strategy. Engage with stakeholders to sharpen 'the story' behind the case and showcase a narrative that shows the human side of the case, not just the law.

Concept Note – EUTC Strategic Litigation Guide

Checklist review

☐ Case Reference:
- Include authoritative court case law and demonstrate familiarity with relevant European norms and cases already applied at the national level.

☐ Legal Arguments:
- Incorporate arguments from relevant European court case law already at the national stage (e.g. EU law for the Court of Justice of the European Union).
- Remember that failure to present arguments at this stage may preclude them from later review.

☐ Know the Judiciary:
- Understand the judges' preferences and adapt style accordingly, including language aspect.
- Difficulty in familiarising due to frequent changes but be aware of court demands.

☐ Media Communication:
- Simplify legal arguments for public understanding – storytelling.
- Highlight the importance and practical impact of the case.

☐ Build Sympathy:
- Garner public and courtroom sympathy.
- Develop a compelling narrative emphasising the human aspect of the case.

Final stages: ruling and follow-up

In Case of an Unfavourable Outcome

Prepare for the eventuality:
Considering the attention strategic litigation may receive, it is important to have a plan for communicating the decision internally and externally. Supporting partners, as well as the wider public need to be informed about its progress. When it comes to the supporting partners, it is important to keep everyone informed and to be transparent about unfavourable outcomes to build trust and minimise backlash.

Elaborate on a critical analysis:
It is important to review the decision and to do it critically and carefully to be able to understand the reasons behind the unfavourable outcome. After understanding the overall reasoning, looking for weaknesses, inconsistencies, nuances or areas of improvement shall be the next step. For example, it is important to check whether there was enough evidence gathered. If there is a dissenting opinion, this could be a good starting point, demonstrating there is still room for both legal and political debate. External factors cannot be ignored either, such as changes in the political, social, economic, or legal sphere. Collaborating with academics may also be helpful for developing and disseminating a well-argued critical analysis of a decision e.g. in the form of scientific articles or presentations at academic conferences.

Provide explanations:
It is important that an explanation is provided, especially if the outcome of the case was unexpected. This might also necessitate engagement with media to build a factually correct understanding of the outcome (e.g., difference between inadmissibility and unfavourable judgment). It is important to keep the public, but most importantly the partners informed and engaged and, to do so, an understandable and clear explanation is needed. Weaknesses and gaps in precedents and law shall also be highlighted, which can trigger further discussion on the matter, which is particularly relevant to illustrate the feeling of injustice at hand.

Identify possible follow-up actions in terms of appeal or political demands:
A possible legal follow-up action is considering the possibility of an appeal, keeping in mind the already identified weaknesses of the case and the chance of success. Where procedurally viable, an option could be for example to take the case to another forum, such as the International Labour Organisation (ILO) or the European Committee of Social Rights (ECSR) (see part II below for more information on specific fora). Other types of alternative remedies for further action might be also considered. In the political context, lobbying can be continued, especially if the decision was taken based on laws or policies that seem unjust. In this context, it could be useful to use the negative outcome to underscore the injustice of those laws or policies.

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In Case of an favourable Outcome

Use the judgement as an instrument for advocacy and a catalyst for legislative change:
Even if a case is successful, by being a strategic litigation case, the work does not stop at the final judgement. It is important to develop a strategy for advocacy to achieve positive impacts, not only in terms of execution of the judgement in an individual case, but also in terms of implementation of the necessary changes beyond that specific case. One must make sure that the achieved result is integrated into future case law and legislation.

Promote the judgment for multiplier effects at national, European, and international levels:
Once a judgement has been published, it is important to raise awareness. When raising awareness with the wider public, it is important to bear in mind that you need to adapt your language and be able to explain what the findings of the court or tribunal mean in terms of the practical impact on workers' rights.

The following steps can be taken to raise awareness:
- appearance in national media to discuss the matter to the wider public,
- providing workshops, seminars,
- organising semi academic open seminars on the importance of the judgement,
- academic collaborations
- write an op-ed,
- write a blogpost,
- social media engagement,
- share the information with NGOs
- collaborating with similar cases, consulting with actors who want to take on similar actions.

In addition to raising awareness, it is also important, where possible, to promote multiplier effects at national, European, and international levels. Multiplier effects can be achieved by, for example, supporting similar cases in other Member States.

Make sure that the judgement is enforced:
Following up on the implementation of a judgment or decision is crucial to securing the desired outcome. Simply winning a case does not guarantee that the ruling will be effectively enforced. For instance, the judgment may require States to take specific actions, and it is essential to monitor compliance. Tools such as follow-up mechanisms, monitoring bodies, or even engaging with civil society can help ensure that the obligations set out in the ruling are properly fulfilled. Regularly check on the progress of implementation and take further legal or advocacy steps if enforcement is lacking.

Part II

Strategic litigation before European and international bodies

Always remember to...

» Assess all fora available for your case, then decide which avenues are suited for your objective

» Check with the ETUC whether support can be provided

» Pay special attention to procedural requirements, follow them strictly

You will find the answers for:

1. Which avenue is most suited for your case?
2. What are the essential procedural requirements for admissibility and standing?
3. Which judicial and quasi-judicial remedies are available for your case?
4. What procedural requirements should you know about judicial and quasi-judicial fora?
5. Can the ETUC provide support?

You will find information on the following European and international bodies:

Council of Europe
- European Court of Human Rights
- European Committee of Social Rights

European Union
- Court of Justice of the European Union
- European Labour Authority
- European Commission
- European Ombudsman

United Nations
- International Labour Organisation
- Committee on Economic, Social and Cultural Rights

Choice of avenue and efficacy

1. Making the Right Avenue Choice

One of the key decisions you must make is whether to take your case to a court or a quasi-judicial body. Courts like the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) deliver binding legal judgments. These rulings can have far-reaching consequences, setting important precedents and ensuring that decisions are enforceable across jurisdictions. For cases where you aim for systemic change, courts are often the most effective option. However, the process is typically long, and you may need to exhaust national remedies before filing. Alternatively, quasi-judicial bodies such as the European Committee of Social Rights (ECSR), the ILO Committee on Freedom of Association (CFA), and the UN Committee on Economic, Social and Cultural Rights provide quicker resolutions with authoritative recommendations. While these decisions are legally non-binding, they are still powerful tools for raising awareness, generating public and political pressure, and bringing international attention to workers' rights issues. These forums are especially useful when immediate intervention is needed, or when enforcing a broader social agenda rather than securing an enforceable judgment.

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2. Understand Forum Compatibility

Strategic litigation often involves navigating multiple legal pathways, but not all forums are compatible. Some legal bodies are mutually exclusive, meaning that filing a case in one forum could block access to others. For example, once the ECtHR has ruled on an issue, you cannot revisit the same case through the UN CESCR.

However, some forums allow for parallel or sequential filings. A preliminary ruling from the CJEU, for instance, can clarify legal issues under EU law without restricting your ability to pursue human rights-based complaints with quasi-judicial bodies like the ILO CFA, the ECSR, or even the ECtHR. This flexibility allows you to target different aspects of a case across multiple legal bodies, potentially broadening the scope of your litigation and maximising its impact.

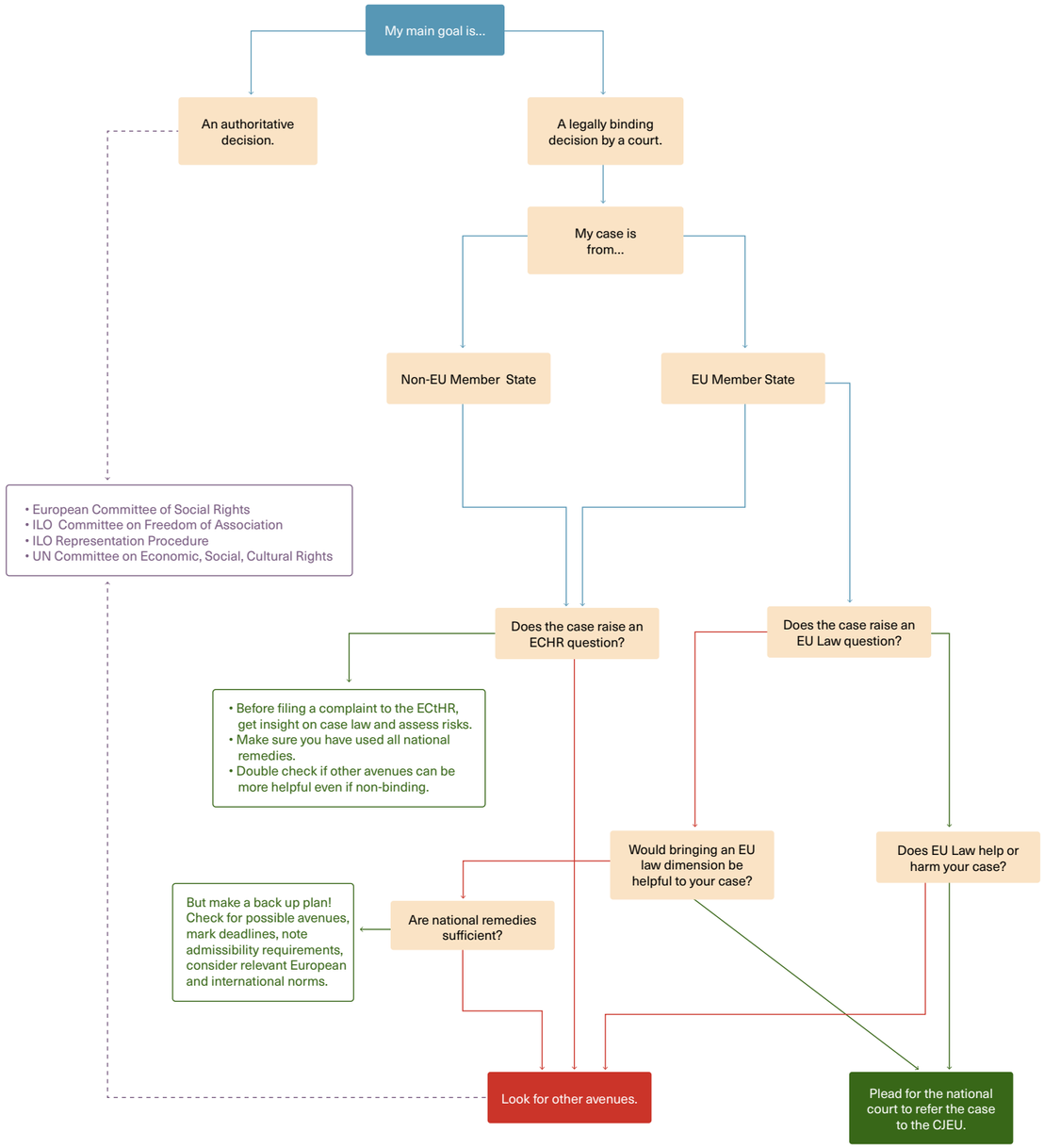
3. Sequencing Your Legal Actions

A well-designed litigation strategy can provide for the eventuality of using multiple forums in a deliberate sequence. For instance, obtaining a preliminary ruling from the CJEU could be useful if EU law benefits the case, which can be followed up with subsequent actions in other fora like the ECSR or ILO CFA, if there is a need to try to mitigate a first negative outcome and shed light on discrepancies between different human rights frameworks at supra-national level. This approach allows you to engage with different legal regimes, creating a layered strategy that addresses both immediate and long-term objectives. It is crucial to plan this sequence carefully, as choosing the wrong forum first could block future legal options. For example, if you begin with a quasi-judicial body like the ILO CFA, this may prevent you from later pursuing legally binding enforcement through the ECtHR.

Forum	Who Can Lodge Complaint?	Timeframe	Advantages	Disadvantages
Court of Justice of the European Union (CJEU)	For preliminary ruling proceedings, only indirect access for trade unions, since such cases are to be referred by national courts. (For legal actions brough against EU bodies before the General Court, trade unions may be granted direct access)	20 months to years (except in urgent cases, 3-6 months)	• Binding judgments. • Legal effect across all EU Member States. • No need to exhaust domestic remedies. • A request for a preliminary ruling can be made at any stage of national proceedings in a pending case. • Can broaden the national court's view of labour rights issues. Does not preclude the possibility of subsequently bringing the case to ILO CFA, ECSR, or even ECtHR. • Trade unions may appear before the CJEU if they are part in the national proceedings before the referring court.	• Question must relate to the interpretation or validity of EU law, that is the question raised by the case must be within the scope of EU law. • Questions can only be referred by a national court. • No direct access for trade unions to request a preliminary ruling, nor any possibility to intervene as a third party.
European Court of Human Rights (ECtHR)	Natural or legal person, including trade unions.	4-6 years, with exceptional possibility of up to 10 years	• Binding judgments. • Legal effect across all Member States. • Trade unions may intervene as a third party in the case. ETUC can also intervene to strengthen a trade union case. • Trade unions can submit observations related to the execution of the judgement.	• Lengthy process. Strict formalistic requirements. • Requires exhaustion of national remedies. • Short timeframe for launching a complaint (4 months). • The use of other supranational avenues in the same case precludes a potential complaint to the ECtHR. • Must demonstrate a victim status in relation to the alleged violation.

