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Brameshuber, Elisabeth; Kager, Ines

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Elisabeth Brameshuber

Professor Dr. Elisabeth Brameshuber is Professor for Labour and Social Security Law at the University of Vienna

Ines Kager

Teaching and research assistant at WU Vienna University of Economics and Business

Abstract

With this paper we aimed to give an insight into Austria's labour and social security jurisdiction, notably into different forms of collective redress within this system. As the Austrian Labour and Social Courts Act provides for certain instruments of collective redress, the primary focus will be on those. The main drawback of those existing forms of collective action for labour law matters, however, is the lacking possibility for the single employee to enforce the respective judgement. Hence it can only serve as a legal test case. In that respect, instruments of Austria's general civil procedural law could present a practical alternative to the problem and thus the legal framework and ongoing academic debate about the application of those procedures is also a key part of the paper.

Keywords

Collective action, collective redress, test case, labour law, social security law, social partners, works council, enforcement, civil procedural law, Austria,

I. Introduction

When it comes to the enforcement of labour and social security law in Austria, individual redress is already very pronounced. Although there are various instruments for collective redress in place, which will be discussed in what follows, their effectiveness is sometimes questioned, resulting in the assessment that further **enhancement of collective redress** is required.¹ This assessment

1. In agreement with G.E. Kodek in 'Entwicklung und Reformbedarf in der Arbeits- und Sozialgerichtsbarkeit – neue Herausforderungen', DRdA 2012, 555 (559).

Corresponding author:

Mag. Ines Kager is teaching and research assistant at WU Vienna University of Economics and Business.

E-mail: ines.kager@wu.ac.at, elisabeth.brameshuber@univie.ac.at

is in line with the increasing demand for more legal instruments to facilitate collective access to courts at international level, aiming at greater efficiency and a lower litigation risk, but it can also be interpreted as a call for uniformity in court decisions.²

The term ‘collective redress’ is not clearly defined by law; hence in a first step, **different forms** of consolidation of more than one lawsuit that have been suggested by scholars or are already being implemented can be subsumed under that term. In this context, opt-in and opt-out systems in particular, test cases and group actions have recently been objects of discussion at national and European level. These possibilities are framed mainly as being particularly suited for the awarding of mass damages in the areas of investor protection, competition or consumer protection law. However, in the areas of labour law, and particularly, in social security law, in which employees or insured parties often have similar interests, there are also numerous scenarios in which such mechanisms could be considered an improvement in terms of legal redress.

Within the framework of this contribution, I shall discuss existing mechanisms of collective redress in Austria’s labour and social security systems, focusing on labour law procedures. In this context, not only specific instruments of the **Labour and Social Courts Act** (*Arbeits- und Sozialgerichtsgesetz*,³ ASGG), but also **civil procedure law**, play an important role, in particular regarding the use of traditional procedural instruments for the purpose of taking a joint course of action. Of course, in respect of a narrow interpretation of collective redress, in Austria only the former and one other instrument of consumer protection law would be subsumed under the term. However, the forms of collective action provided by the Labour and Social Courts Act do have some inefficiencies and the collective action provided by the **Consumer Protection Act** does not apply to labour or social law-related cases. Therefore, this article also discusses other existing legal institutions that were not intentionally established as means of delivering collective redress, but can provide an alternative solution to easier access to court. Next to instruments of civil procedure law (joinder of parties, representative action, etc.) other legal institutions to be dealt with in this context are provided for by **competition law** and the **Labour Constitution Act**.

2. Legal framework for collective access to Austrian courts

2.1 Jurisdiction in labour and social security matters

2.1.1 Special characteristics

The Austrian court system is divided into ordinary and administrative jurisdictions. **Jurisdiction for labour law** in general and for so-called performance actions⁴ that allow insured persons to file claims against the social insurance carrier (pursuant to § 354 of the General Social Insurance

2. J. Cremers and M. Bulla (2012) ‘Collective redress and workers’ rights in the EU’, AIAS Working Paper 118; Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013]; Report from the Commission COM (2018) 40 final, on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) [2018]; H. Jarolim (ed), *Dialog im Parlament, Band 8: ‘Beschleunigung von Verfahren als Gebot der Stunde - Sammel-, Musterklagen und andere Möglichkeiten’* 71.

3. ASGG, BGBl 1985/104 as amended by BGBl I 2018/100.

4. The greater part of social security disputes, however, falls under the jurisdiction of administrative courts.

Act)⁵ **lies with the ordinary courts**;⁶ however, due to having its own procedural laws it constitutes a rather autonomous subcategory among civil procedures.

Procedural law in labour-related matters is independently regulated in the Labour and Social Courts Act and differs, in many ways, from general civil procedural law, which thus applies only subordinately (§ 2 leg cit). Contrary to what the Act's title might imply, though, there are no 'Labour and Social Courts', except for in Vienna,⁷ but the *Landesgerichte* (circuit courts) decide as labour and social courts of first instance when called upon in such matters.⁸

Due to its social function, the Labour and Social Courts Act provides extended legal protection for employees. The most obvious difference from civil procedural law lies in the composition of the court, which consists of a panel of two **lay judges** and one professional judge of first instance. The positions of the lay judges have to be filled with an **employers' and an employees' representative** (§ 12 (2) leg cit), who are selected within, and appointed by, the statutory representative association of each group (§ 19 (2) leg cit). The Act, furthermore, provides additional rules and options concerning **legal representation** before the court, as well as special regulations on the **bearing of costs**. One of the most outstanding features of labour and social procedural law, however, is the so-called **collective right of complaint**, pursuant to § 54 of the Act.⁹

