

Strategic litigation in the framework of effective enforcement. New directives, new approaches?

Klaus Lörcher

Conference: Enforcing workers' rights in Europe through strategic litigation
20 October 2023, Frankfurt/Main, House of Labour

Hearing before the Grand Chamber of the European Court of Human Rights



Strategic litigation by 6 young applicants against gas emissions from 33 States contributing to the phenomenon of **global warming** resulting, among other things, in heatwaves affecting the applicants' living conditions and health (27/09/23).

1. Photo left: <https://www.echr.coe.int/w/grand-chamber-hearing-concerning-33-member-states> Photo right: <https://www.lto.de/recht/hintergruende/h/verhandlung-klimaklage-egmr-3937120-portugiesische-jugendliche-duarte-agostinho-gegen-32-staaten/>

20.10.2023

K. Lörcher

2

OVERVIEW

This presentation concentrates mainly on **EU law**.

- Part I: **Strategic litigation** in the framework of effective enforcement
- Part II: **New Directives** and their enforcement
- Part III: **New approaches?**
- **Conclusions**

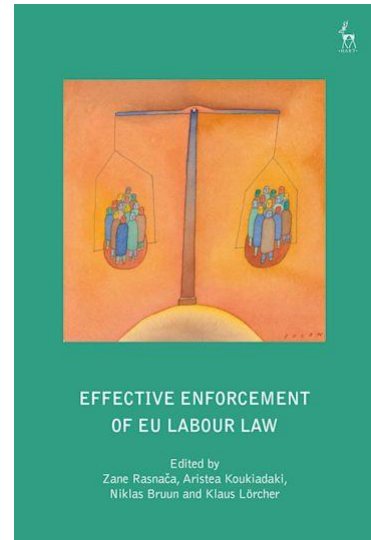
Part I: Strategic litigation in the framework of effective enforcement

(I.) Strategic litigation Overview

If you intend to start strategic litigation, what should be taken into account?

- **Introduction**
- **Objectives**
- **Level of actions**
- **Criteria for identifying the appropriate**
 - avenue
 - case.

(Content taken mainly from chapter 7 of this book:)



(I.) Strategic litigation Introduction

- **Enforcement needs well chosen (strategic) activities**, otherwise it might go into wrong directions.
- Such action is aimed at contributing to **empower trade unions and workers - assisted by their lawyers** - to fully enjoy the rights provided for by EU Labour Law, **protect them** in case of violations and even improve them.
- Strategic enforcement in particular by **strategic litigation** is therefore key to the realisation of **human, trade union and workers' rights**.
- As **general approach**, it should be **carefully assessed** whether the strategy chosen is appropriate to effectively remedy the situation in question which is in violation of legal obligations (ex-post) or to prevent such violations (ex-ante), and take into account that both approaches have a 'strong connection'.

(I.) Strategic litigation

Legal objectives

• At national level

- The starting point will be to **increase compliance with the labour law provisions** by ensuring that existing laws are correctly interpreted, applied and enforced. This includes filling a gap, clarifying a point of law, or the meaning, scope or applicability of a legal provision in a particular situation. Moreover, it might be important to overturn previous damaging case law.
- While these objectives are more related to the existing legislation further objectives can be to **advance national law through application of international and European standards** by testing whether national law or practice complies with international or European human rights standards, potentially setting aside or annulling non-compliant legislation.

• At EU level, having a much wider impact as ‘supra-level’

- **similar objectives** are relevant, i.e. to advance EU standards, by establishing progressive or innovative legal precedents, thus also enabling workers also in other EU Member States to better enforce their rights.

20.10.2023

K. Lörhcdcr

7

(I.) Strategic litigation

Objectives - Trade union objectives and priorities

- The exemplary character of a case can be shown by **highlighting a particular problem or a widespread infringement** with regard to its nature or scale, shedding light on problematic policies or practices with negative effects on many workers or triggering human rights-based reforms of national laws, policies and practices.
- The claims in the case could be framed as **part of a broader set of trade union priorities** or demands. In some cases, trade union action through legal proceedings may be the most appropriate or even sole means to
 - raise awareness,
 - address the problem and
 - achieve legal and/or political objectives beyond the individual case at hand.

