ETUC Call for tenders to subcontract an expert to draft a strategic litigation guide for trade unionists

This is a call for a subcontractor to provide expertise with a view to support the activities of the Fundamental Rights and Litigation Advisory Group under the ETUC project ETUCLEX. More specifically, this call for tenders relates to the drafting of a strategic litigation guide for trade unionists.

The ETUC will publish the call on its website, on 10 June 2022, and keep it online for 28 calendar days. The deadline for submission of bids is 8 July 2022.

1. Background information on the project

Promoting and defending human rights, including labour and trade union rights, has always been at the core of the priorities and actions of the ETUC. Strategic litigation undertaken by the ETUC and its affiliates before international and European judicial and quasi-judicial bodies has played a key role in the effective enforcement and advancement of workers’ rights. Looking ahead, the ETUC intends to further equip itself and its affiliates with concrete tools to stimulate and develop strategic approaches to litigation.

The ETUC has reaffirmed its commitment as a Human Rights Defender in its Action Programme 2019-2023, adopted at its 14th Statutory Congress held in Vienna in May 2019. Since then, the ETUC has embarked on a mission to renew and further enhance the work of its Fundamental Rights and Litigation Advisory Group and associated trade union legal networks.

In November 2020, the ETUC Executive Committee adopted a Resolution laying the basis for the ETUCLEX, a human rights, legal and strategic litigation network, with a view to serve the interests of the ETUC and its affiliates in these domains. The ETUCLEX aims to consolidate the legal expertise, competence and capacity of the ETUC and its affiliates, including through improved exchange of information, increased capacity building and a more coordinated approach to strategic litigation.

Against this background, the ETUC intends to subcontract an external expert to prepare a strategic litigation guide (hereinafter “guide”) for trade unionists and legal practitioners wishing to defend or advance social, workers’ and trade union rights through legal proceedings.

The guide is intended as a practical tool that can be used by trade union legal activists to support their strategic litigation process and inform their decisions, in particular in terms of considerations linked to the identification of strategically favourable cases, the choice of appropriate legal fora and capitalising on the outcomes of the case. In the absence of a strategic litigation guide addressing specifically the needs of trade unions, this guide intends to fill that gap and build capacity among trade union legal practitioners wishing to mobilise human rights instruments at European and international level.
2. Tasks to be performed by the subcontractor

As part of the ETUC project ETUCLEX, the subcontractor will be entrusted with the drafting of a practical guide on strategic litigation for trade union legal activists. The project will start in **July 2022** and be concluded by December 2022.

The guide shall be divided into two parts. The first part (1) will offer insights into strategic litigation both as a concept and as an action, explaining how it can be pursued to either defend or advance social, workers’ and trade union rights. In practical terms, it should outline what practitioners need to know and take into consideration to give their litigation a more strategic approach, including non-legal activities such as advocacy and the creation of strategic partnerships among others. The checklist previously developed by the ETUC and annexed to the ETUCLEX Resolution will serve as basis for this chapter, with a view to further explore and elaborate on the various considerations to be taken into account when identifying a favourable case, choosing the appropriate legal forum, and ensuring and effective follow-up independently of whether the outcome of the case is positive or negative.

The second part (2) of the guide will give an overview of the judicial and quasi-judicial bodies and remedies before which strategic litigation and action may be envisaged at European and international level, with a view to outline in more detail the specificities of the proceedings before the different bodies. For each body, this overview should elaborate on issues such as:

- What is the scope of the body (e.g. geographical and personal scope, material rights covered, etc.)?
- Who has legal standing?
- What are the advantages (or disadvantages) of litigation or action before the specific body in relation to social, workers’ and trade union rights?
- How to bring a case?
- What are the possibilities for appeal of a judgement or decision?
- What complementary actions can be undertaken in relation to a case pending before the specific body in addition to or in the absence of legal standing (E.g. asking a Member State to intervene as a third party between the CJEU)?
- Examples of relevant successful (or unsuccessful) trade union cases?

N.B. the list is not exhaustive and other elements will be identified in cooperation with the successful bidder.