2.1.2 Legal representation

2.1.2.1 Legal representation. Pursuant to § 39 (3) of the Labour and Social Courts Act, parties to proceedings at first instance Labour and Social Courts are **not obligated to be represented legally**. If they choose to be represented, apart from lawyers, officials or employees of a statutory or voluntary representative association, members of the respective works council on the employees' behalf, employees or members of an executive body of the company on the employer's behalf, a member of the plant-level representative body on the body's behalf, officials or employees of the Federal Council for the Disabled and any other person the judge considers competent upon request can also act as qualified legal representatives. In practice, this possibility is made use of very often. Above all, the **Chambers of Labour**, as the employees' statutory representative associations, have taken on the leading role in employee representation. In line with the respective statutory provisions of the Chambers of Labour Act¹⁰ (AKG; § 7), they provide **legal advice and representation** through their own legal practitioners or by passing on cases to law firms (substitution). In 2019 alone, more than 2 million consultations in labour, social security and insolvency issues were recorded.¹¹ A similar service is also offered to employers by their respective statutory

5. Allgemeines Sozialversicherungsgesetz – ASVG, BGBl 1955/189 as amended by BGBl I 2019/84.

6. Cf G. Löschnigg, *Arbeitsrecht*¹³ 14/013.

7. 'Labour and Social Court of Vienna'. N.B.: There is no difference in how the circuit court as labour and social court and the Labour and Social Court of Vienna decide which laws apply, etc. Basically, the difference arises because Vienna is the capital and the most densely populated region in Austria.

8. In second instance, the intermediate court of appeal (*Oberlandesgericht*) decides; in third instance, the Supreme Court of Justice rules (*Oberster Gerichtshof*).

9. See section 3.2 below.

10. AKG, BGBl 1991/626 as amended by BGBl I 2018/32.

11. Portal der Arbeiterkammern, Daten und Fakten 2019, <https://www.arbeiterkammer.at/akleistungsbilanz2019> accessed 12 June 2020.

representative body, the Economic Chambers.¹² Employers, however, tend to hire their own lawyers.

2.1.2.2 Excursus: representation of interests. Under Austria's system of 'social partnership', the employers' and employees' representatives at national, regional and establishment levels are different in nature. The social partners at national and regional levels can be subdivided into voluntary associations (coalitions), on one hand, and statutory ones with mandatory membership (chambers), on the other.

The **Austrian Trade Union Federation** (*Österreichischer Gewerkschaftsbund*, ÖGB), as a voluntary association, represents all sectoral unions apart from the agricultural workers, and therefore holds a monopolistic position.¹³ The Federation represents employees' interests and plays an essential role in the process of collective bargaining in Austria.

In contrast, on the **employers' side free trade associations** only exist in a small number of areas and are not assembled under one head organisation, as on the the employees' side. Furthermore, only a minority of free trade associations have concluded collective agreements in practice.

Instead, historically, the **Economic Chambers** have taken on the role of chief representative of businesses¹⁴ and act as the main negotiators in respect of collective agreements. Together with the **Chambers of Labour** (*Arbeiterkammern*), which represent all employees, they form a group of statutory representative bodies with mandatory membership. The Chambers of Labour not only support their members in court proceedings but also commonly take advantage of the existing instruments of collective redress on behalf of employees'¹⁵ interests. The most important available mechanisms are representative actions and the collective right of complaint.

At establishment level, employees can establish **works councils**. Because such institutions aim to level the playing field between the employees and the employer, the legislator has equipped works councils with certain rights of scrutiny, information, consultation and codetermination, as well as the right to intervene.

The mandatory requirement to establish a works council is a minimum of five employees of the same kind of blue- or white-collar workers within a company. Employee representative bodies can or shall¹⁶ also be established at the level of corporations (*Zentralbetriebsrat*, central works council) and groups of undertakings (*Konzernvertretung*, at the level of a group of undertakings).

Additionally, certain groups, such as disabled people or young employees under the age of 18, along with apprentices under the age of 21, can also elect their own representatives.

12. Cf for a more general overview on the Chambers of Labour and the Economic Chambers as mandatorily provided for employee and employer representative bodies E. Bramshuber, 'The importance of Sectoral Collective Bargaining in Austria' (ch 6), in: S. Laulom (ed), *Collective Bargaining Developments in Times of Crises* 2018.

13. N. Melzer-Azodanloo, *Labour Law in Austria*, para 610.

14. The mandatory membership is, however, limited to businesses with obligatory business licenses (§ 2 of the Economic Chambers Act – WKG, BGBl I 1998/103 as amended by BGBl I 2018/108).