Concept Note – EUTC Strategic Litigation Guide

Forum	Who Can Lodge Complaint?	Timeframe	Advantages	Disadvantages
European Committee of Social Rights (ECSR)	Trade unions, ETUC	1-2 years	• No need to exhaust domestic remedies. • No specific timeframe for launching a complaint. • Complaints possible for issues of systemic nature regarding non-compliance due to a State's law or practice, without being a victim of the alleged violation. • ETUC can intervene as a third party to strengthen a trade union case. • A complaint to the ILO does not necessarily preclude a subsequent complaint to the ECSR on the same matter.	• Legally non-binding decisions. • Complaints about individual situations may not be submitted. • Complaints only possible against Member States having ratified the ESC Protocol on Collective Complaints, and only concerning Charter provisions ratified by that State.
ILO Committee on Freedom of Association (CFA)	Trade unions, ETUC	1-3 years	• No exhaustion of national remedies required. No specific timeframe for launching a complaint. A complaint can even be launched while national procedures are still pending. • A complaint can address specific violations of trade union rights or non-compliance of national legislation or practice with the principles of freedom of association and collective bargaining under ILO Conventions. • The relevant ILO conventions do not need to be ratified. By membership of the ILO, each State Party is bound to respect its fundamental principles. • A complaint to the ILO does not necessarily preclude a subsequent complaint to the ECSR on the same matter.	• Legally non-binding recommendations. • Complaints cannot be of a purely political nature. • No third-party interventions possible.
ILO Representation Procedure	Trade unions, ETUC	2-3 years	• No exhaustion of national remedies required. No specific timeframe for launching a complaint. A complaint can even be launched while national procedures are still pending. • A complaint can address failures of a Member State to observe and give effect to any ILO Convention to which it is a party, whether it relates to systemic non-compliance of national law or practice, or specific violations committed by the State. • A complaint to the ILO does not necessarily preclude a subsequent complaint to the ECSR on the same matter.	• Legally non-binding recommendations. • Can only be filed against a State having ratified the Convention concerned. • No third-party interventions possible.
UN Committee on Economic, Social and Cultural Rights (CESCR)	Individuals Trade unions	2-3 years	• Can be used submit complaints about individual violations of guaranteed rights as a result of the law, policy, practice, act, or omission of the State Party concerned. • Third-party interventions by trade unions may be accepted.	• Legally non-binding decisions. • Requires exhaustion of national remedies. Short timeframe for launching a complaint (12 months). • Only against State Parties having ratified the Optional Protocol on individual complaints. • Complaint to ECtHR would block further action under CESCR for the same case.

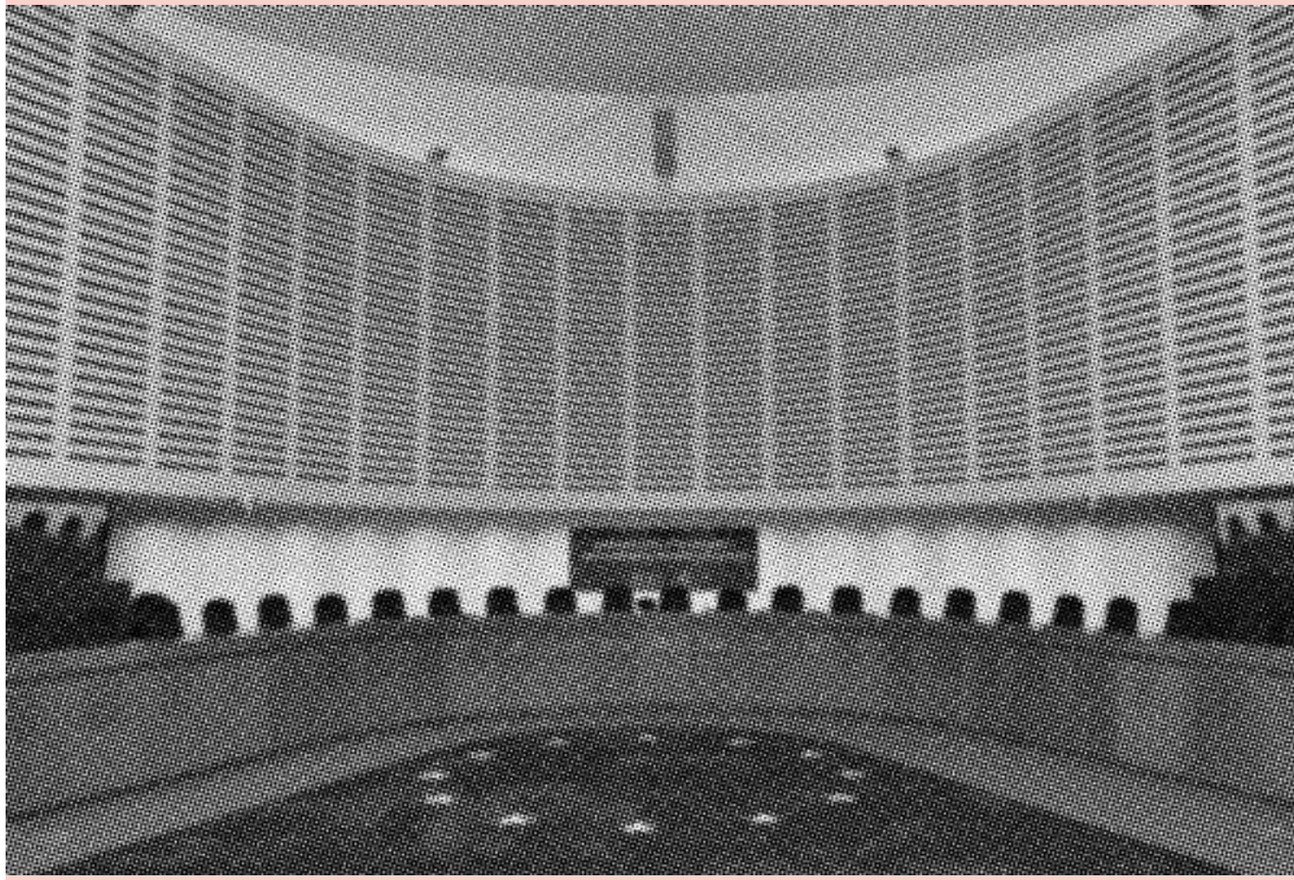


Procedure Tip

Keep in mind the following issues when you are reflecting on choice of avenue:

- ***Standing*** (individual, collective, or general violation, etc.)
- ***Admissibility*** (possible requirements linked to deadline, national remedies, material scope, ratifications, incompatibility with other avenues, etc.)
- ***Resources*** (length of procedure, costs, expertise, etc.)

Council of Europe



Under the legal regime of the Council of Europe, the two main bodies you must know about, and the procedures to address your case, are the European Committee of Social Rights and the European Court of Human Rights. Below you find more on which procedures are available and the intricacies for utilising them. Especially if you are a lawyer or from a trade union in a non-EU Member State, these instruments may be the only ones you could utilise to address issues at European level, in addition to the international bodies further discussed in pages **58–66.**

European Court of Human Rights

Basic information about this avenue

The European Convention on Human Rights and its protocols provide the complaint process for the European Court of Human Rights (ECtHR). It is the highest judicial avenue for cases on issues falling within the scope of the Convention. It is particularly important as a judicial forum for trade unions from non-EU Member States as the ECtHR would be the only possible judicial remedy at the European level.

Advantages and disAdvantages

An advantage of the ECtHR is that its case law has played a significant and favourable role in advancing certain aspects of trade union and workers' rights. As a judicial forum with binding judgments, it is crucial for holding States that are contracting parties accountable. It is also important to note that the ETUC is among the organisations permitted to make third-party interventions and can be called upon to support your case. However, a request to intervene must be made within a specific timeframe, namely within four months from the date of the final decision.

The main disadvantage of the ECtHR lies in the length of the process. First, national remedies must be exhausted before an application can be filed, and combined with the significant backlog of cases, it may take years before a final judgment is reached. Moreover, the ECtHR is incompatible with other international remedies; pursuing another remedy would render your application inadmissible.

Therefore, during the mapping and planning stages of your case, it is of utmost importance to assess the risks and benefits of other available remedies, possibly including non-judicial options, or to make a clear commitment that the case will proceed to the ECtHR once national remedies are exhausted.

Procedure Tip

Judicial redress at the ECtHR is incompatible with seeking any other international remedy. If you will opt for the ECtHR, be sure to exhaust national remedies and then seek redress only at the ECtHR.

Standing

You can only invoke a violation if you are the victim of that violation. According to article 34 of the European Convention of Human Rights "the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols." This is a significant difference with the collective complaints procedure (see page **37** below).

Procedure Tip

The time-limit for seeking leave to intervene as a third party is twelve weeks and starts to run when information that a notice of the application has been given to the respondent Contracting Party is published on the Court's case-law database, HUDOC.

Process

The process for a case to reach the ECtHR and the procedure therein can be lengthy and formalistic. It is of utmost importance to follow every step that the Court requires[5]. You must first exhaust all domestic remedies, which means that you must have used every available legal remedy within your own country before you may file a complaint with the Court. The application must be submitted within a period of four months from the date on which the final decision was taken. The ECtHR does not accept anonymous applications. Make sure that the case is clearly addressing an issue that has not been brought to the Court before. If a case is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information, it will be considered inadmissible.

After a judgement has become final, and a breach of one or more Convention rights has been identified, the State is obliged to submit an action plan detailing how it intends to implement the judgement. This will be followed by a report outlining all the measures taken to implement the judgement. It is important to know that trade unions can submit observations related to the execution of the judgement. Through these observations they can review and assess a State's performance regarding the execution of judgments and make recommendations on how to proceed with the execution process.[6]

Formalities	• Application form provided by the Registry must be used (accessible online). • For natural persons: name, date of birth, nationality, and address of the applicant. • For legal persons: the full name, date of incorporation or registration, the official registration number (if any) and the official address. • If representative: the name, address, telephone and fax numbers and e-mail address of the representative; the dated and original signature of the applicant on the authority section of the application form; the original signature of the representative showing that he or she has agreed to act for the applicant must also be on the authority section of the application form. • Name of the Contracting Party against which the application is made. • Signature by the applicant or the applicant's representative.
Content	• Concise and legible statement of the facts • Concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments • Concise and legible statement confirming the applicant's compliance with the admissibility criteria laid down in Article 35(1) of the European Convention on Human Rights

5 Be sure to check the section of the ECtHR website "apply to the Court" where you can download the application form. See: www.echr.coe.int/apply-to-the-court

6 Council of Europe, explanation for Art. 9, Communications by NHRIs/CSOs www.coe.int/en/web/execution/nhri-ngo ; See also the section of the website of the Council of Europe "Communications by NHRIs/CSOs".

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Attachments	The following documents must be sent: a) copies of documents relating to the decisions or measures complained of, judicial or otherwise. b) copies of documents and decisions showing that the applicant has complied with the exhaustion of domestic remedies requirement and the time-limit contained in Article 35 § 1 of the Convention c) where appropriate, copies of documents relating to any other procedure of international investigation or settlement d) where the applicant is a legal person as referred to in Rule 47 § 1 (a), a document or documents showing that the individual who lodged the application has the standing or authority to represent the applicant. • Documents submitted in support of the application shall be listed in order by date, numbered consecutively and be identified clearly
Optional attachment	• Appending information with further details on the facts, alleged violation, and arguments; max 20 pages.

Essential to keep in mind

Understanding the ECtHR's Role: When engaging in litigation before the ECtHR, consider the strategic implications to effectively advance labour rights and whether it could be the adequate avenue for your case.

Scope of issues: The ECtHR deals with complaints alleging violations of rights and freedoms outlined in the European Convention on Human Rights. This means various issues crucial to labour rights, such as freedom of association and prohibition of discrimination.