20.10.2023

K. Lörhcdcr

8

(I.) Strategic litigation

Main actors

- **Individual worker** concerned,
- **Trade union** and/or **workers representatives**, in particular works councils.
- **Combination**: Main actors can be and are often interrelated:
 - As trade union member, the individual worker might wish to get **legal assistance** from his or her trade union.
 - The trade union might be empowered to initiate court proceedings – depending on the national legal situation – in labour law matters,
 - **generally** in their own procedural rights (see also Part III), or
 - **on behalf of its membership** or
 - on behalf of **individual members**.

20.10.2023

K. Lörhcdcr

9

(I.) Strategic litigation

Levels of action

The intra-EU dimension

- The **direct access to EU courts is very limited**.
- Accordingly, indirect avenues are specifically relevant (in principle, **infringement procedures**; but mainly **preliminary ruling proceedings** having the greatest impact in EU Labour Law.

The extra-EU dimension (indirect influence)

- **European Convention on Human Rights** (ECHR), via references in the Charter of Fundamental Rights of the EU (CFREU): Articles 52(3) and 53 CFREU as well as the respective Explanations and, accordingly, to ECtHR case law. The EU (Labour), also Article 6(3) TEU
- **European Social Charter** (ESC) via direct references in EU primary law (recital 5 of the Preamble of the TEU and Article 151(1) TFEU, recital 5 of the Preamble of the CFREU and the Explanations to the relevant provisions in the CFREU).
- **ILO standards** via references in the Preamble of the Community Charter of Fundamental Social Rights of Workers (Article 151(1) TFEU) or specific references in EU directives).
- **UN Covenant on Economic, Social and Cultural Rights** (ICESCR) can become relevant for EU Labour Law since all EU Member States have ratified it (Article 53 CFREU).

20.10.2023

K. Lörhcdcr

10

(I.) Strategic litigation

Criteria for identifying the appropriate avenue

- For each actor, separately, general criteria will always have to be checked against the **legal, political and social realities** in the country concerned.
- The achievement of the objectives defined above very much depends on the fulfilment of the criteria in relation to finding the 'right' case and the **appropriate avenue**.
- The main relevant **national and European** avenues which could be used are shown in the slides below. (It should, however, be noted that several of the avenues mentioned might be mutually exclusive (legally). Two sorts of avenues might be separated: **Judicial** and **quasi-judicial**.

20.10.2023

K. Lörhcdcr

11

(I.) Strategic litigation

Criteria for Judicial avenues

Level of action	(Individual) workers	Trade unions	
		National	European/internat.
	Main advantages : Legally binding outcome		
	Main disadvantages : procedures are potentially are very time-consuming (unless injunctions would be possible) and costly		
National	Court proceedings (possibly up to the constitutional and/or European level)		
European			
- EU (Court of Justice of the EU – CJEU)	Preliminary references		Direct actions very rarely (see <i>EPSU</i> case)
		CJEU cases on EU Social Dialogue Framework Agreements/Directives	In these cases the ETUC should be invited by the Commission
- Council of Europe	Applications to European Court of Human Rights	Legal representation or support	Third-party interventions

20.10.2023

K. Lörhcdcr

12

(I.) Strategic litigation

Criteria for Quasi-judicial avenues

Level of action	(Individual) workers	Trade unions	
		National level	European level
	Main advantages: Procedures are usually quicker and less costly than judicial proceedings		
	Main disadvantages: In principle, legally non-binding outcome but they can support legal argumentation before courts		
National	- (Parliamentary) Petition - National supervisory bodies: Ombudsman, data protection supervisor etc.		
European			
- EU	- EP Petition - Ombudsman - European Labour Authority (ELA)		
- CoE	Collective complaints before the European Committee of Social Rights, if respective Protocol is ratified		

20.10.2023

K. Lörhcdler

13

(I.) Strategic litigation

Criteria for identifying the appropriate case

For identifying **possible opportunities**

- Possibility for **access to justice**: legal standing or at least third-party intervention
- Probability of a **positive outcome**: facts and arguments should be clear, strong and convincing
- Legal impact and **transferability**: legally binding, beyond the individual case
- Probability for **supportive context**: from the political, social or economic environment.