The guide will cover the relevant procedures under the following judicial and quasi-judicial bodies:

- **Council of Europe**
  - European Committee of Social Rights (ECSR)
  - European Court of Human Rights (ECtHR)
- **European Union**
  - Court of Justice of the European Union (CJEU)
  - European Ombudsman
  - European Labour Authority (ELA) (social partner cases)
  - European Commission Directorate General for Competition (whistleblowing (antitrust) and complaints (state aid) mechanisms)
Chapter 3: Expertise, experience and skills required

Sound expertise is required on the following issues:

- Expert knowledge in the field of international human rights law;
- Expert knowledge of trade union rights;
- Expert knowledge of legal redress systems/possibilities;
- Practical experience or demonstrated interest in strategic litigation;
- Experience in working on European level projects;
- Good understanding of the European trade union movement.

Sound experience is required in the following areas:

- Carrying out in-depth legal research;
• Producing practical/pragmatic and comprehensible material for a non-research related public;
• Writing research reports containing analysis of legal frameworks;
• Successful track record of delivering in case studies for similar projects, with EU institutions and/or European stakeholders (social partners, NGOs, etc.).

Skills required:
• Proven research, drafting and presentation skills in English;
• Proven skills in drafting case study reports and interview templates;
• Ability to work within specified deadlines and to respect budgetary limits;
• Ability to work in a multicultural context and understanding of different industrial relations systems, cultures & traditions;
• Good administration and project management skills.

4. Time schedule and reporting
The subcontractor will be asked to perform the above-mentioned tasks by 31 December 2022.

The progress and development of the study will be closely followed and monitored through collaboration with the project’s Steering Committee composed of the ETUC legal team.

Feedback on the draft guide will be collected from the experts interviewed and other legal practitioners as appropriate and identified by the ETUC legal team.

5. Payment
The total maximum budget available for the fees of the subcontractor is as follows:

<table>
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<tr>
<th>Contract with ETUC</th>
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<tr>
<td>Main activities and meetings</td>
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<tr>
<td>• Produce a report of approximately 70 pages containing:</td>
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<tr>
<td>o An introduction/foreword</td>
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<tr>
<td>o A chapter on the aims, objectives, considerations and associated actions relevant to strategic litigation</td>
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<td>o A chapter on strategic litigation before European and international judicial and quasi-judicial bodies</td>
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<td>• Undertake a minimum of 4 interviews with experts with practical experience of strategic litigation</td>
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<td>• Participate in meetings with the Steering Committee to discuss the evolution of the guide.</td>
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<tr>
<td>Total budget for the Expertise</td>
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The subcontractor will be remunerated in various instalments (advance and final payment). This amount covers the fees but does not include the travel and subsistence costs incurred for attending project meetings (such as Steering Committee meetings and workshops, ETUC Committee meetings).
These will be covered by ETUC on the basis of EU rules & thresholds (see the EC table of maximum amounts per EU member state).

6. Selection criteria

The selection criteria are in particular:

- Verifiable expertise, experience and skills, as required and described in part 3 of this call;
- Quality of the methodology proposed in the offer;
- Proven track record of ensuring the quality of written materials produced, both in terms of content and format (i.e. previous publications), in the relevant subjects specified in this call for tenders;
- Price/Quality ratio;
- Previous research/work undertaken in the field of human rights/trade union rights, in particular in the field of litigation.

7. Form, structure and content of the tender

Tenders must be written in English. They must be signed by the tenderer or his/her duly authorised representative and be perfectly legible so that there can be no doubt as to words and figures. Tenders must be clear and concise and assembled in a coherent fashion.

Since tenderers will be judged on the content of their written bids, they must make it clear that they are able to meet the requirements of the specifications.