Strict Admissibility Criteria: Understand the Court's application of strict admissibility criteria to ensure thorough examination of well-founded applications. Admissibility requirements may include exhaustion of domestic remedies, adherence to the four-months' time limit for lodging applications and demonstrating sufficient interest or standing to bring complaints before the ECtHR. It is imperative not to modify the application provided online by the Court, as even minor changes in formatting or extensions beyond the limits provided by the Court may lead to the application being declared inadmissible.

Case Law Development: Recognise the significant role of the ECtHR's judgments in shaping European human rights law. These judgments set precedents and provide clarity on interpreting and applying provisions of the European Convention on Human Rights. Through its case law, the ECtHR addresses a wide array of labour rights issues, including freedom of association, collective bargaining rights, protection against unfair dismissal, anti-union discrimination, and forced labour.

Collective complaints procedure – European Committee of Social Rights

Basic information about this avenue

The Collective Complaints procedure is a mechanism for promoting and protecting the rights protected by the European Social Charter (hereinafter "Charter"). Introduced in 1995 by an additional protocol, it is a parallel system complementing the legal protection established by the European Convention on Human Rights. Collective complaints can be lodged against States which have ratified this additional protocol and on the basis of one or more Charter provisions accepted by the State concerned.

Advantages and disadvantages

The collective nature of the complaints means that they should address general questions of non-compliance of domestic laws or practices with the Charter. As such, individual situations will not be addressed. One aspect that facilitates engagement with the system is that a complaint may be lodged without exhausting domestic remedies first. Standing has also a lower threshold, and an organisation may lodge a complaint without being a victim of the relevant violation, as opposed to the ECtHR (see above). Another advantage to bear in mind is that the ETUC can intervene as a third party in support of your trade union complaint. The deadline for submissions is specified in the declaration of admissibility.

The main disadvantage is the legally non-binding nature of the decision delivered by the European Committee of Social Rights (ECSR). Nonetheless, the Committee's jurisprudence represents an authoritative interpretation of the Charter and its provisions. The Charter is a legally binding treaty of international law and contracting States have an obligation to cooperate in good faith with the ESCR. In the event of violation of one or more Charter provisions, the respondent State is asked to inform the Committee of Ministers of the Council of Europe of the measures to bring the situation into conformity. This is comparable to the follow-up to judgements of the European Court of Human Rights.

Overall, as a direct channel for participation for trade unions, this avenue, whilst it does not have the same level of legal binding effect as judicial action is nonetheless a strong tool through which to highlight violations of social rights, pressuring governments to address them and enhancing the visibility of trade unions.

Standing

The following entities and organisations are entitled to lodge a collective complaint:

- European social partners:
  - for workers: European Trade Union Confederation
  - for employers: Business Europe, and International Organisation of Employers
- International non-governmental organisations who have participatory status in the Council of Europe.
- Representative trade unions and employer's organisations in the country concerned.
- Any national non-governmental organisations that have been granted representation by the State to have the right to lodge a complaint against it within its own jurisdiction (at the time of writing this is the case only in Finland, all country-specific information can be found in the country profiles section of the European Social Charter's website).[7]

Process

Lodging a collective complaint is possible at any time. International bodies must submit the complaint either in French or English – one of the official languages of the Council of Europe – while national bodies may submit it in their official language. The complaint must be in writing, signed by a representative of the

7 www.coe.int/en/web/european-social-charter/country-profiles

complainant organisation, and must clearly state which provisions of the European Social Charter are alleged to have been violated, specifying how the Contracting Party is failing to comply.

Formalities	• Must be in writing. • Provide name, contact details, signed by representative. • Must be addresses to Executive Secretary of the ECSR.
Language of the compliant	• International bodies: English or French • National bodies: official language of the State concerned
Content	• Concerns provisions of the European Social Charter, that are ratified by the State in question. • Indicate to which extent the State has violated the provisions. Evidence and relevant arguments must be stated, with supporting documents.
Additional requirement for national trade unions	Proof that the body is representative within the meaning of the collective complaints procedure (it is an autonomous concept, being representative under domestic law does not mean that the body is considered representative for the purpose of the collective complaint procedure). There is no conclusive list of ways of proving representativeness, however the most common include evidence of the number of members, of participation in the negotiation of collective agreements, and membership of international organisations with participatory status with the Council of Europe (such as the ETUC).

Essential to keep in mind

No individual applications can be considered. Only certain non-governmental organisations are entitled to lodge a collective complaint. If you are working on an issue that includes a possible violation of one or more provisions of the European Social Charter, collaborate with relevant social partners, such as the ETUC, as well as national trade unions, to be able to benefit from the possibility to lodge a collective complaint. Check whether the country you are applying from has ratified the specific provision which is the basis for your complaint. Be especially careful on this regard as different countries have different ratifications and you must ensure that the specific Charter provision you are invoking applies to the country in question.

Reporting procedure – European committee of social rights

Basic information about this avenue

States that have ratified the European Social Charter are required to submit periodic reports to the European Committee of Social Rights (ECSR), providing information on how the Charter is implemented in national law and practice. This reporting process, along with the collective complaints mechanism, is one of the two tools the ECSR uses to monitor compliance with the Charter. All ETUC affiliates can contribute to this supervisory reporting system by submitting observations on their government's report.

Trade union observations on government reports are crucial in ensuring that the ECSR does not rely solely on the government's perspective. By providing more balanced and targeted information, trade union input helps the ECSR better assess the (non-)conformity of each country's situation with the Charter. Additionally, such contributions demonstrate the trade union's involvement and interest in the Council of Europe's supervisory system.

There are two types of reports:

- Statutory reports
- Ad hoc reports

Within the framework of statutory reporting, States Parties to the Charter must submit a report every two years, covering accepted provisions from one of two groups of the Charter, according to a division based on thematic or other criteria. These reports are drafted in response to a series of targeted questions and focus on the prevailing situation at the time of submission, as well as actions being taken or planned to improve or alter the situation.

For States Parties bound by the collective complaints procedure, reporting on the two groups of provisions occurs every four years, meaning that all accepted provisions of the Charter are reviewed every eight years.

The European Committee of Social Rights examines these statutory reports and determines whether the situations described comply with the Charter.

Ad hoc reports focus on emerging or critical issues with broad, transversal, or pan-European implications that require analysis or review by the ECSR. However, the ECSR does not make conclusions regarding the conformity of the situation with the Charter in these cases.

Advantages and disadvantages

For statutory reporting, the length of time between reporting periods on the same group of articles (8-year cycles for States that have ratified the collective complaints procedure) could potentially be a disadvantage, depending on the subject matter of your case and the articles of the Charter currently being examined. The timeliness of your case will depend on the reporting cycle.

As for ad hoc reporting, the ECSR will not make conclusions on the conformity of the situation with the Charter, in the context of the ad hoc reporting procedure. Instead, it may, as appropriate propose general orientations. However, this process may be somewhat difficult to use strategically as the decision whether to request reporting and on what topics is taken by the ECSR as it sees fit. Follow-up on the reports should however involve dialogue among the States Parties (within the framework of the Governmental Committee), associating relevant stakeholders (including the social partners).

There is a possibility to comment on the reports submitted by States Parties, shaping the review and the final reports as to whether the State is complying with the commitments.

Whilst this is not a litigation option, it can be an important manner of tracking compliance and of asserting pressure when the State is non-compliant whilst avoiding high litigation costs. However, it is at the discretion of the ECSR to what extent your observations are considered.

Standing
Only those trade unions that are affiliate members of the ETUC can submit their observations to national reports.

Process
For trade union organisations to submit their observations on national reports, they must follow the same timeframe as the national reports.

For the statutory reports, the articles of the Charter are divided into two groups with a report on one group to be submitted every two years. This means that all accepted Charter provisions are to be examined for each State every four years.

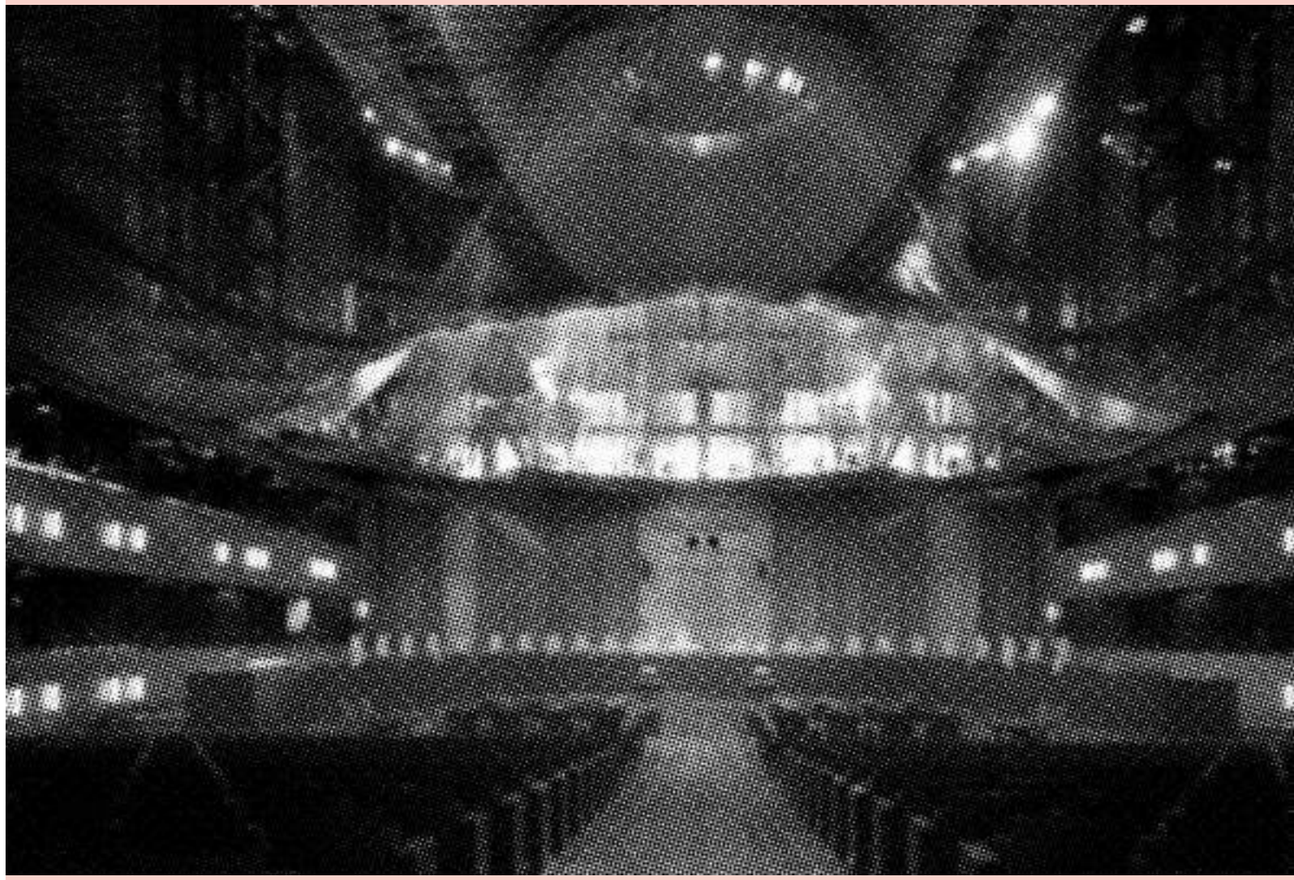
States Parties are also divided into two groups according to whether they have ratified the collective complaints mechanism. For States Parties bound by the collective complaints procedure, reporting on the two groups of provisions takes place every four years, which means that all accepted Charter provisions are examined for each of these States every eight years. The reporting required will take account of decisions on collective complaints pertaining to the provisions reported on.

Essential to keep in mind
Whilst there is no formal format for drafting the observations, you could benefit from the suggested format developed by the ETUC Guidance Note[5], which gives you a general framework and information specific for countries which are obliged to report. Your observations should reach the Secretariat of the European Social Charter at the latest by 30 June.

5 See ETUC Guidance Note for Observations by the affiliates to the national reports within the regular reporting system of the Council of Europe European Social Charter in Annex to this Guide.

Procedure Tip
When sending a report, each State Party shall forward a copy of that report to such of its national organisations as are members of the international organisations of employers and trade unions (the ETUC), to be represented at meetings of the Governmental Committee. If you do not receive the report, ask your government to share it with you. Strengthen trade union involvement in the Council of Europe's supervisory system by referring in your introductory remarks that your organisation is affiliated to the ETUC.