For identifying **potential challenges**

- **Legal and political risks** of bringing a case
- **Length** of the procedure
- Required **resources** including potential costs
- Possible or probable **counter-strategies**

Follow-up strategies on the outcome of a case

- Promoting the **spill-over effects** of a positive outcome
- Managing the **implications of a (possible) negative outcome**

20.10.2023

K. Lörhcdler

14

Part II: New Directives and their enforcement provisions

20.10.2023

K. Lörhcdcr

15

(II.) New EU Labour Law Directives Introduction

Important developments have taken place in the last years

- Since 2019 at least **five new labour law directives** have been adopted
 - **Equal Pay Transparency** Directive (2023/970, EPTD)
 - **Minimum Wage** Directive (2022/2041, MWD)
 - **Whistleblower** Directive (2019/1937, WBD)
 - **Work-Life Balance** Directive (2019/1158 WLBD) and finally
 - **Transparent and Predictable Working Conditions** Directive (2019/1152, TPWCD)
- They contain several **enforcement provisions** ranging from the right to redress to public procurement

20.10.2023

K. Lörhcdcr

16

(II.) New EU Labour Law Directives

Description (in chronological order – newest first)

- Directive (EU) 2023/970 to strengthen the application of the principle of equal pay for **equal** work or work of equal value between men and women through **pay transparency** and enforcement mechanisms (EPTD)
- Directive (EU) 2022/2041 on adequate **minimum wages** in the European Union (MWD)
- Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (**whistleblower** Directive)
- Directive (EU) 2019/1158 on **work-life balance** for parents and carers (WLBD)
- Directive (EU) 2019/1152 on **transparent and predictable working conditions** in the European Union (TPWCD)

20.10.2023

K. Lörhcdcr

17

(II.) New EU Labour Law Directives

Enforcement provisions (with respective Articles)

	EPTD	MWD	WBD	WLBD	TPWCD
Right to redress	14	12(1)			16
Protection against adverse treatment (also retaliation)	25(1)	12(2)	19-21	14	17
- Protection from dismissal	25(2)		19(1)(a)	12	18
Right to compensation	16				
Legal Presumption/Proof	18-20				15
Legal costs	22				
Penalties	23	13	23	13	19
Public procurement	24	9			

20.10.2023

K. Lörhcdcr

18

WBD - Article 19 - Prohibition of retaliation

- suspension, lay-off, **dismissal** or equivalent measures;
- demotion or withholding of **promotion**;
- transfer of duties, change of location of place of work, **reduction in wages**, change in working hours;
- withholding of **training**;
- a negative **performance assessment** or employment reference;
- imposition or administering of any **disciplinary measure**, reprimand or other penalty, including a financial penalty;
- coercion, **intimidation**, harassment or ostracism;
- discrimination, disadvantageous or **unfair treatment**;
- failure to convert a temporary **employment** contract into a **permanent** one, where the worker had legitimate expectations that he or she would be offered permanent employment;
- failure to **renew**, or early termination of, a **temporary employment** contract;
- harm, including to the **person's reputation**, particularly in social media, or financial loss, including loss of business and loss of income;
- **blacklisting** on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;
- ...

20.10.2023

K. Lörhcdcr

19

(II.) New EU Labour Law Directives

A preliminary comparative evaluation

- **Common** elements:
 - protection against **adverse treatment**,
 - **penalties**
- Important **differences**: in respect of
 - the **order**
 - the **substance**
- **Widest range of protection** in EPTD and WBD
- Preliminary **conclusions**
 - Examination of **possibilities to cross-fertilise** existing elements into Directives where they do not exist **by strategic litigation**, e.g. prohibition of retaliation into victimisation
 - Anyhow, **need for a coherent approach** on the legislation itself, see next Part III

20.10.2023

K. Lörhcdcr

20

Part III: New approaches?

20.10.2023

K. Lörhcdcr

21

(III.) New approaches?

Introduction

In general, workers' and trade unions' rights have been more and more developed also by strategic litigation. Important experience has been gained. Against this background, the question arises what new approaches could be used or existing further developed. Some ideas:

- Procedural: Strategic trade union **coordination**;
- Substance: Possible new fields for **preliminary questions** ;
- Future: Suggestion for a ‚Proposal‘ for a **new Directive** on effective enforcement.

20.10.2023

K. Lörhcdcr

22

(III.) New approaches?