15. As well as consumers' interests.

16. N.B.: is the employees' duty to establish the respective representative body, not the employer's.

2.1.3 Conciliation boards

The **possibility for employers and works councils** to turn to conciliation boards is also worth mentioning in the context of collective redress. They are based at the labour and social courts and aim to **resolve collective labour law disputes arising at establishment level**, namely, between the works council and the employer. Each party can turn to a conciliation board when consensus on a company agreement concerning certain issues (e.g. a social plan or redundancy programme) cannot be reached, but they are also bound by its decision.¹⁷

Conciliation boards find their legal basis in the Labour Constitution Act (*Arbeitsverfassungsgesetz*,¹⁸ ArbVG). In contrast to courts, conciliation boards are not established permanently, but rather, are implemented *ad hoc* on a **case-by-case** basis, under a two-step procedure. Moreover, they are considered to be **independent collegial administrative bodies**. The conciliation board first has to be established by the President of the court, who then also nominates the members.¹⁹ Under a second step, the board carries out the conciliation procedure by trying to reach an amicable solution and, in the case of failure, by reaching a binding decision within the panel.²⁰

2.2 Current Mechanisms for joint assertion in civil procedural law and their applicability in labour and social security law disputes

Because of the subsidiary applicability of the Austrian Civil Procedure Code (*Zivilprozessordnung*,²¹ ZPO) to labour and social security law disputes,²² mechanisms provided for by it are also to be assessed within the framework of this study.

Civil procedural law in Austria is, for the most part, not tailored to the specific needs of mass or group procedures. Generally, it is designed as a **two-party system**. Each of the two parties can consist of more than one natural and/or legal person.²³ There are, however, instruments that allow some kind of consolidation of claims and/or a plurality of persons involved. Among them, some have evolved through practice, while others were put in place by the legislator expressly for the purpose of collective redress. The former, referring to procedures that are not considered to be collective redress but allow for a plurality of parties, are being assessed mainly to serve as a back-up or to demonstrate the (sometimes) more effective alternative to the collective redress mechanisms in place for labour law disputes. As the following section will illustrate, the demand in practice is already notable, particularly when it comes to finding a way to achieve a binding solution for a multitude of workers.

In practice, the assignment of claims or the joinder of cases/parties, in particular, form the basis for collective actions, aside from the few collective actions provided for by law (i.e. the collective right of complaint in labour law, representative actions in competition, as well as consumer protection, law and the test-case system of § 502 (5) item 3 of the Civil Procedure Code).

17. A change in the company agreement can then only be achieved by a mutual agreement or by turning to the board once again.

18. ArbVG, BGBl 1974/22 as amended by BGBl I No 2017/104.

19. Four in total, two for the employer's, two for the employees' side.

20. K. Körber-Risak/C. Wolf, *Die Betriebsvereinbarung vor der Schlichtungsstelle*² 126f.

21. Code of Civil Procedure – ZPO, RGBI 1895/113 as amended by BGBl I 2018/109.

22. § 2 para 1 of the Labour and Social Courts Act; see also ch 2.2.

23. G. E. Kodek/P. G. Mayr, *Zivilprozessrecht*⁴, 292; W. H. Rechberger/D.-A. Simotta, *Zivilprozessrecht*⁹ 345.

2.2.1 'Joinder of parties'

§§ 11 et seq of the Civil Procedure Code form the legal basis for the '**joinder of parties**' (*Streitgenossenschaft*). § 11 regulates the 'ordinary'²⁴ joinder of parties,²⁵ which can be subdivided into two types: substantial (item 1) or procedural (item 2). For a substantial joinder of parties, the point of origin in substantial law can either be a legal community with respect to the subject of litigation (e.g. co-heirs, co-owners, associates of partnerships), a group of persons entitled or liable for the same reason (e.g. liable parties within tort actions) and jointly liable or entitled persons. By contrast, a so-called 'formal' (procedural) joinder of parties pursuant to item 2 leg cit requires the claims to be of the same kind and resulting from a similar actual cause, and the same court has to have jurisdiction over all claims of all joint parties.²⁶ Within both scenarios, the joint parties' individual lawsuits remain unattached to one another, which means that the parties involved may freely dispose (acknowledge, waive or settle) of their claims. Therefore, the results can differ from one another, but those claims are accumulated in a joint proceeding.

Of the two types, the latter is of greater relevance in the context of this study as it allows for collective access to courts. Under certain circumstances, separate claims can be accumulated by this means. According to Austrian jurisprudence, employees can form a formal joinder of parties as plaintiffs to sue their employer for overdue wages.²⁷ Under social security law, courts, for example, recognised multiple insured parties who were defendants in a case regarding overdue premium payments as a formal joinder of parties.²⁸ It is thus relevant in practice and serves the purpose of procedural economy. This form of consolidation of proceedings does not meet the needs of collective redress for a large number of claims, however, as judges regularly do not have the resources and capacity to deal with such a multitude of parties and lawyers.²⁹ This problem mostly stems from the aforementioned circumstance that the claims still must be addressed individually.³⁰ Therefore, it also **does not serve the aspired purpose of achieving uniformity in judgments or easier access to justice**, of providing a means of helping parties unite, or of tackling the frequent lack of interest in pursuing small claims.³¹ Yet, as regards labour and social security law, because the employees' statutory and voluntary representative associations provide legal representation for a large number of cases and often pursue even claims with a negligibly small amount in dispute to set an example, the interest in pursuing small claims is not negligible. This holds true, in particular, when it serves a higher common interest.³²

24. 'einfache/gewöhnliche/selbständige Streitgenossenschaft'.

25. Aside from that, § 14 regulates the inevitable joinder of parties, also called the 'unitary party', a form that is not a topic of discussion within the framework of this article, as it does not fall in the category of collective redress, nor is it of great importance to labour or social security proceedings.