The European Union



The EU offers several avenues to pursue in mobilising for trade union and workers' rights and interests. EU law can be seen to advance rights, but as many experienced lawyers will recognise, its mechanisms can also be used to challenge existing national protections. This Guide is not a textbook on EU law and rather seeks to give you the gist of procedures and avenues that could be useful if you are pursuing a case stemming from an EU Member State. Please see the additional resources as a list offered in the Guide for literature and open sources available to help you understand and navigate through EU law. If you are dealing with a case from an EU Member State and believe that you could benefit from support from the ETUC, get in touch as early as possible.

Court of Justice of The European Union

Basic information about this avenue

The Court of Justice of the European Union is the main judicial avenue for remedies pertaining to EU law. It is highly influential in the development of EU law and through numerous landmark judgments it has either advanced or significantly hampered trade union and workers' rights and interest. Several different procedures exist to bring a case before the CJEU and each of these legal actions has different set of procedural requirements and effects in the EU legal order. You are strongly advised to consult the listed sources in the Guide to have a deeper understanding of each legal action. Considering the most utilised procedure, as evident in case law and through the empirical work for this Guide, the **focus here is on the preliminary reference procedure**.

Advantages and disadvantages

The preliminary reference procedure is crucial for the legal dialogue between national courts and the CJEU, as it enables national courts to seek guidance on questions regarding the interpretation and validity of EU law. This process contributes to the uniform application of EU law across the EU Member States.

For trade unions, this avenue presents both advantages and disadvantages. The primary advantage is that through cases brought at the national level, trade unions can address issues for which they might otherwise lack legal standing as non-privileged applicants in direct actions before the CJEU. Viewing the implications of a case through the lens of EU law can broaden the impact of the judgment, potentially leading to legal changes at the national level and ensuring that the results apply across other EU Member States. Indeed, preliminary rulings are legally binding not only on the referring court but on all courts in all Member States. In this sense, CJEU judgments interpreting EU law hold authority similar to that of national supreme courts in civil law countries, with national courts required to take them into account when interpreting and applying EU law.

It could, therefore, be strategically valuable for trade unions to advocate for the national court to request a preliminary ruling. However, it is important to bear in mind that taking a case to the CJEU will affect the legal context in which the case is assessed, potentially broadening its legal scope. Conversely, a request for a preliminary ruling might also be advocated by the adversary in the national proceedings as a means to challenge trade union rights under EU law.

The preliminary reference procedure can bring trade union-related issues concerning EU law to reach the CJEU, which, in its role as the supreme interpreter of EU law, provides answers to the questions posed by the national court. By assisting in framing the questions on legal issues that the trade unions are interested in, there is a possibility to influence the outcome of the case.

A key disadvantage of this procedure, however, lies in its limited scope, which is restricted to the interpretation and validity of EU law. It is not sufficient for the issue to relate solely to workers' rights; the matter must fall within the scope of EU law. For example, matters related to the Charter of Fundamental Rights of the European Union alone is not sufficient to bring a case; it must be tied primarily secondary EU law, but also the Treaties or general principles of EU law.

Another disadvantage is the reduced level of control that the parties have over the process. Even if a trade union successfully advocates for a preliminary reference, the national court will decide the questions to be put before the CJEU, and these may not be phrased in a way that aligns with the trade union's preferences.

The CJEU also has the discretion to rephrase the questions if it deems it necessary, which can shift the focus or determine which legal aspects to address.

Moreover, given that the purpose of a preliminary ruling is to clarify EU law rather than resolve the specific dispute, third-party interventions are significantly limited. Interventions are typically reserved for Member States and the European Commission, which is a disadvantage compared to other avenues, such as the European Court of Human Rights or the Collective Complaints mechanism under the European Social Charter.

It is also important to note that this is a lengthy procedure. It can take up to 20 months or more for the CJEU to issue a preliminary ruling, after which the case must return to the national court for a final judgment, which will then consider the guidance provided by the CJEU.

Standing

In the preliminary reference procedure, the party does not need direct standing at the CJEU. Rather, the case is initiated and developed at the national judicial avenues, and it is the national judge that engages through the procedure with the CJEU. This aspect of the procedure is also what makes the preliminary reference a much more viable option for trade unions considering the difficulties with standing requirements for direct actions[5]. However, be alert that the matter at hand should fall within the scope of EU law. For example, if a case relates to the Charter of Fundamental Rights, it will be essential to demonstrate a link with EU law, as otherwise the case will be inadmissible. This typically involves connecting it to EU secondary legislation or, in some cases, to the Treaties themselves. Another important aspect to be aware of is that each Member State can intervene in a case, and this legal possibility provides a window of opportunity for trade unions by requesting their national governments to intervene in the case. They can provide their governments with relevant arguments, either in favour or against the intervention, to ensure that their interests are effectively represented.

Since you will need to bring the case at the national level, it is then important to understand what may be considered a 'court or tribunal' for purposes of EU law for preliminary reference procedure to be an option at all. There is no definition in the Treaties and the CJEU has established criteria by which it can be assessed whether a national body may be considered a court or tribunal for purposes of preliminary reference procedure. Take note of the following criteria: (1) whether the referring body is established by law, (2) whether the referring body is permanent, (3) whether the referring body's jurisdiction is compulsory, (4) whether the referring body follows an adversarial procedure, (5) whether the referring body applies rules of law, and (6) whether the referring body is independent.

Process

A preliminary reference may be submitted if two conditions are met jointly: a question of EU law is raised before a national court; and a decision on that question is necessary for the national court to give judgment on the case at hand. The answer must be necessary for the referring court to decide on the dispute before it.

Procedure Tip

CJEU will reject as inadmissible references that are too general or hypothetical, deemed of no use in deciding the case.

5 See details on other actions in the 'Handbook for Europe: A practical Guide for Union Legal Bureau Officers'.

EU law does not specify the stage in proceedings at which a preliminary reference may be brought. It can therefore be brought at any moment from the time a case is launched, until the very moment before a judgment is given. Also, a court of any instance may bring a reference. It can also be submitted at the stage of a preliminary consideration before allowing an extraordinary appeal to the supreme court. Unlike for the ECtHR, there is no requirement for exhaustion of national remedies before referring a case to the CJEU for preliminary ruling. In case a national court is the last instance of appeal, however, it is obliged under Article 267 TFEU to refer the matter to the CJEU, unless the meaning of the legal provisions before the court are obvious *(acte clair)* or if the questions raised are identical to issues already dealt with by preliminary rulings in similar cases *(acte éclairé)*. Preliminary ruling proceedings before the CJEU are as such free of charge, although in terms of time and resources they can prolong the process. The CJEU does not rule on the costs of the parties to the main proceedings, this is determined by the national court.

Essential to keep in mind

Role of CJEU in Preliminary Rulings: In cases involving preliminary rulings, the CJEU interprets EU law without establishing facts or assessing evidence. Following interpretation, the case returns to the national court for further proceedings. It then becomes the national court's responsibility to examine facts guided by the CJEU's interpretation. However, the process continues beyond the CJEU, with parties arguing before the national court based on CJEU guidance to determine the final verdict.

Strategic Formulation of Questions: The formulation of questions in a preliminary reference procedure is crucial. Consider precision, quantity, and wording of questions. Consult EU legal experts to determine which legal fields are considered, potentially impacting legal analysis and outcomes. While national judges ultimately pose the questions to the CJEU, the formulation by parties may significantly influence the outcomes.

EU Law as a Risk: Evaluate whether the case involves a conflict between e.g., trade union rights and market freedoms, or legal issues like non-discrimination, as this could impact remedies sought. Assess how previous case law supports arguments and whether alternative fora may be more suitable. Consider potential risks of circumvention or weakening of trade union rights by applying EU law.

EU Integration Perspective: Recognise that the CJEU views national issues from an EU law perspective, potentially affecting remedies sought by national trade unions and national protections. Engage with EU stakeholders to evaluate the impact of EU law perspective may have on trade unions' legal position. Consider broader EU legal integration considerations beyond trade union interests and assess the case's impact on workers across Europe.

Early Stakeholder Engagement: Recognise that multiple stakeholders from EU Member States may have an interest in the case and resources to facilitate it. Mobilise stakeholders before the case reaches the CJEU to enhance legal arguments. Note that only Member States may intervene, emphasising the importance of early engagement to ensure comprehensive case facilitation beyond the capacities of involved parties.

ETUC litigation early-warning system: Seek trade union input and support by relying on the ETUC litigation network established with the purpose to monitor case law, and to promote trade unions and workers' rights through legal actions. The ETUCLEX network

consists of trade union legal experts from each EU Member State, who can help in preparing your litigation strategy and argumentation by sharing experiences, providing expert input, and raising awareness about the case. Joining forces across borders can be particularly important for mobilising and successfully addressing cases at supranational level.

European Labour Authority

Basic information about this avenue

The European Labour Authority (ELA) has been established as an EU agency tasked with ensuring the correct application of cross-border labour mobility and social security rules. It plays an important role in safeguarding the rights of workers and employers within the EU who are involved in cross-border activities. The Authority is dedicated to improving access to information concerning the rights and duties associated with labour mobility for all citizens across the EU. It enhances cooperation between EU Member States to ensure the consistent enforcement of Union law, which includes the coordination of cross-border inspections, as well as supporting Member States' efforts to tackle undeclared work. The ELA also provides mediation services to help resolve cross-border disputes between Member States, fostering a collaborative environment to address issues amicably. In essence, the ELA acts as a bridge, fostering collaboration among national governments, social partners, and the European Commission to protect and maintain fair labour mobility within the EU.

Advantages and disadvantages

Approaching the European Labour Authority (ELA) for assistance is an option that national social partner organisations, in particular trade unions, may consider beneficial, particularly for its cost efficiency and procedural straightforwardness. When a trade union wants to raise a case, it can do so directly with the ELA, with a view to trigger a cross-border inspection as outlined in the ELA founding regulation and the dedicated ELA Guidelines on Joint and Concerted Inspections[6]. This process is designed to be uncomplicated and swift, offering a route that is free from financial liabilities, thus reducing the burden typically associated with such legal procedures.

It is preferrable that the issue has been brought to the attention of competent national authorities before approaching the ELA, but it is not a prerequisite for any measures to have been taken by these authorities. This stipulation ensures that cases are noted at a national level, yet still leaves room for the ELA to act where national responses may be lacking.

However, submitting a case to the ELA doesn't automatically lead to an inspection. The ELA has the authority to decide if an inspection is the most suitable course of action or if the situation could be better addressed through other means, such as providing information, building capacity, mediation or feeding into its risk assessments. If an inspection is deemed necessary, the ELA can only recommend it to the Member States concerned; it cannot impose one. The Member States must agree and actively participate for the inspection to proceed. This means that while the ELA can facilitate and coordinate, it does not have the power to carry out inspections independently, which may limit the effect of the submission.

There's also the consideration of the ELA's jurisdiction, which only covers issues pertaining to EU rules on labour mobility and social

6 Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344: and Guidelines for the Concerted and Joint Inspections, https://www.ela.europa.eu/en/activities/concerted-and-joint-inspections

security coordination. This specificity means that only cases with a cross-border component fall within its remit, restricting the range of violations that the ELA can address. The legislative acts of EU secondary law which the Authority is competent to enforce are listed in the ELA founding Regulation (EU) 2019/1149.

Despite these constraints, the advantages of using the ELA pathway include its relative ease of use and the lack of financial risk. National social partner organisations can submit a case without needing to dedicate substantial time or resources to the subsequent proceedings. At the same time, however, it is important to ensure the enforcement mandate of social partners is respected in accordance with national law and practice (e.g. in relation to collective agreements), and that the ELA therefore involves the complaint trade union it is enforcement actions accordingly. Nevertheless, the possibility to bring cases to the ELA allows for a more efficient and less costly approach compared to other legal avenues, providing trade unions with a valuable tool to enforce for workers' rights in cross-border situations.

Standing

Any social partner organisation at national level may bring cases to the attention of ELA. This does not require social partners to jointly bring a case for it to be admissible, but any national trade union organisations at central, sectoral, or local level can ask ELA to investigate a cross-border case further. To bring a case to ELA, it is also important that the trade union communicates this intention to the competent national authorities to secure their support for the next steps.

Process

When a trade union aims for the ELA to consider a case for further investigation, it must first gather and organise the pertinent facts. This is done using a specific form the ELA provides to facilitate this process. The trade union's submission should offer an overview of the case that, while general, includes all relevant details. It is recognised that social partners might not always be able to provide the level of detail that national authorities can. Nevertheless, this should not dissuade them from making a submission.

To establish the ELA's authority to act, the submission must clarify the related legislation under EU rules on labour mobility that may apply to the cross-border context of the case. The breadth of the ELA's legislative remit could include regulations on the free movement of workers, directives on worker posting, coordination of social security systems, or adherence to social standards in international road transport, as delineated in Article 1 of the ELA Regulation.