Strategic coordination of trade unions

- Several countries provide for trade union **access to court beyond their own rights** (a sort of actio popularis for trade unions)
 - At least the following countries provide for such an access: Austria, Denmark, France, Netherlands, Romania and Spain (according to CJEU judgments in the last 5 years)
- Litigation by trade unions concerned provide **enormous advantages**:
 - Introducing the case and being able to push it through all instances
 - No problems in relation to (the possible loss or retaliation of) individual applicants
- Conclusion: It should be further explored to which extent a **coordination** of those trade unions could lead to a more **coherent litigation strategy**

20.10.2023

K. Lörhcdcr

23

(III.) New approaches?

Strategic coordination of trade unions

- **Austria**
 - *Österreichischer Gewerkschaftsbund Gewerkschaft Öffentlicher Dienst*, 08/05/2019, C-24/17, ECLI:EU:C:2019:373, (**discrimination on grounds of age**)
- **Denmark**
 - *HK v Danmark and HK/Privat*, 02/06/2022, C-587/20, ECLI:EU:C:2022:419 (**discrimination on grounds of age**)
- **France**
 - *Syndicat des cadres de la sécurité intérieure*, 11/04/2019, C-254/18, ECLI:EU:C:2019:318 (**working time**)
 - *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle*, 18/11/2020, C-463/19, ECLI:EU:C:2020:932 (**maternity leave**)
- **Netherlands**
 - *FNV v Van den Bosch Transporten*, 28/04/2022, C-815/18, ECLI:EU:C:2020:976 (**transfers of undertakings**)
- **Romania**
 - *Sindicatul Familia Constanța*, 20/11/2018, C-147/17, ECLI:EU:C:2018:926 (**working time**)
- **Spain**
 - *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank*, 14/05/2019, C-55/18, ECLI:EU:C:2019:402 (**working time**)

20.10.2023

24

(III.) New approaches?

Possible new fields for preliminary questions

- In relation to the **new Directives**
 - Cross-fertilising the respective **enforcement provisions** (victimisation – retaliation)
 - Clarification of **vague notions** in the interest of workers
 - **Exclusion of labour rights** under the WBD
- In relation to the EU **Charter of Fundamental Rights** (CFREU) Article 31 providing for unconditional rights (unlike Articles 27, 28 and 30):
 - (para. 2): **working time**: several elements might still need further development
 - (para. 1): **health, safety and dignity of workers**: need particular attention
- In relation to binding **international instruments** (ratified by EU)
 - International Convention on the Rights of **Persons with Disabilities** (CRPD)
 - Convention on Preventing and Combating **Violence against Women** and Domestic Violence (Istanbul Convention), entered into force on 2/10/2023

20.10.2023

K. Lörhcdcr

25

(III.) New approaches?

Suggestion for a **Proposal for a Directive on Effective enforcement**

- Proposed main legal base: Art. 153(1)(b) TFEU
- Chapter I: **General provisions**
- Chapter II: **Judicial enforcement** (following slide)
- Chapter III: **Non-judicial enforcement**
- Chapter IV: **Horizontal provisions**
- Chapter V: **Final provisions**

(Content taken from chapter 22 of this book:)



20.10.2023

K. Lörhcdcr

26

(III.) New approaches?

Proposal for a Directive on Effective enforcement

Chapter II: Judicial enforcement

- Section 1: **Access to Court**
 - Effective access, Collective redress, Legal aid and Assistance, Jurisdiction
- Section 2: **Court Procedures**
 - Fair trial, Speedy procedures, Injunctions, Evidence, Burden of proof, Third Party interventions, Legal costs
- Section 3: **Remedies and Sanctions**
 - Principle (real and effective judicial protection), Compensation or Reparation, Sanctions and Fines, Specific sanctions (in certain human rights areas)
- Section 4: **Enforcement of Judgments**
 - Principle, Specific Protection for Migrant Workers

20.10.2023

K. Lörhcdcr

27

CONCLUSIONS

- This presentation has tried to highlight **important elements for developing an effective enforcement strategy**. While not being exhaustive, they demonstrate at least an impressive variety of them.
- In any event, it appears to be indispensable to **carefully look at all elements** individually and at their interrelationship as closely as possible in order to successfully weigh advantages and disadvantages **before starting a specific strategic case**.
- **Bold visions** should nevertheless remain ... and could perhaps be inspired by the photos shown at the beginning of this presentation.

Any encouragement for strategic litigation.

Thank you very much for your attention.

20.10.2023

K. Lörhcdcr

28