26. G. E. Kodek/P. G. Mayr, *Zivilprozessrecht*⁴ 321 ff; W. H. Rechberger/D.-A. Simotta, *Zivilprozessrecht*⁹ 379 ff.

27. OGH 9 Ob A 60/92, 18.03.1992.

28. B. Schneider in H. W. Fasching/A. Konecny *Zivilprozessgesetze*³ II/1 § 11 ZPO 25.

29. Cf G. E. Kodek in B. Gabriel/T. Pirker-Hörmann, *Option Schlichtung - Eine neue Kultur der Konfliktlösung* 321; C. Koller, 'Effektive Rechtsdurchsetzung durch Sammelklagen!?' *Zak* 2012, 63 (63); W. H. Rechberger, 'Prozessrechtliche Aspekte von Kumul- und Großschäden', *VR* 2003, 19.

30. Often, a larger case results in a change of the court's rotation of business to unburden the concerned judge, and therefore has to meet the criteria of procedural economy.

31. Cf F. Karall, *Kollektiver Rechtsschutz*, 69.

32. A topical case, which serves as a perfect example of this practice, is the recent judgment of the CJEU regarding the proceedings 'between Cresco Investigation GmbH ('Cresco') and Mr Markus Achatzi in respect of the latter's right to a

2.2.2 Representative action (*prozessesstandschaft*)

Litigation in one's own name on another's behalf is called *Prozessesstandschaft* in Austria. A person is therefore entitled to bring an action despite not being entitled to the claims in question. According to prevailing opinion, the right to bring proceedings cannot be assigned to another person unattached from the respective substantive right other than by law.³³ Thus, a representative action does not occur in procedural practice if not provided for by law.

Representative actions in competition and consumer protection law³⁴ (*Verbandsklage*), as well as the collective right to complaint in labour law,³⁵ enable representative associations to engage in litigation in their own names on behalf of public (and therefore, not their own) interests. Along with a few other legal provisions, these actions therefore allow for a so-called statutory or legal *Prozessesstandschaft*, and provide for the only scenarios in which litigation in one's name on another's behalf is permitted.

2.2.3 Associations' representative actions (*verbandsklagen*)

The Consumer Protection Act³⁶ (§ 29 KSchG), as well as the Federal Act against Unfair Competition³⁷ (§ 14 UWG) provide for collective redress in the form of representative actions. It is therefore one of the above-mentioned cases in which the law provides for the possibility to bring proceedings in one's own name on another's behalf, resulting in a binding judgement for the represented parties. The primary objective of the action is to ensure the observation of the law in the public interest.³⁸ Certain associations (the Economic Chambers, the Federal Chamber of Labour, the Presidents' Conference of the Austrian Chambers of Agriculture and the Federal Trade Union Organisation, among others³⁹) can therefore sue corporations in their own name to safeguard collective interests of consumer protection or against unfair competition without depending on individual actions. They are limited to injunctive relief and have binding effect only *inter partes*. Individual claims can thus not be pursued within this legal remedy.

The Consumer Protection Act specifically protects consumers against **unlawful or unusual provisions in general terms and conditions**. The emergence of written employment contracts brought with it the use of standardised forms and raised the question of whether representative actions pursuant to § 29 *leg cit* are permissible.⁴⁰ The Supreme Court of Justice dealt with this question in

payment in addition to his regular salary for work done on a Good Friday', where the initial amount in dispute was only €69; Cf CJEU C-193/17, *Cresco Investigation v Achatzi* [2019] ECLI:EU:C:2019:43.

33. §234 of the Civil Procedure Code provides an exception from that rule for former owners of the object in dispute, when the object was sold in the course of the court proceedings; cf W. H. Rechberger/D.-A. Simotta, *Zivilprozessrecht*⁹ 354.

34. See section 2.2.3 below.

35. See section 3.2 below.

36. Konsumentenschutzgesetz, KSchG, BGBl 1979/140, as amended by BGBl I 2018/58.

37. Bundesgesetz gegen den unlauteren Wettbewerb – UWG, BGBl 1984/448 as amended by BGBl I 2018/109.

38. W. H. Rechberger, 'Verbandsklagen, Musterprozesse und Sammelklagen', *FS Welser* (2004) 871 (883).

39. The Federal Act Against Unfair Competition additionally grants this right to the Federal Competition Authority, the Consumer Protection Act to the Austrian Technical Chambers of Agricultural Workers, the Association for Consumer Information and the Senior Citizen's Organisation.

40. Cf affirmative Georg E. Kodek, 'Die Verbandsklage nach § 29 KSchG im Arbeitsrecht', *DRdA* 2007, 356; negative C. Graf-Schimek, 'KSchG-Verbandsklage im Arbeitsrecht?', *ZAS* 2011/37.

2015⁴¹ and negated the applicability, although contrary to the explicit wording of the law, by the means of a teleological reduction.⁴²

Pursuant to § 14 of the Federal Act against Unfair Competition, in the case of **unfair or aggressive business practices** ‘a suit for a cease-and-desist order may be filed by any trader who manufactures or markets goods or services of the same or a similar kind (competitor) or **by associations to promote the economic interests of traders**, provided that such associations represent interests which are affected by the offence’. For the purpose of this article, however, it is crucial to note that not only traders and their respective associations, the Federal Chambers of Labour, as well as the **Austrian Trade Union Federation**,⁴³ can file such a claim.