The trade union should precisely identify the alleged contraventions and irregularities in its submission. Such violations may range from the infringement of mobile workers' rights to instances of social fraud, from the misapplication of posting rules to the presence of bogus self-employment schemes. Other concerns might include the operation of fraudulent letterbox companies, illegitimate temporary work agencies, and cases of undeclared, under-declared or wrongly declared work.

It is also necessary for the trade union to document any previous interactions with national authorities regarding the issue. This historical documentation is essential to provide context, outline the evolution of the case to its present status, and demonstrate why it requires intervention from the ELA.

If the case is of a time-sensitive nature, this urgency must be highlighted in the submission to prompt a swift response from the ELA. The final part of the submission should be a definitive request for specific follow-up actions from the ELA. The trade union's submission might address a specific case or broader, structural labour market challenges recurring within the EU.

Procedure Tip

Include reference to the applicable legislation in your submission. These include free movement of workers, posting of workers, social security coordination or social standards in international road transport. For the legislative scope of ELA actions, please see Article 1 of the ELA Regulation.

Essential to keep in mind

Keep in mind that the ELA's authority primarily extends to cross-border matters within the European Union. The remit of the ELA includes addressing issues that impact labour mobility and social security coordination across Member States.

In terms of what a submission to the ELA can accomplish, it provides a channel through which trade unions can raise concerns about potential violations of EU labour laws that have a transnational dimension, in particular linked to the free movement of workers and services. A submission can have several outcomes, such as the initiation of cross-border inspections, the conducting of risk assessments, the facilitation of cooperation among Member States, or the provision of information and resources to resolve labour issues. Within its remit, the ELA also has a mandate to mediate cross-border disputes between Member States.

For trade unions, the process of submitting cases to the ELA is designed to be straightforward, minimising bureaucratic hurdles and allowing for ease of access to the ELA's services. As an applicant, you possess the right to receive updates on the ELA's assessment of your submission. This includes being informed about the decision on whether to act and, if so, what kind of action will be taken. Furthermore, you should be kept informed about the results of any actions that the ELA undertakes because of your submission. This transparency will ensure that you are aware of the effectiveness and impact of your engagement with the ELA on the issues you have raised.

European Commission: Directorate General for Competition

Basic information about this avenue

The competition laws within the European Union empower the competition authorities of the Member States to apply Articles 101 and 102 TFEU to individual cases[7]. These authorities, whether acting autonomously or in response to a complaint, are vested with the authority to make several types of decisions. They can demand the cessation of any infringement, order temporary measures, accept commitments to alter behaviour, and levy fines or periodic penalty payments as per their national laws. Additionally, if the evidence available to them suggests that the conditions for a prohibition are not met, they may conclude that no action is required on their part.

Trade unions can seek redress in three distinct areas of competition policy if they believe there has been an infringement. These areas are anti-trust proceedings, merger control, and state aid proceedings. While the procedures for involvement in these areas share similarities, important differences also exist, and these must be carefully considered when deciding whether to include them as part of a litigation strategy. The specifics of how to engage in each type of proceeding are detailed in subsequent sections, guiding trade unions on how to navigate these complex legal landscapes effectively. For a more detailed outline of the EU competition enforcement proceedings, you may also consult the ETUC report *Competition and Labour – A Trade Union Reading of EU Competition Policies*[8].

Advantages and disadvantages

Anti-trust Proceedings

Anti-trust proceedings provide significant opportunities for trade unions to influence outcomes and could be a key part of an assertive union strategy. The bar for lodging a complaint is relatively low; showing a legitimate interest is enough to establish standing. While filing a complaint does not incur a fee and the process is accessible, there are specific criteria that must be met for the complaint to be considered (details are provided in the process section).

Even without lodging a complaint, trade unions can still have a say as an "interested third party" by demonstrating "sufficient interest" – a criterion even less demanding than legitimate interest. However, strategically, one must consider the limited reach of this approach since the complaint must strictly adhere to the domain of EU antitrust law. Antitrust cases with a labour market dimension and a clear trade union interest may involve uncompetitive business practices such as:

- wage-fixing agreements among competitors, unilaterally agreeing on salaries and conditions without the involvement of trade unions;
- no-poach agreements between employers, unilaterally agreeing not to hire or solicit each other's employees; or
- non-compete clauses in employment contracts, prohibiting workers from joining a competing firm or starting similar business.

Alternatively, trade unions might opt to send a 'market information letter' to bring certain facts to the Commission's attention and encourage the launch of an ex officio investigation. These letters are less formal than complaints, with no stringent content requirements or need to demonstrate legitimate interest. Yet, they do not confer procedural rights on the informant. The Commission is not compelled to issue a rejection decision if it decides not to pursue an investigation. Moreover, if an investigation is initiated, the informant has no specific rights during the proceedings.

Merger Control

Compared to anti-trust proceedings, merger control provides fewer opportunities for trade unions. Formal requests for information are typically made by companies, often customers or competitors of the entities planning to merge. Trade unions can become formally involved as interested third parties, but this requires a proactive stance and demonstration of "sufficient interest". Trade union engagement in merger control may be used to influence the outcomes of the proceedings, including the assessment, design and implementation of structural and/or behaviours remedies imposed by the Commission to clear the merger.

State Aid Proceedings

State aid proceedings offer even fewer third-party rights than merger control and anti-trust proceedings. While third-party interventions are recognised, the timeframe for such involvement is limited: a one-month period during which a formal investigation is open, specifically when the Commission harbours serious doubts about compatibility. Trade unions may use this avenue to highlight any unfair advantages enjoyed by service providers in Member States that fail to implement EU labour laws to the required standards. This intervention can bring critical issues to the fore, potentially influencing the competitive landscape within the EU.

Standing

Standing is the same for all three policy fields. The eligibility to engage in such proceedings is granted to both natural and legal persons, but the specific criteria for involvement vary depending on the type of intervention anticipated in the given proceedings.

Formal complaints: are relevant to both anti-trust and state aid proceedings, the parties must be able to demonstrate a legitimate interest. This typically means anyone who is adversely affected by the alleged infringement, such as individuals or organisations that have suffered harm or disadvantage as a result.

Third-party intervention: available in all three proceedings, requires the demonstrating of "sufficient interest" in the case. This threshold is notably lower than that for legitimate interest, potentially allowing a broader range of parties to engage with the proceedings. For example, a trade union or a business association may not be directly harmed by the infringement, but if they have a significant concern regarding the broader impact of the violation on their members or the market, they may be deemed to have sufficient interest to intervene.

Process

Anti-trust Proceedings

In the realm of anti-trust proceedings, trade unions find a powerful tool to further their objectives and protect their members' interests. These proceedings offer two principal avenues for trade unions to exert influence:

(1) Lodging a Formal Complaint:

Trade unions have the right to submit formal complaints to the Commission to instigate an antitrust investigation. To ensure that such a complaint is admissible, it must:

- Detail the alleged antitrust infringement, name the entities involved, provide relevant market information, and present any evidence available.
- Establish that the trade union has a "legitimate interest" by demonstrating that its constituency is negatively impacted by the alleged misconduct.

The Commission is obligated to conduct a thorough examination of the formal complaint. Should the complaint be dismissed, the Commission's decision is subject to appeal.

7 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

8 www.etuc.org/sites/default/files/press-release/file/2023-05/Competition%20and%20Labour%20-%20ETUC%20study%20May%202023.pdf

(2) Participating as an Interested Third Party:

Beyond filing complaints, trade unions can also participate in ongoing investigations as interested third parties, enjoying certain procedural rights:

- They can access a non-confidential version of the statement of objections, which is the document wherein the Commission lays out its preliminary antitrust concerns and the evidence to the parties under investigation.
- Trade unions are afforded the opportunity to submit written observations on the statement of objections, potentially arguing for a different interpretation of the facts being scrutinised.
- They are entitled to take part in the Oral Hearing, providing a platform to directly convey their perspective to the Commission's senior officials and to hear the arguments of the entities being investigated.

These mechanisms within anti-trust proceedings empower trade unions to not only instigate investigations into anti-competitive practices but also to actively engage in the process, ensuring that the interests of their members and the larger workforce are adequately represented and defended.

Trade unions recognised as interested third parties in anti-trust proceedings are afforded certain procedural rights that enable them to play an active role in the regulatory oversight of market competition. These rights include:

Being informed by the Commission about the subject matter of the proceedings, which provides them with the opportunity to present their viewpoints on the issues at hand. Although there is no formal entitlement to receive the statement of objections, in practice, the Commission may grant access to this document in certain cases.

The possibility of *being admitted* to the oral hearing, which is a crucial stage of the process where they can listen to the arguments of the parties involved and articulate their positions directly to the decision-makers.

Additionally, during proceedings that address the abuse of a dominant market position, the company in question may propose voluntary commitments to alleviate the Commission's competition concerns. If these commitments are deemed satisfactory by the Commission, it may decide to terminate the investigation without imposing a fine, effectively resolving the matter based on the company's proposed remedies. This avenue provides an alternative resolution path that trade unions, as interested third parties, can influence through their involvement and submissions.

Procedure Tip

It is important to note that the complainant does not become an actual party to the proceedings as the Commission's investigation targets the company.

Procedure Tip

Before the conclusion of the investigation, a company may voluntarily offer commitments to address the Commission's concerns. They will be published on the Commission's website and trade unions may submit their comments and propose improvements.

Merger Control

In merger control, trade unions can engage as interested third parties, but this is specifically after the initiation of a phase 2 investigation. Those identified as having a "sufficient interest," which includes relevant trade unions and workers' representatives, are eligible to take part in this advanced stage of scrutiny. To become involved, trade unions must submit an application to the Hearing Officer assigned to the case. As an interested third party in merger control proceedings, trade unions are entitled to several participatory rights:

- They can obtain a non-confidential version of the statement of objections. This document outlines the preliminary concerns of the Commission regarding the merger and is instrumental for understanding the regulatory perspective on the potential impact of the merger.
- They are permitted to take part in the oral hearing. It is important to note that the holding of such a hearing is at the discretion of the merging parties, and thus, it is not a guaranteed stage of the process.
- Trade unions may also be called for meetings to discuss and elucidate particular issues they have raised. These meetings are a platform for trade unions to directly address specific concerns and provide insights that might influence the outcome of the merger assessment.

These procedural rights granted to trade unions in merger control proceedings underscore the significance of workers' representation in evaluating the potential consequences of corporate mergers and safeguarding the interests of employees who may be affected by these large-scale corporate transactions.

Procedure Tip

When drafting submissions, good practices include:

- explaining the representativeness of the trade union in the relevant company, industry, and/or country.
- providing information on the merging parties in relation to the transaction.
- providing concrete evidence on the working of the relevant businesses and markets.

Essential to keep in mind

The contact details through which to access the 3 avenues are the following:

- Formal anti-trust complaints must be submitted via a form ('Form C').[9] For all other matters, the anti-trust registry can be contacted at: comp-greffe-antitrust@ec.europa.eu
- An anti-trust market information letter should be sent by email to: comp-market-information@ec.europa.eu
- To intervene as an interested third party in a merger control case, contact the Hearing Officer at: hearing.officer@ec.europa.eu
- To submit a complaint or register as an "interested third party" in a state aid case, submit the complaint form.[10] The completed form should be sent to: stateaidgreffe@ec.europa.eu

9 competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/complaints_en

10 competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/complaints_en

European Commission: Directorate General For Competition (Antitrust) – Whistleblowing

Basic information about this avenue

The European Commission has introduced a new mechanism commonly referred to as "The EU Whistleblower Tool" within its competition policy framework.[11] This tool is designed to streamline the enforcement of EU competition law. Its primary aim is to make it easier for individuals and organisations to report undisclosed or illegal competitive practices, such as cartels and other anti-competitive agreements or abuse of dominant positions. By facilitating such reports, the Commission seeks to strengthen its oversight and regulatory capacity, ensuring fair play in the internal market and protecting consumer interests.

Advantages and disadvantages

The European Commission has established a low-barrier approach for individuals to report on anti-competitive practices, which can be utilised by anyone wishing to file a report. This reporting mechanism is designed to be user-friendly, allowing for anonymous submissions. The option to report anonymously is intended to encourage more individuals to come forward with information, by providing a safeguard against possible reprisals.

There is no cost associated with filing a report, ensuring that the process is accessible to all, regardless of financial status. The system itself is designed to be secure, to protect the identity and integrity of the whistleblower, thereby minimising the risk of any negative consequences that they might otherwise face for their disclosure.