All tenders must include at least two sections:

i) Technical proposal

The technical proposal must provide all the information needed for the purpose of awarding the contract, including:

- Specific information covering the technical and professional capacity, as required, in particular:
  - Description of relevant professional experience with emphasis on the specific fields covered by the invitation to tender;
  - Detailed curriculum vitae of tenderer and of the other team members if applicable;
  - A selection of the main works and/or articles published by all the experts involved, in relation to the relevant subjects specified in this tender.
- Specific information concerning the proposed methodology for delivering the tasks listed in part 2 of this call.

ii) Financial proposal

The prices of the financial proposal must be quoted in euros, including if the subcontractor is based in a country which is not in the euro area. As far as the tenderers of those countries are concerned, they cannot change the amount of the bid because of the evolution of the exchange rate. The tenderers
choose the exchange rate and assume all risks or opportunities relating to the rate fluctuation.

Prices must be fixed amounts and shall not include travel expenses and daily allowances for the attendance to the Steering Committee meetings and other project events which will be covered by ETUC on the basis of EU rules & thresholds.

The maximum amount available for this contract is EUR 20 000 (VAT and all taxes included).

Prices shall be fixed and not subject to revision during the performance of the contract.

8. Award Criteria

The contract will be awarded to the tender offering the best value for money, taking into account the specific objectives, requirements and selection criteria of the tender. The principles of transparency and equal treatment will be respected with a view to avoiding any conflicts of interest.

9. Content and selection of the bids

This call for tenders will be published on the ETUC website on 10 June 2022. Offers must be sent at the latest on 8 July. Offers must be sent to ETUC, in electronic format (by e-mail to amartin@etuc.org), and refer to our “Call for Tenders – ETUCLEX”.

As Steering Committee, the ETUC legal team will assess the bids received. One member of this committee will confirm the date and time of receipt of each bid. The committee members will sign the report on the bids received, which will list the admissible bids and provide reasons for rejecting bids owing to their failure to comply with the stipulations of the tendering process.

The committee will also evaluate the tenders that have been deemed admissible. An evaluation report and classification of participation requests will be drawn up, dated and signed by all the members of the Steering Committee and kept for future reference.

This report will include:

1. The name and address of the contracting authority, the purpose and value of the contract;
2. The names of any excluded candidates and the reasons for their rejection;
3. The names of candidates selected for consideration and the justification for their selection;
4. The names of candidates put forward and justification of their choice in terms of the selection or award criteria.
10. Annex to call for tenders

Strategic litigation guide draft structure

This annex provides an indicative draft structure for the strategic litigation guide described in the call for tenders. To this end, also the ETUCLEX checklist provides further insight into the various elements and dimensions to be explored by this guide.

N.B. the elements outlined below are not exhaustive and are subject to change.

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Foreword/Introduction

- Who is the guide addressed to
  - Trade union legal activists
  - Human rights activists and legal practitioners

- Why do we need this guide and what is its purpose to assist and foster trade union litigation
- Importance of strategic litigation in defending and furthering labour rights

The aims and objectives of strategic litigation

Initial stages: case development and hearings

- Identify a case
  - What makes a case ‘strategic’?
- Plan a strategy
  - Landmark judgement vs iterative approach
  - Defending or advancing labour rights
- Identify partners
  - who can support the case? E.g. trade unions, academics, pro-bono lawyers, NGOs, etc.
- Raise awareness and galvanise support from like-minded organisations
  - Non-legal strategies to promote media and political attention
  - Stimulate debate and a favourable policy context

Final stages: ruling and follow-up

- What to do in the event of an unfavourable outcome
  - Prepare for the eventuality
  - Elaborate a critical analysis
  - Provide explanations (e.g. history of anti-union judgements)
  - Identify possible follow-up actions in terms of appeal or political demands

- What to do in the event of a favourable outcome
  - How to use the judgement as an instrument for advocacy and a catalyst for legislative change
  - Promoting the judgment for multiplier effects at national level
Strategic litigation before European and international judicial bodies

This section could include an infographic providing an overview of timelines and possibilities for combined avenues. Each section could then in turn have its own infographic.