Any violation of labour law could potentially be considered an unfair business practice, especially when the trader can offer certain services only under unlawful employment conditions.⁴⁴ In practice, these violations often happen in the areas of working time and rest periods. The precise extent of the need for the violation to be relevant in this context – i.e. the relation between violation and actual influencing of the market – is yet to be determined by the courts. R. Rebhahn, however, sees a tendency in the Supreme Court’s jurisprudence in favour of a broad interpretation, so that, for example, a financial impact could be regarded as a violation.⁴⁵ Although case law on the matter is scarce, the following cases are good examples of labour law-related claims under to § 14 of the Act.

In the first case (*Rupertitag*), the Supreme Court of Justice did not presume that a deviation from common usage in the relevant sector is an unlawful or unfair business practice. In *Rupertitag*, a company did not close its shop on the *Rupertitag*, which is not a public holiday, but the relevant collective agreement prohibited employers from insisting that their employees work on that day. The relevant company agreement, however, contained a provision that employees who worked on this day could exchange it for a working day on a Saturday before Christmas. This regulation was held to be beneficial to the employees and thus permissible. It was additionally stated that a violation of common usage is not automatically considered to be *contra bonos mores*.⁴⁶

In another case before the Supreme Court of Justice, however, the litigation concerned a violation of normative provisions of a collective agreement. In this case, the Federal Chamber of Labour sued a bank, pursuant to the Federal Act against Unfair Competition, because of a violation of the sectoral agreement for banks. The agreement provided that, in addition to public holidays, banks must be closed on, among other dates, 24 December, and allowed for a maximum of two opening hours on these days. This provision was regulated within the normative part of the agreement and was therefore legally binding. Not only the bank concerned in this case, but also other

41. OGH 9 Ob A 113/14d, DRdA-InfAs 2015/72, 79 (C. Klein) = ÖJZ EvBl 2015/87, 613 (R. Rohrer/C. Graf-Schimek) = ZAS 2015/34, 217 (G. E. Kodek) = DRdA 2015/53, 546 (C. Kietaihl) = PVInfo 2015 H 11, 20 (A. Gerhartl).

42. In response to this judgment, G. E. Kodek and A. Klein predicted an extensive use of the proceeding pursuant to § 54 (2) of the Labour and Social Courts Act and urged the legislator to provide a solution in view of the higher administrative effort; cf G. E. Kodek, *Keine Verbandsklage nach KSchG im Arbeitsrecht*, ZAS 2015/34; A. Klein, *Keine Verbandsklagemöglichkeit der Bundesarbeiterkammer nach KonsumentenschutzG gegen gesetzeswidrige Bestimmungen in Arbeitsverträgen*, DRdA-InfAs 2015/72.

43. The Austrian Trade Union Federation being, apart from a handful of small trade unions of hardly any practical importance, the single most important Trade Union in Austria (cf in detail E. Bramshuber, ‘The importance of Sectoral Collective Bargaining in Austria’ loc cit).

44. P. Burgstaller and others in A. Wiebe/ G. E. Kodek, *UWG*² § 1.

45. R. Rebhahn 2051 wbl 2006, 1.

46. OGH 12.09.1989, 4 Ob 71/89, WBl 1990, 25 = MR 1990, 29 = ÖBl 1990, 7 = SZ 62/147 = ARD 4596/14/94.

banks, opened from 9 a.m. until 12 p.m. on 24 December. The Court considered this business practice unlawful and the request for injunctive relief was granted.⁴⁷

This example demonstrates the important link between collective agreements, competition law and collective redress: the vast majority of collective agreements in Austria are concluded at sectoral level. As a result, because of the legal framework governing collective bargaining in Austria, almost all employers in the sector are bound by the relevant agreement. Thus, they must not deviate from the agreement *in peius*.⁴⁸ Any such deviation might therefore be assessed as unlawful competition. The possibility of collective redress according to § 14 of the Federal Act against Unfair Competition, by tackling such a violation with a cease-and-desist order, can be regarded as a most effective tool. Although it immediately obliges only one employer to comply with the judgment, the effect is much broader, because the judgment extends exemplary status to any other employer bound by the same collective agreement, thus over a whole branch. Therefore, by means of a single claim, due to group pressure within the scope of application of one collective agreement, compliance with labour standards can be enhanced fairly easily. This, for example, held true in respect of a judgment on whether the time taken by hospital employees to change into their uniforms should be considered working time. The court ruled in the affirmative and in practice this resulted in most of the comparable employers paying their workforce a lump sum.⁴⁹

The actions provided by both Acts, KSchG and UWG, are targeted towards the future behaviour of businesses. Hence, the purpose of collective redress is only served through the influential effect of the judgment on others and the prevention of unlawful or unfair behaviour by the same business and only in respect of the matter in question. Representative actions thus are not an answer to the lack of legal mechanisms to assert individual claims collectively with binding results for each claimant. Nevertheless, they have proved to be quite effective and are therefore widely used instruments of preventive market surveillance.⁵⁰

2.2.4 *De Lege lata* instruments used in practice to deal with mass procedure situations

The **Austrian-type class action** (*Sammelklage österreichischer Prägung*) is a creation of legal practice⁵¹ and results from the flaws of the test-case system⁵² and the lack of effective instruments of collective redress in general civil procedural law.⁵³ The individually entitled **parties assign their claims** to an association or a person expressly for the purpose of filing a complaint in court. The association or person then initiates a legal proceeding that covers all these individual claims at once via an objective joinder of claims pursuant to § 227 of the Civil Procedure Code. They usually also act as litigation funders and claim a certain success fee. According to (by now) prevailing opinion, § 227 even allows for this, regardless of whether