Despite these advantages, processing a report can be time-consuming, and the concerns raised must be directly related to the violations of EU antitrust law to be considered valid. The whistleblower communication tool is particularly valuable in upholding the rights and interests of workers, providing a channel through which trade unions can report issues, thereby bolstering the enforcement of competition law and protecting the workforce.

Standing

Both natural and legal persons are empowered to report potential violations of EU antitrust law. Complementing the existing leniency program, which is primarily used by companies seeking immunity or reduction in fines for their participation in a cartel, the European Commission has, since 2017, provided a platform that allows individuals to report on competition law infringements.

Workers who consider making a direct report can draw on the safeguards established by the EU Whistleblower Directive.[12] This directive provides protection for individuals in both the public and private sectors when they report breaches of EU law. It is designed to ensure that workers who come forward with information about infringements are shielded from retaliation, thus encouraging the disclosure of violations, and promoting a more competitive and fair market within the EU.

Process

If you are reporting a potential violation of EU antitrust law, there are distinct pathways you can follow based on your preference to remain anonymous or to disclose your identity. If you choose to remain anonymous, however, you may not be able to enjoy the procedural advantages granted to formal complainants or recognised interested third parties, as described above for the EU anti-trust proceedings.

For those willing to disclose their identity:

You can contact the European Commission directly via:

11 competition-policy.ec.europa.eu/index/whistleblower_en

12 Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17–56.

Procedure Tip

It is crucial, especially when providing legal counsel, to ensure that the matter being reported falls under the purview of EU law and not solely national law, which would not be covered by EU legal protections.

Email at comp-whistleblower@ec.europa.eu, or

Phone call to 0032-2-29 74800, which is monitored between 09:00 to 17:00 on working days.

For those needing to maintain anonymity due to fear of retaliation:

The Commission has established procedures to protect your anonymity, which include:

Utilising a specialised external intermediary experienced in handling such matters.

Entering your message into the intermediary's encrypted messaging tool, which notifies the Commission without revealing your identity.

Engaging in two-way communication with the Commission through the encryption tool, which allows them to request additional information or clarification. Rest assured; the tool is designed to prevent the disclosure of any identifying information such as your IP address.

For company representatives seeking leniency:

If you are authorised to represent a company implicated in a cartel, you should consider applying for leniency. This could potentially exempt your company from fines or result in a significant reduction of fines.

Essential to keep in mind

It is imperative to follow the process correctly to benefit from the full extent of legal protections and confidentiality measures provided by the European Commission.

European Commission: Directorate General For Trade – Chief Trade Enforcement Officer (CTEO)

Basic information about this avenue

The Chief Trade Enforcement Officer (CTEO) has a crucial role within the European Commission, primarily tasked with the enforcement aspect of the EU's external trade policy at multilateral and bilateral level. The creation of this position is part of the Commission's strategic initiative to enhance the enforcement of trade policies, with a specific focus on the sustainability chapters of the EU's international trade agreements.

The responsibilities of the Chief Trade Enforcement Officer are multifaceted and far-reaching within the domain of trade policy. This includes overseeing the implementation of trade agreement in the EU and with its trading partners, ensuring that partners adhere to their commitments, particularly those related to sustainable development. The CTEO has the authority to engage in dialogue, conduct investigations, and apply measures to ensure compliance with the sustainability provisions.

This avenue serves as a testament to upholding not only the economic aspects of trade but also the social and environmental standards. The CTEO's role is integral to ensuring that the EU's trade agreements are fair, transparent, and align with the Union's values and standards, including on labour rights and environmental protection.

Advantages and disadvantages

The route offered through the CTEO provides a streamlined and accessible channel for lodging complaints related to trade enforcement issues. This mechanism is open to both individuals and organisations, facilitating an approachable and cost-free method to address concerns.

The CTEO is empowered with the capacity to thoroughly investigate the content of complaints. Based on these investigations, the Officer can make recommendations on the appropriate course of action. In instances where it is determined that there has been a violation of antitrust provisions, the resulting decision is considered binding. This serves to underscore the authority and the impact that the CTEO's role has within the sphere of trade enforcement.

However, it is important to note the limitations of the CTEO's powers. Despite the ability to investigate and recommend, the CTEO does not possess the authority to overturn decisions. This delineation ensures that while the Officer plays a significant role in the enforcement process, the final adjudicative power rests with the designated judicial or quasi-judicial bodies within the EU's legal framework.

Standing

EU companies, trade organisations, or non-governmental organisations, including trade unions, have the right to submit complaints to DG Trade when they are directly impacted by an issue that lies within the Directorate-General's remit. The issues can be diverse:

- Challenges in accessing markets for EU exports and investments, which can encompass barriers to entry, unfair practices, or other hindrances that affect the ability to operate freely in an international market.
- Non-compliance with trade commitments that are supposed to benefit EU operators, where the expectation of a level playing field based on existing agreements is not met.
- Violations or concerns related to workers' rights in the context of international trade, where commitments made in trade agreements regarding labour standards are not being upheld.
- Issues pertaining to climate change which intersect with trade policies, particularly where environmental commitments within trade agreements are not being observed.
- General environmental concerns related to trade, where trade practices or policies are having a detrimental impact on the environment and are not in line with the commitments of sustainability chapters in trade agreements.

By providing a mechanism for these entities to voice their concerns, DG Trade ensures that there is a channel for addressing grievances and reinforcing the EU's stance on open markets, fair trade practices, and the intersection of trade with social and environmental concerns.

Process

To file a complaint regarding trade issues, individuals or organisations can utilise the online portal provided by the European Commission, specifically on the Access2Markets website, or they can choose to do so via mail. The process requires the complainant to deliver a comprehensive and precise account of the factual circumstances surrounding the issue.

When drafting the complaint, it is essential to:

- Elaborate on the problem, including all relevant details and the context in which the issue has occurred.
- Outline any measures or steps that have already been undertaken to address the problem before escalating it to the European Commission.
- Specify the implications and severity of the alleged infringement, especially in terms of its impact on workers' rights, climate, or environmental protection.

Such a detailed account is crucial as it allows the European Commission to assess the validity of the complaint and understand the urgency and significance of the issue.

For those who wish to get in touch or require assistance with the complaint process, the European Commission provides contact details:
Email: TRADE-CTEO@ec.europa.eu
Phone number: +32 (0)2 295 54 24.
This contact information offers a direct line to the Commission for inquiries or further clarification regarding the complaint submission process.

Essential to keep in mind

Filing a complaint with DG Trade is a strategic tool that European trade unions can employ to support their counterparts in partner countries. When the EU enters into trade agreements with other nations, it typically includes clauses that uphold fundamental labour rights in line with ILO conventions. If these rights are being violated, European trade unions can leverage the complaint mechanism to bring these issues to the attention of the European Commission. Such complaints serve several purposes, such as a form of international solidarity, allowing European trade unions to advocate on behalf of workers in other countries, to pressure the EU to enforce the labour provisions in its trade agreements, and to possibly offer practical support to sister organisations by providing them with the backing of European entities, which might have more influence on the international stage.

European Ombudsman

Basic information about this avenue

The European Ombudsman acts as an independent intermediary between European citizens, including trade unions and businesses, and the EU institutions. Its fundamental role is to investigate complaints about maladministration in the activities of these institutions. Maladministration refers to instances where an EU body or agency acts unlawfully, fails to act in accordance with the law, or does not uphold the principles of good administration, which includes e.g. access to documents and respect for human rights.

The prerogatives of the European Ombudsman include the authority to receive and investigate complaints from any citizen or entity residing or having its registered office in a Member State. The Ombudsman can initiate inquiries on their own initiative if they identify systemic issues. After an investigation, the Ombudsman can make recommendations to the concerned EU institution. While these recommendations are not legally binding, they carry significant moral and political weight. The institution is expected to respond and, in most cases, is motivated to resolve the issues to avoid reputational damage and further scrutiny.

An example of the Ombudsman's role in action is the investigation into the European Commission's processing of public consultation responses for the Corporate Sustainability Due Diligence Directive. The complaint by a coalition of NGOs and trade unions led to a finding against the Commission, demonstrating the Ombudsman's capacity to scrutinise the internal workings of EU institutions and hold them accountable for their administrative practices.[13]

The European Ombudsman also plays a proactive role in enhancing the quality of administration by advising on improvements and promoting best practices across the EU institutions. The Ombudsman can refer cases to the Court of Justice of the European Union, although this happens rarely. The Ombudsman's work ensures transparency and serves as a barometer for the democratic nature of the EU's administrative processes, thus fostering a culture of service that respects the rights of all stakeholders, including trade unions and their members.

13 www.ombudsman.europa.eu/en/case/en/60412

Advantages and disadvantages

Filing a complaint with the European Ombudsman is a cost-free process, designed to be straightforward and easily accessible. There is no financial cost associated with the submission, which can be done either through an online form or by traditional mail. The Ombudsman possesses the authority to investigate and propose recommendations to EU institutions and bodies, aiming to address and rectify the injustice reported. It is important to note that due to the volume of complaints the Ombudsman receives, there may be a delay in response, and submissions by mail could result in longer waiting times.

The limitation of this recourse is its specific mandate; it only deals with cases of maladministration within EU institutions, related to the areas outlined in the provided basic information. While this may seem restrictive, it remains pertinent to workers and trade unions, provided that the grievances are properly articulated as infringements of fundamental rights to be considered valid.

Moreover, the European Ombudsman does not wield the power to reverse decisions made by EU institutions but is limited to offering recommendations for remedial actions.

Standing

Any EU citizen or any natural or legal person residing or based in the EU can lodge a complaint with the European Ombudsman. Direct personal impact by the alleged maladministration is not a prerequisite for filing a complaint. However, the European Ombudsman is unable to take up matters that are currently being or have previously been litigated in court. Furthermore, there is a time constraint for lodging complaints: they must be filed within two years from the date the complainant became aware of the issue in question. It is also required that before approaching the Ombudsman, the complainant must have already attempted to resolve the issue by directly contacting the concerned EU institution or body, such as through a formal letter.

Standing Tip

If your complaint concerns an issue with national public administration in an EU Member State, it falls outside the European Ombudsman's mandate. In such cases, you should approach the national ombudsman or equivalent body in the respective EU country. This national entity is part of the wider European Network of Ombudsmen, which collaborates on issues within EU jurisdiction.

Concept Note – EUTC Strategic Litigation Guide

Process

To submit an online complaint to the European Ombudsman, follow these three steps:

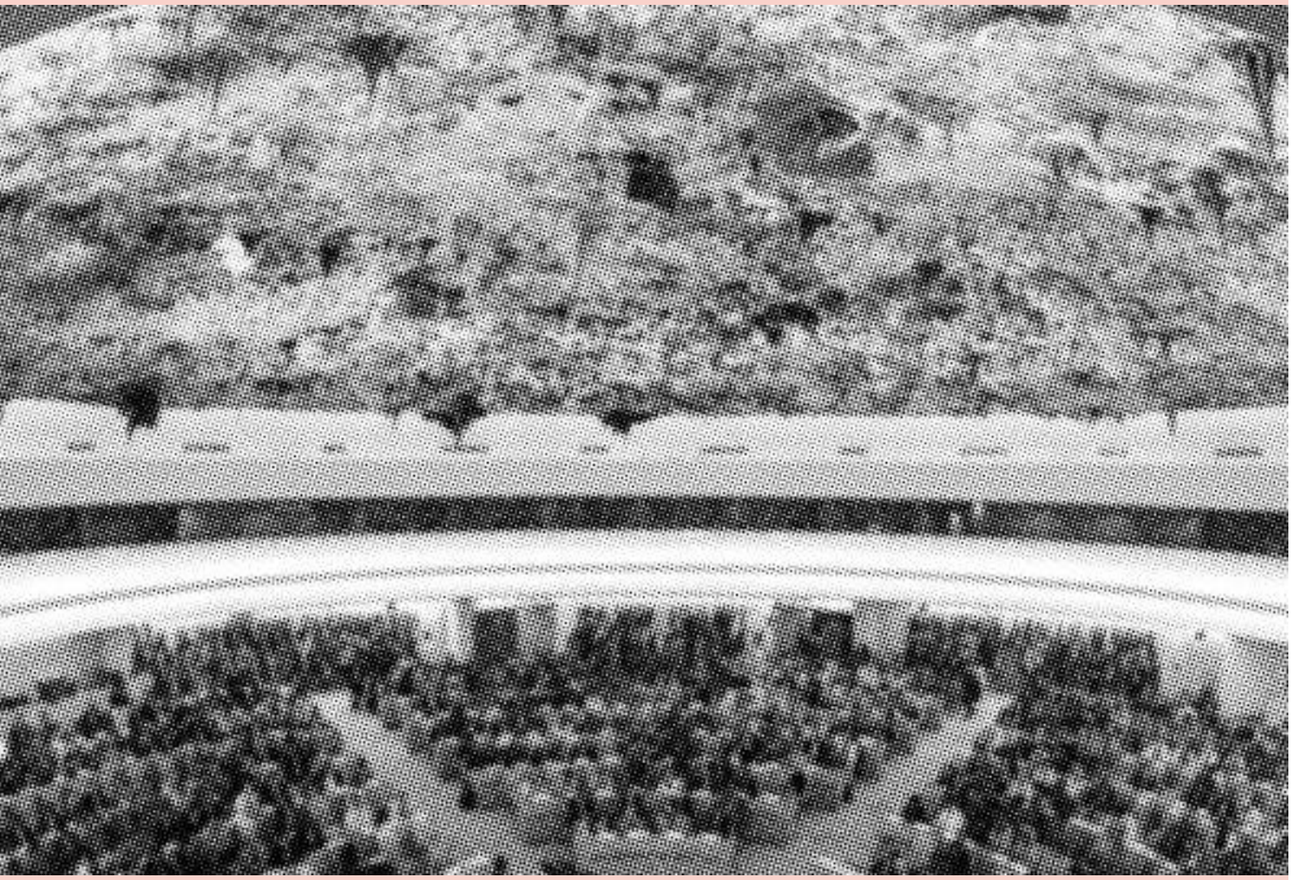
1. Ensure you meet the eligibility criteria as outlined in the previously mentioned section on standing.
2. Gather the necessary information and documents beforehand:
   - The name of the EU institution you are lodging a complaint against.
   - Details of the decision or issue that is the subject of your complaint.
   - Your reasons for considering the EU institution or body's actions to be incorrect.
   - Your suggestions for what the institution should do to rectify the problem.
   - Confirmation that the issue neither is nor has been subject to legal proceedings.
   - Proof that you have already approached the EU institution or body to seek redress, including evidence of giving them reasonable time to respond. This step is compulsory for the admissibility of your complaint.
   - If relevant, any additional documents related to the decision or issue and the time when you became aware of it.
3. Register for an online account to file your complaint. This account will enable you to track the status of your complaint and file additional complaints if necessary.