Council of Europe

European Committee of Social Rights

Collective Complaints procedure

- Which countries does it apply to
- Advantages/disadvantages of system in relation to social/labour rights due to the collective nature of the complaint system
- How does it work
  - Admissibility
  - Who can submit a collective complaint
  - How to submit a collective complaint (including drafting, etc.)
  - Procedural issues such as time limits for submission
- Added value of collective complaint for trade unions and social rights
- Examples of successful (and unsuccessful) complaints
- Role of European social partners (ETUC)

Reporting procedure

- Advantages/disadvantages of system in relation to social/labour rights
  - E.g. less time consuming
- Added value of reporting procedure for trade unions and social rights
- How does it work
  - How to submit a comment
  - How to draft a comment (what should be included, how should it be structured, etc.)
  - Procedural issues such as time limits for submission
- Impacts of the procedure

European Court of Human Rights (ECtHR)

- Which countries does it apply to
- Advantages/disadvantages of ECtHR system
  - E.g. it covers rights outside of scope of EU law
- Added value of ECtHR route for trade unions and social rights
- How does it work
  - Admissibility
  - Who can submit a complaint
  - How to submit a complaint
  - Procedural aspects such as time limit for submission and exhaustion of domestic remedies
- Examples of successful or unsuccessful cases
- Role of European social partners (ETUC)

**European Union**

**Court of Justice of the European Union (CJEU)**
- Advantages/disadvantages of pursuing the CJEU route
  - E.g. no need to exhaust domestic remedies
  - What objectives can the trade union movement pursue via the CJEU
  - Need to ensure that issue falls within the scope of EU law
- Added value of CJEU route for trade unions and social rights
- How to obtain a preliminary ruling
  - How to draft a submission if petitioning national court
  - How to persuade the court to make a request
- Examples of successful (and unsuccessful) cases
- Role of European social partners (ETUC)
  - E.g. can they take part in proceedings or submit an amicus curiae?
  - Social partner opinions on the interpretation of framework agreements

**European Ombudsman**
- Who can submit a complaint and on what issues
- What are the (general) requirements for submission
- Advantages/disadvantages of pursuing this route
- Added value of the European ombudsman

**European Labour Authority (ELA) Social Partner cases**
- Who can petition ELA and on what issues
- What are the (general) requirements for submission
- Advantages/disadvantages of pursuing this route
- Added value of the ELA route

**European Commission Directorate General for Competition – Whistleblowing (antitrust) and complaint (state aid) mechanisms**
- Who can whistle blow and on what issues
- What are the (general) requirements for whistleblowing
- Advantages/disadvantages of pursuing this route
- Added value of whistleblowing to DG COMP

**European Commission Directorate General for Trade - Chief Trade Enforcement Office complaints**
- Who can submit a complaint and on what issues
- What are the (general) requirements for submission
- Advantages/disadvantages of pursuing this route
- Added value of this route

**European Parliament – Submissions to the Committee on Petitions**
- Who can submit a petition and on what issues
- What are the (general) requirements for submission
• Advantages/disadvantages of pursuing this route
• Added value of the PETI Committee route

United Nations Systems

International Labour Organisation (ILO)

Representations
• Who can submit a representation and on what issues
• What are the (general) requirements for submission
• Advantages/disadvantages of submitting a representation
• Added value of the ILO representations route

Complaints
• Who can submit a complaint and on what issues
• What are the (general) requirements for submission
• Advantages/disadvantages of submitting a complaint
• Added value of the ILO complaints route

Committee on Freedom of Association (CFA)
• Who can submit a complaint to the CFA and on what issues
• What are the (general) requirements for submission to the CFA
• Advantages/disadvantages of submitting a complaint to the CFA
• Added value of the ILO CFA complaints route

United Nations Committee on Economic, Social and Cultural Rights (CESCR)

Individual complaints mechanism
• What is the International Covenant on Economic, Social and Cultural Rights
• Which countries does the complaints mechanism apply to (ratifications of optional protocol)
• How does it work
  o How to submit a complaint
  o Who can submit a complaint
  o Procedural issues such as time limits for submission
• Interactions with the ILO complaints system
• Role of European social partners (ETUC)

Annexes
• ETUCLEX checklist on strategic litigation
• Examples of complaint forms, etc.
• Existing guidance forms for submission
• Other useful literature
• References to rules or procedure, etc.