47. OGH 30.5.1990, 4 Ob 79/90, MR 1990, 196 = ÖBl 1991, 67 = ecolex 1990, 625.

48. E. Brameshuber, 'The importance of Sectoral Collective Bargaining in Austria' loc cit.

49. OGH 17.5.2018, 9 ObA 29/18g Der Standard 2018/25/02 = ÖZPR 2018/83, 135 (Geiblinger) = ARD 6607/5/2018 (Gerhartl) = DRdA 2019/25, 256 = JMG 2019, 28 (Stadler) = ÖZPR 2019/43, 70 (Geiblinger); relating to the lump sum payment cf <https://kurier.at/chronik/oesterreich/neuer-gehaltstreit-umziehen-im-spital-kostet-millionen/400058321> .

50. P. Leupold, 'Enforcing consumer rights: Collective Redress in Austria and the European Union', EuCML 2019, 121.

51. G. E. Kodek, Massenverfahren oder Verfahrensmassen: einige Gedanken zur aktuellen Diskussion, Zak 2012, 66.

52. See the last para of ch 2.2.3 above.

53. P. Leupold, loc cit.

or not a factual connection actually exists.⁵⁴ Furthermore, the Supreme Court of Justice stated in an *obiter dictum* that this form of collective assertion is permitted by law as long as the claims have a **similar basis and raise similar questions of a legal or factual nature**.⁵⁵ Another advantage of this procedure is the possibility of **commercial financing**, as this does not fall under the prohibition of *quota litis* agreements.

Another example of practice is a tactic used by practitioners when a multitude of employees employed by the same employer and with similar claims want to sue their employer. Some individual cases are then picked out, so that all represented scenarios are covered. The parties to the other proceedings agree to **suspend their single proceeding** and to waive the statutory limitation period. By this means, they pave the way for **'unofficial model cases'**. The selection is usually guided by interest groups or cooperating lawyers. This system is effective, not least because of the facilitated access to the Supreme Court of Justice due to the Civil Procedure Code's (§ 502 (5) item 4 leg cit) exemption of labour and social law disputes from the threshold for the amount in dispute. Even though Austria does not, by law, have binding case law, the courts of lower instance *de facto* act for the greater part. However, if a bad litigation strategy leads to an unwanted result, the other proceedings will still be litigated and, as mentioned previously, the other judges are not bound by the decision.

3. Special Forms of collective redress in labour and social security law to be exercised by social partners and works councils

The obvious and most effective way for the social partners to take action on behalf of their members and represent their interests at sectoral level is through **collective bargaining** and, of course, putting political pressure on their counterparts within this process. The main players are the Economic Chambers, on the employers' side, and the Austrian Trade Union Federation, on the employees' side. Although the Chambers of Labour are, in theory, also allowed to conclude collective agreements, they have in practice waived this right in favour of the Austrian Trade Union Federation.⁵⁶ Nevertheless, the Austrian Trade Union Federation and the Chambers of Labour are both regarded as the main players on the employees' side of social partnership. At establishment level, **company agreements** are the works council's main devices of participation.

The practical importance of the system of **social partnership** within the Austrian political landscape and the **protective aspect** of labour and social security law procedures have led to the establishment of special instruments for collective access to courts. These instruments are predominantly aligned with enforcement through those same social partners and play a pioneering role in Austria's procedural law. In the ongoing discussion regarding the expansion of collective redress in Austrian civil procedural law, these instruments are even considered possible forms of **'best practice'**.⁵⁷ In short, associations with the ability to take part in collective bargaining (i.e. the social partners) and

54. H. W. Fasching in H. W. Fasching/A. Konecny² § 227 ZPO Rz 16; W. H. Rechberger, 'Verbandsklagen, Musterprozesse und "Sammelklagen" - Möglichkeiten kollektiven Rechtsschutzes im österreichischen Zivilprozess', *FS Welser* (2004) 871 (883); G. E. Kodek, 'Die "Sammelklage" nach österreichischem Recht', *ÖBA* 2004, 615.

55. OGH 15.9.2005, 4 Ob 116/05w, *ecolex* 2005, 766 (A. Klausner) = *ÖBA* 2005, 802 (R. Madl).

56. E. Brameshuber, 'The importance of Sectoral Collective Bargaining in Austria' loc cit.

57. H. Jarolim, *Dialog im Parlament, Band 8*: 'Beschleunigung von Verfahren als Gebot der Stunde - Sammel-, Musterklagen und andere Möglichkeiten' 1.

employee representatives at company, corporation and group level are equipped with additional functions in labour law disputes. Among these, besides the devices provided by civil procedural law mentioned previously, the collective right of complaint pursuant to § 54 of the Labour and Social Courts Act can be regarded as the most relevant in practice.

When it comes to subjective rights provided for in the applicable collective agreement, however, only individual employees can sue their respective employer for not abiding by the agreement. Because the individual employer does not have obligations to the employees' association (the Austrian Trade Union Federation) that signed the relevant collective agreement, they cannot be sued by the Austrian Trade Union Federation for (non-)observance of the agreement.

Regarding the enforcement of company agreements that are most commonly concluded between single employers and works council, the situation is somewhat different. The works council can even force the employer to conclude a company agreement in certain areas by turning to the aforementioned conciliation boards,⁵⁸ which contributes significantly to collective redress in the enforcement of collective labour law issues.