Procedure Tip

Keep your complaint concise. In exceptional cases, where a complaint needs to be longer than the allowed maximum number of words in the form, please include the full complaint as an attachment, and write a summary in the complaint form fields.

It is mandatory to provide evidence proving that you already contacted the EU institution or body concerned to obtain redress and you have given it a reasonable amount of time to reply - until this is received, the Ombudsman will not be able to deal with the complaint.

The United Nations



International Labour Organisation: Committee on Freedom of Association

Basic information about this avenue

The Committee on Freedom of Association (CFA) is a key body within the ILO, tasked with a tripartite supervisory role. Its mandate is to examine if national laws and practices are in line with the principles of the right to freedom of association and the right to collective bargaining. These principles are foundational to the ILO's philosophy, as outlined in its Constitution's Preamble, further reaffirmed in the Declaration of Philadelphia, and detailed in Conventions No. 87 (Freedom of Association and Protection of the Right to Organize Convention) and No. 98 (Right to Organise and Collective Bargaining Convention), as well as articulated in the 1970 resolution of the International Labour Conference.

The CFA plays a crucial role in safeguarding the rights of workers and employers to form and join organisations of their own choosing, which is essential for fair collective bargaining negotiations and for maintaining harmonious labour relations.

Advantages and disadvantages

The CFA operates under a mandate from the ILO Constitution, providing a unique advantage in that complaints can be filed regardless of whether the government has consented or ratified the relevant ILO Conventions. However, if a Convention has not been ratified, the follow-up by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on the CFA's findings will not occur.

Trade unions can directly pursue this avenue without the need to exhaust national remedies, which can serve as an effective parallel means to apply pressure on a Member State for compliance, even while national procedures are still in progress. One potential drawback is that pursuing a complaint through the CFA might preclude recourse to certain United Nations mechanisms, which may decline to review cases already examined by the CFA.

When planning a strategy for international legal action, it is crucial to assess early on which UN body is most appropriate for the specific case and whether it is advantageous to pursue an international avenue concurrently with national procedures or to wait until those domestic avenues have been exhausted.

The CFA's role is particularly relevant as it can establish the facts of a case in consultation with the government concerned. If it finds a violation of the principles of freedom of association, it reports to the ILO Governing Body with recommendations for resolution. Governments are then expected to report back on the implementation of these recommendations, giving the CFA's findings a practical impact and contributing to the global governance of labour rights.

Standing

To have standing, the complaint must be submitted either by an employers' or a workers' organisation. To qualify as a workers' organisation, the complaining trade union must either have official consultative status with the ILO, be affiliated with an international organisation whose member organisations are affected by the complaint, or if it is a national organisation, it must have a direct stake in the matter.

Local organisations, at e.g., regional, municipal or workplace level, must be affiliated with or supported by one of the mentioned organisations to be eligible. It is also possible for complaints to be lodged by non-governmental organisations (NGOs) holding consultative status with the ILO.

For a clear checklist and details on what's needed for a complaint to be considered, check out the ILO Supervisory System: Guide for Constituents, available online.[14]

Standing Tip
If the complaint is signed by a lawyer, it is important to attach to the complaint the power of attorney given by the organization.

Process
Submitting a complaint to the CFA involves several key steps. Firstly, the complaint must be in writing and signed by a representative authorised to file the complaint. It should be addressed to the ILO Director-General at the ILO Headquarters in Geneva. An electronic submission form is available on the ILO's website.[15]

In terms of substance, the claims presented in the complaint must not solely be of a political nature; they should be supported by evidence such as administrative or judicial decisions, photographs, press reports, and other relevant documents. It is crucial to present events chronologically and be prepared to provide answers to basic questions such as what, who, where, when, and why.

The CFA may consider cases even if they are under investigation by national jurisdictions, i.e. it is not mandatory to have exhausted all national procedures beforehand.
Upon examining the case, the CFA typically prepares a report containing conclusions and recommendations. This report is then submitted to the Governing Body for approval.

As part of its conclusions and recommendations, the CFA may bring certain aspects of a case to the attention of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). This step occurs only if the relevant freedom of association Convention has been ratified.

The CEACR will then monitor the outstanding issues related to the Convention until the requested actions have been taken and compliance has been achieved, thereby resolving the issue of non-compliance.

Procedure Tip
Workers' organisations can seek support with the preparation and submission of their complaint from the Bureau for Workers' Activities ACTRAV (ACTRAV@ILO.org)

Essential to keep in mind
Although there is no specific time limit set for addressing complaints, the CFA recognises the practical difficulties governments face in responding to allegations related to events from the distant past. Consequently, if a complaint involves historical matters, it may be challenging or even impossible for a government to provide a detailed response. In such instances, the CFA may opt not to examine the complaint.

When deciding which course of action to pursue for your case, assess whether engaging in a national-level process while your case is still unfolding is more advantageous, or if waiting until after exhausting national remedies would be more appropriate. It is worth noting that seeking redress through the CFA could limit your access to other available United Nations mechanisms.

Additionally, consider whether an international or European avenue is better suited for your case, as seeking remedies through the CFA might prevent you from seeking European-level remedies later. Carefully weighing these factors will help you make well-informed decisions about the most effective path forward for your situation.

14 guide-supervision.ilo.org/wp-content/uploads/2018/11/EN-CFA-CHECKLIST-RECEIVABILITY.pdf

15 www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm

International Labour Organisation: Complaint Procedure

Basic information about this avenue
Under Article 26 of the ILO Constitution, the complaint procedure allows for a formal grievance to be filed with the ILO Governing Body against a Member State accused of not fulfilling its obligations under a ratified Convention. This formal complaint can be initiated by another Member State, a delegate to the International Labour Conference, or the Governing Body itself. It is a mechanism designed to address and resolve allegations of non-compliance with international labour standards as agreed upon by ILO Member States.

Advantages and disadvantages
The complaint procedure of the ILO is particularly accessible to trade unions that are members of the International Labour Conference (ILC). This route is beneficial because it leverages the high-level investigative capabilities of the Commission of Inquiry (COI), which is among the most influential mechanisms of the ILO, carrying considerable political weight.

According to Article 27 of the ILO Constitution, all Member States are obliged to cooperate fully with a COI, even if they are not directly implicated in the complaint. Should a country fail to adhere to the COI's recommendations, the ILO Governing Body has the authority to recommend actions to the ILC to ensure compliance.

However, the COI's recommendations are not legally binding. Their impact depends significantly on the political and social context within the Member State and the importance it places on adherence to ILO standards. Experience suggests that the effectiveness of these recommendations can vary greatly from one country to another.

The complaint procedure is not typically suited for individual cases or minor infractions. It is best reserved for addressing serious, widespread violations that carry political implications. Additionally, coupling the complaint with media outreach can amplify its impact, creating broader public and international pressure for compliance. This strategic use of public scrutiny can enhance the effectiveness of the recommendations and promote accountability.

Standing
In the context of the ILO, not only can Member States file a complaint, but worker delegates to the ILC also have this right. These worker delegates are appointed in concordance with the most representative national workers' organisations within each Member State.

Process
A complaint within the ILO can be initiated by a Member State or an ILC delegate and submitted to the ILO Governing Body. Should the Governing Body determine the complaint to be admissible, it may establish a COI, which is reserved for serious and repeated violations.

The COI is composed of three independent members who undertake a comprehensive investigation into the complaint and develop recommendations for resolution. Given the absence of pre-set procedures for the COI, it is the responsibility of the Commission to determine its own procedural approach within the bounds of the ILO Constitution.
The investigative process may involve the collection of written statements, the gathering of evidence, cross-examinations, and on-site visits, provided the government in question grants permission. The COI is tasked with compiling a detailed report that includes time-sensitive recommendations, and an account of the procedures followed during the investigation.

Upon government acceptance of the COI's recommendations, the case advances to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which then reviews the government's actions in implementing these recommendations. Conversely, if the government rejects the recommendations, the Governing Body may respond by seeking the ILC's assistance to ensure the Member State's compliance.

For complaints specifically addressing Conventions 87 and 98, which relate to freedom of association and collective bargaining rights, the case may be directed to the Committee on Freedom of Association for further examination and action.

Essential to keep in mind

If you are aware of a violation that could be grounds for a complaint, contact a trade union in your Member State that is affiliated with the ILC. Such a union would be equipped to formally lodge the complaint.

Instances where a Member State disregards the recommendations of a COI are rare. While the recommendations stemming from the ILO's procedures are not legally enforceable, they can be influential, especially if the Member State in question values its standing with the ILO and if there is significant public awareness about the issue. Generating media attention can amplify the impact of the ILO's recommendations, thereby exerting additional pressure on the government to act in line with those recommendations. Utilising public and media scrutiny as part of the strategy can be an effective way to encourage compliance.

International Labour Organisation: Representations

Basic information about this avenue

The representation procedure provided by Articles 24 and 25 of the ILO Constitution allows social partners to formally present their concerns to the ILO Governing Body. This process is specifically designed for situations where an association believes that a Member State has not fulfilled its obligations under an ILO Convention to which it is a party. This right of representation is a crucial mechanism for ensuring that the standards set out in ILO Conventions are upheld and that Member States remain accountable for their commitments to international labour standards.[16]

Advantages and disadvantages

The ILO's representation procedure offers a strategic approach for addressing situations in which a country "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party". A representation thus may be filed only against a State that has ratified the Convention concerned. This process, while potentially protracted, taking several years to conclude, is a thorough means of ensuring that Member States are held accountable for their commitments to international labour standards.

One of the advantages of this route is the scrutiny it involves. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) reviews the actions taken by governments to implement the recommendations of the ILO Governing Body. Moreover, in instances of serious and persistent violations, the Governing Body has the discretion to initiate a complaint against the government in question, leading to the establishment of a Commission of Inquiry (COI). Such commissions conduct in-depth investigations into the allegations.

16 You can find out which ILO Conventions have been ratified by your country on the ILO's Normlex website here: https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO:::

The ILO representation procedure is particularly well-suited for situations where there is a systemic issue in a Member State's legislation or practice that contravenes the provisions of an ILO Convention. For example, if a country has ratified an ILO Convention on occupational safety and health but fails to implement adequate laws to protect workers from hazardous working conditions, a trade union could use this procedure to seek redress. Another scenario could involve violations of the rights to freedom of association and collective bargaining. If a Member State has ratified the relevant ILO Conventions but enacts laws that restrict workers' rights to organise or negotiate collectively, trade unions could file a representation with the ILO. This avenue is also ideal for instances where there might be widespread or systematic discrimination in employment practices that violate international labour standards on equality and non-discrimination, which the Member State has agreed to uphold by ratifying the respective ILO Convention. In these cases, the ILO's lengthy review process allows for a comprehensive examination of the issues, and the potential establishment of a Commission of Inquiry signifies the seriousness with which the ILO regards such allegations, providing a robust mechanism to address and rectify systemic labour rights violations.

There is however a low compliance rate with the recommendations of the representations, as evident by the follow-up reports of the CEACR.

Standing

Under the ILO's procedures, individual workers or employers cannot make representations directly; they must be channelled through an organisation representing workers or employers. This organisation could be local, national, or international but must meet certain criteria to be considered receivable:

- The representation must be submitted in writing.
- The complaint must explicitly refer to Article 24 of the ILO Constitution.
- It must address issues with a Member State of the ILO.
- It should pertain to an ILO Convention that the Member State in question has ratified.
- The representation must detail how the Member State is alleged to have breached the specific Convention.

These criteria ensure that the representation is formally structured and based on a clear claim of non-compliance with international labour standards as set out in the ILO's legal framework.

Process

In addressing a representation, the ILO Governing Body has the option to appoint a three-member tripartite committee. This committee is tasked with a thorough review of the representation alongside the government's response. The committee's report to the Governing Body outlines the legal and practical aspects of the case, assesses the evidence presented, and ends with recommendations for action.

Should the government in question fail to implement the necessary actions following these recommendations, the ILO's Committee of Experts on the Application of Conventions and Recommendations may be called upon to monitor the situation further. In cases of particularly grave or persistent violations, the situation could escalate to a formal complaint. At this point, the Governing Body holds the authority to establish a COI, which is one of the ILO's highest-level investigative mechanisms, to conduct a comprehensive examination of the allegations.

Essential to keep in mind
This procedure does not require the exhaustion of national remedies before a representation is submitted. However, the process of examining a representation may include opportunities for conciliation or other forms of resolution at the national level. When filing a representation, it is crucial for the complainant organisation to consider whether it is open to conciliation because they will need to state their intentions regarding this in the complaint form. This willingness to engage in conciliation can be a significant part of the process, as it may offer a faster resolution to the dispute and is often encouraged as a step towards cooperative problem-solving.

UN Committee on Economic, Social and Cultural Rights: Individual Communications (Complaints)

Basic information about this avenue
The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a human rights treaty adopted in 1966 under the United Nations system. It introduced an individual complaints mechanism, which allows individuals to bring complaints directly to the attention of the Committee on Economic, Social and Cultural Rights (CESCR).

Article 7 ICESCR focuses on workers' rights, while Article 8 ICESCR specifically addresses trade union rights. These articles outline the rights and protections afforded to workers and trade unions under the Covenant.

The CESCR is responsible for overseeing implementation and consists of 18 independent experts. These experts are tasked with reviewing UN Member State reports, considering individual complaints, and promoting the realisation of economic, social, and cultural rights worldwide.

Advantages and disadvantages
This avenue offers a relatively low-cost and accessible method for filing a complaint, presenting an additional means to pressure UN Member States into compliance. The ICESCR explicitly outlines workers' and trade union rights, making it possible to identify violations.

However, there are drawbacks to consider. This avenue is not supplementary; instead, it requires the exhaustion of national remedies. Opting for this avenue may also limit your ability to pursue other options. Additionally, there's a limited timeframe for action after exhausting national remedies, with only one year available. The CESCR meets twice a year, so it is crucial to keep track of these dates to ensure timely review of your case.

The CESCR conducts two sessions annually: a three-week plenary session and a one-week pre-sessional working group in Geneva, Switzerland. The schedule of past and upcoming CESCR sessions is accessible online, and the OHCHR maintains a Master Calendar of all UN Member States' upcoming treaty body reviews. Keeping abreast of these schedules is essential for effective engagement with the CESCR.

Standing
For the CESCR to have jurisdiction to receive individual complaints, the concerned State Party must have recognised its competence by ratifying the Optional Protocol.[17]

Submissions can be made by an individual or a group of individuals. The complainant, or the person on whose behalf the communication is submitted, must have been directly and personally affected by the law, policy, practice, act, or omission of the State Party, which is the subject of the complaint. It is not sufficient to merely challenge a law or state policy or practice in abstract terms.

Typically, the CESCR does not consider complaints where the facts occurred before the entry into force of the complaint mechanism for the State Party concerned. In such instances, the complaint would be deemed inadmissible due to temporal reasons. However, there are exceptions to this rule, particularly in cases where the effects of the event in question result in a continuous violation of the treaty.

Process
Filing a complaint with the CESCR involves several crucial components to ensure admissibility and adherence to the procedure. The format, language, timing, and manner of submission are paramount.

Firstly, it is imperative to articulate why the described facts constitute a violation of the rights enshrined in the ICESCR. This necessitates specificity, including citing the specific treaty article allegedly violated and how the State Party breached them. Additionally, it is advisable to indicate the desired remedies from the State Party, should a violation be established by the CESCR. Insufficient substantiation of facts and allegations may result in the rejection of the communication.
Presenting the main facts of the case chronologically, including remedies sought at the domestic level and decisions adopted by domestic authorities, is essential. Communications must be presented in one of the Secretariat's working languages (English, French, Russian, and Spanish). If annexes are in a different language, an unofficial translation summary must be provided.

The communication cannot be anonymous, but the victim(s) and/or the author may request that their identity not be disclosed in the CESCR final decision, which is made public.

The complaint must be submitted within one year from the exhaustion of domestic remedies. It should be in writing, preferably typed and signed. If sent via email, it must be scanned. The complaint should include the alleged victim's name, nationality, date of birth, mailing address, and email address, as well as the name of the Member State it is directed against. If made on behalf of another person, evidence of that person's consent should be provided, or the author should explain why such evidence cannot be offered.

To access the form for submitting an individual communication and guidance on its preparation, visit the website of the Office of the High Commissioner for Human Rights.[18]

Additionally, in your strategy, consider that third-party interventions may be submitted by individuals or by an organisation, such as a trade union. Authorisation to intervene must be obtained from the CESCR, which will provide the deadline for submission, word limit, and focus issues. A guidance note is available on the Office of the High Commissioner for Human Rights website.[19]

Procedure Tip
To help you draft your own individual communication, read previous decisions on individual complaints on human rights violations. These can be accessed via the JURI Database at juris.ohchr.org.

Essential to keep in mind
Before pursuing this avenue, it is essential to exhaust all national remedies. This means resolving any legal issues within your country's legal system first.

Once you have exhausted national remedies, you have a strict one-year window to submit your case to the CESCR. It is crucial to prepare

17 To see ratification by country, visit the UN Treaty Body Database, here: tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR-OP

18 www.ohchr.org/en/documents/tools-and-resources/form-and-guidance-submitting-individual-communication-treaty-bodies

19 www.ohchr.org/en/treaty-bodies/cescr/individual-communications

your documents early to meet this deadline, as any delay could cause you to miss the opportunity to have your case reviewed.

Anonymous communications are not accepted, so you must identify yourself when submitting your complaint. Additionally, the CESCR does not provide legal aid, thus if you are unfamiliar with UN procedures, you may need to seek pro bono assistance or expertise.

The CESCR only processes electronic submissions unless it is impossible to submit electronically. Make sure to know the meeting schedule, as missing relevant dates could result in your case not being reviewed.

To submit your complaint or communication, email it in Word format to the OHCHR Petitions and Urgent Actions Section (PUAS) at ohchr-petitions@un.org. Also, remember to include an unsigned Word version of your submission.

If your submission lacks clarity or essential information, the PUAS may request additional details. It is crucial to respond promptly to these requests. Failure to provide the necessary information within two years from the date of the request will result in the closure of your file.

Closing reflections

Strategic litigation requires thorough planning and careful consideration. From the outset, it is crucial to anticipate the full trajectory of a case, considering the procedural requirements of each forum and the long-term objectives of your action. The choice of forum—whether judicial or quasi-judicial—will shape not only the legal arguments but also the potential remedies and the broader impact of the case. Throughout the process, ensure compliance with procedural requirements at each stage, as any missteps may prevent the case from moving forward.

Understanding the potential fora available for your case is paramount. Each legal forum has its own procedural nuances and potential limitations. Whether you are considering bringing a case before the European Court of Human Rights, the Court of Justice of the European Union, or quasi-judicial bodies such as the European Committee of Social Rights, it is essential to be well-versed in the specific procedural and admissibility requirements of each. Selecting the appropriate forum ensures that your case is presented in the most effective way possible.

One of the most important aspects of strategic litigation is choosing the right partners. Collaborating with other trade unions, NGOs, and legal experts enhances your resources and adds credibility to your case. The **ETUC can be a critical partner** in this process. For instance, the ETUC can support you in lodging a collective complaint before the ECSR, allowing trade unions to address violations of the European Social Charter without the need to exhaust domestic remedies. Similarly, the ETUC can intervene as a third party to support a trade union complaint to the ECtHR, further strengthening the case. By engaging early with the ETUC, you can draw on the support of the European trade union movement when bringing a case at before European and international fora, increasing its impact and effectiveness.

The strength of your case often lies in the **expertise** and support you can gather around it. Scholars, law clinics, and legal experts can provide critical insights that help frame your legal arguments more effectively. Beyond legal arguments, **building a compelling story** is vital. Engaging the public through media is an effective way to gain support and raise awareness about the broader implications of the case. Involving journalists or bloggers can secure traditional media coverage, while social media allows for fast and widespread dissemination of information. The narrative should highlight the human element, focusing on how the case impacts workers' rights and the broader social context.

Litigation is not a one-time event—it is a process that unfolds over time, often spanning years. During this time, laws may change, governments may shift, and new challenges may emerge. Strategic litigation requires **resilience to adapt** to these evolving circumstances. A solid legal strategy leaves room for flexibility, allowing you to adjust your approach as needed while keeping the broader objective in sight. Success in strategic litigation is not measured solely by a win in the courtroom. **The impact of a case often extends beyond the final judgment** – even in instances where the outcome is not favourable. Whether a case advances new legal principles, challenges existing laws, or brings public attention to crucial issues, strategic litigation can create ripple effects across legal and social landscapes.

Annex 1

- Rules of the ECtHR: https://www.echr.coe.int/documents/d/echr/Rules_Court_ENG
- Practice directions for third party interventions at the ECtHR: https://www.echr.coe.int/practice-directions
- Online form for ECtHR applications: https://prd-echr.coe.int/en/web/echr/apply-to-the-court
- ECtHR Guide on Article 11 of the European Convention on Human Rights: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_11_eng

Annex 2

ETUC Guidance Note for Observations under the ESC Reporting Procedure

In principle, you are free to structure and formulate your Observations as you see fit, because there is no particular format for comments on national reports. However, the following approach might be helpful.

General information

- Provide the full name (and abbreviation) of your organisation as well as the contact details of a colleague in your organisation whom the ECSR (and ETUC) could contact in case further information would be required.
- Refer to your affiliation to the ETUC (for the privileged role of the ETUC under the ESC, see Articles 21, 23 and 27 ESC (1961); Article C Revised ESC). If you want to you can also add some facts and figures on you how representative you are in your country although this is not necessary as your affiliation to ETUC is sufficient mandate to make observations.

Structure for comments on specific provisions (to be treated individually)

Generally: Concentrating on criticisms in relation to the Government's report.

- Very briefly summarizing the content of the Government's report.
- As Governments tend to have the habit to present a more favorable picture of the reality to the ECSR, focus your Observations on (information provided in) the Government's report also in relation to the questions asked by the ECSR in factual and legal terms, if appropriate by criticizing:
    - the facts: i.e. by including statistics and/or examples
    - the legal arguments: by reference to
        - domestic judgments not taken into account by the Government
        - international case law in particular if the respective body has assessed the situation critically (in particular CESCR, ILO, ECtHR, EU)
- As Governments often on purpose do not report on everything, focus your comments also on what is missing in relation to the following three elements:
    - Non-conformity
    - Questions which have been asked by the ECSR in previous Conclusions
    - in relation to changes in law and practice since the last report

Submissions

Please submit your Observations to the Secretariat of the European Social Charter (social.charter@coe.int) by the indicated deadline, preferably also including the ETUC Legal Team in copy to your email.

Annex 3

Relevant research for strategic litigation

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- De Fazio, Gianluca "Legal opportunity structure and social strategy in Northern Ireland and southern United States" International Journal of Comparative Sociology 53 no. 1 (February 2012): 3-22.
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