3.1 Capacity to be party to legal proceedings

The **social partners**, as (voluntary or statutory) associations which play an important role in collective redress (i.e. the Austrian Trade Union Federation and the Chambers), have **legal personality of their own**. Therefore, their capacity to be party to legal proceedings may already be assumed.⁵⁹ Questions about the legal basis of the capacity to be party in the context of this article thus arise only in relation to representative bodies at establishment level.

§ 53 of the Labour and Social Courts Act confers the capacity to be party to legal proceedings on **all workforce bodies** (in particular, the works council, the central works council and the representative body at the level of a group of undertakings),⁶⁰ except for explicitly mentioned bodies such as the general assembly of the workforce. Competent bodies can thus sue or be sued on their own behalf, and according to the Supreme Court of Justice,⁶¹ this right is not limited to labour law matters.

The **works council** is neither a legal entity nor any other object equipped with legal capacity.⁶² Only the staff itself are entitled to the rights and subjected to the obligations provided for by the Labour Constitution Act in particular, in their own name.⁶³ The works council's sole function is the representation of the staff regarding their works constitution rights.⁶⁴ In this regard, the works council can, for example, negotiate and conclude company agreements with the employer or initiate proceedings before a conciliation board to force a binding judgment on certain

58. See section 2.1 above.

59. G. E. Kodek/Mayr, *Zivilprozessrecht*⁴, 307.

60. In order to avoid complexity, in the following only the works council is addressed and mentioned. However, when referring to the legal capacity according to § 54 (1) Labour and Social Courts Act, for example, this also includes the central works council and the representative body at the level of a group of undertakings.

61. OGH 4 Ob 177/90, DRdA1992/4, 43 = SZ 64/17; cf. M. Neumayr in M. Neumayr/G.-P. Reissner, *ZellKomm*³ § 53 ASGG.

62. The only representative body of the staff at establishment level with partial legal capacity is the (central) works council fund (§ 74 Abs 1, § 86 of the Labour Organisation Act) with regard to the collection of the works council contribution.

63. F. Marhold/M. Friedrich, *Arbeitsrecht*³ 553 et seq, 579 et seq.: It is commonly acknowledged that the staff, as a whole, has partial legal capacity, but that it can fully benefit from the attributed rights only when or as soon as the employees establish their respective representative organs (the works council, in particular).

64. Cf. F. Kuderna *Arbeits- und Sozialgerichtsgesetz*, 338 ff.

company agreements. As for the civil claims of individual employees, it is settled case law that the works council **cannot act as statutory representative of either the staff or an individual employee.**⁶⁵ Nevertheless, the law allows for exceptions to that limitation of legal capacity in specific cases, one being the collective right of complaint pursuant to § 54 (1) Labour and Social Courts Act, which enables the works council to take action in individual labour law matters when at least three represented employees are affected.⁶⁶

In a representative case⁶⁷ regarding individual claims (specifically, violations of minimum rest periods of a multitude of employees on the instruction of the employer) the Supreme Court of Justice set out the legal framework for the works council's scope of action. In this case (and commonly in practice), the affected employees did not take action against their employer, as they wanted their employment relationship to remain intact. The relevant works council then submitted an action for injunction based on its right to intervene pursuant to § 90 of Labour Constitution Act, as well as the collective right to complaint pursuant to § 54 (2) of the Labour and Social Courts Act. According to the judgment, neither regulation forms an admissible legal basis for the works council to act in its own name within an action for injunction against the employer. The right to intervene, according to § 90 Labour Constitution Act, does not grant the works council access to courts, a fact that was already assumed in former decisions⁶⁸ of the Supreme Court and indirectly confirmed by the later introduced mechanism of § 54 (1) of the Labour and Social Courts Act. Although this provision does grant works councils the right to act in their own name on behalf of employees' claims, it is limited to declaratory actions. Thus, in the concrete case, the works council's action for injunction was rejected.

To sum up, in respect of its access to the Labour and Social Courts, the works council can *de facto* be party to lawsuits contemplated in Part II of the Labour Constitution Act (**works constitutional proceedings**), to the already mentioned declaratory procedure pursuant to § 54 (1) Labour and Social Courts Act (**collective right of complaint**) and to proceedings before a conciliation board concerning **works agreements** pursuant to §§ 96a and 97 (1) item 1 to 6a of the Labour Constitution Act. In disputes concerning employees' individual interests, the works council can, under certain circumstances, represent them legally, but in general cannot bring actions before a court on their behalf.

3.2 Collective right of complaint (§ 54 labour and social courts Act)

Typical intentions behind calling for collective redress include reducing the financial risks of litigation, facilitating actions, even though the amount in dispute may be low, and alleviating the burden on the judiciary. In labour-related matters, however, the more relevant motive is also to disburden dependent employees from the risk of losing their job due to legal actions against their employers and from the litigation risk in general.⁶⁹

65. OGH 9 ObA 136/03w, ecolex 2004,389 = ARD 5508/5/04 = wbl 2004,339 = ZAS-Judikatur 2004/62.

66. See section 3.1 above; This does not interfere with the mentioned jurisdiction, that the works council has no right to take action on behalf of the represented employees' individual labour law claims, as this is simply an exception specifically provided for by law for the purpose of collective redress.

67. OGH 9 Ob A 112/09z, wbl 2010/77, 196 = ecolex 2010/173, 486 = ARD 6031/2/2010 = ÖJZ EvBI-LS 2010/64, 423 = RdW 2010/203, 190 = RdW 2010/391, 358 = ASoK 2010, 235 = ZAS-Judikatur 2010/71, 171 = DRdA 2010, 423 = Arb 12.864 = taxlex 2010, 257 (A. Gerhartl).

68. OGH 4 Ob 24/81, SZ 54/49.

69. Cf R. Peschek, 'Streiten oder Vergleichen? – Die Ökonomie des Rechtsstreits im Arbeitsrecht', ecolex 2013, 262.

The legal remedies provided by § 54 of the Labour and Social Courts Act were initially introduced in the spirit of the motives mentioned above within the framework of a government Bill concerning changes in social security law procedures. The objective of this initiative was a comprehensive collective right to litigate, which grants the social partners the right to bring actions before a domestic court.⁷⁰ The remedy was by then already meant solely to include declaratory judgments on the existence or non-existence of rights or other legal relations of the represented members. No further formal requirements were intended, however.⁷¹ This government Bill was, however, revised, as the original proposal was rejected by the employers' representatives.⁷² The employers' and the employees' sides agreed to a compromise, which only later resulted in the regulation of the current § 54 leg cit.

The collective right of complaint exists in two different forms.⁷³ At establishment level, the works council can initiate a test case on individual labour law matters, when at least three employees are affected by it (Paragraph 1). Paragraph 2, furthermore, enables the social partners to submit an application for the declaration of abstract labour law issues directly to the Supreme Court of Justice. In both proceedings the declaratory judgment has binding effect only between the parties of that case. Therefore, it has no immediate impact on the individual employees' claims but aims to influence all affected parties to act in accordance with it, similar to the aforementioned *Verbandsklage*.⁷⁴ Having said that, there is one important exception to the fact that these proceedings do not interfere with the individual employees' claims. In accordance with the legislator's objective of preventing individual disputes by providing collective redress, the second sentence of § 54 (5) provides that periods of limitation and preclusion be suspended for the duration of the declaratory proceedings.⁷⁵ This also holds true if the motion is dismissed.⁷⁶

Even in view of the special nature of these proceedings, the general requirements for declaratory proceedings according to § 228 of the Code of Civil Procedure also have to be met, i.e. a legal interest of the applicant (the association itself) in the immediate declaration of the respective right or legal relation is required.⁷⁷ For that purpose, the acting representative body has to substantiate its own legal interest without regard to the affected employees. This may be confusing, but is a result of the nature of the test case as a proceeding *inter partes* with no binding effect on the employees' individual claims.

Similarities to the other forms of representative action suits in competition and consumer law⁷⁸ exist mainly in their protective purpose, as private or statutory associations are able to take action on behalf of their members or the general public within both legal remedies.

70. 7 BlgNR 16. GP 48.

71. 7 BlgNR 16. GP 11, 48.

72. H. Gamerith, 'Die besonderen Feststellungsverfahren nach § 54 ASGG', DRdA 1988, 303.

73. H. Aubauer/H. Kaszanits in FS P. Bauer/G. Maier/K. H. Petrag, 'Kollektives Klagsrecht als Testprozess - Rechtspolitische Erwägungen zu § 54 Abs 2 ASGG' 300.

74. AB 527 BlgNR 16. GP 7; OGH 9 ObA 29/88, Arb 10.735 = ZAS 1990/17, 151 [F. M. Adamovic]; 9 Ob A 343/97z, DRdA 1998/64, 436 [H. Ziehensack] = Arb 11.682; 9 ObA 236/02z, DRdA 2004/26, 357 [D. Weiß] = wbl 2003, 439; 9 ObA 140/09t, Arb 12.910; RIS-Justiz RS0085545; see also M. Neumayr in M. Neumayr/G.-P. Reissner, *ZellKomm*³ § 54 ASGG, 10.

75. M. Neumayr/G.-P. Reissner, *ZellKomm*³ § 54 ASGG, 12.

76. OGH 28.6.2018, 9 Ob A 60/18s, JAS 2019, 146 (Th. Schoditsch) = JAS 2019, 178.

77. G. Löschnigg, *Arbeitsrecht*¹³ 14/025; F. Kuderna, *ASGG*² § 54, 12 in conjunction with 6

78. Cf section 2.2 above

3.2.1 Special Characteristics of § 54 (1) labour and social courts Act (establishment level)

§ 54 (1) Labour and Social Courts Act states that workforce bodies with the capacity to be a party,⁷⁹ as well as the employer, can file an action for a declaratory judgment on the existence or non-existence of rights or legal relations when at least three employees from their plant or corporation are affected by the matter.

The works councils are the bodies that primarily exercise this right in practice on behalf of the employees. The representative bodies' **capacity to be party** results indirectly from § 53 (1).⁸⁰ According to prevailing opinion,⁸¹ their ability to conduct a case before a court regarding this collective right to complaint therefore has its legal basis in a so-called '**gesetzliche [legal or statutory] Prozessstandschaft**'. This describes an action brought by the claimant in their own name but on behalf of another person, and has to be provided for by law.⁸²

Within the framework of § 54(1) Labour and Social Courts Act, the relevant employee representative bodies can, further, only act on behalf of the employees they actually represent. If different kinds of works councils are established for different groups of employees in the same company, each of them has to fulfil the requirements. Furthermore, each acting body is limited to its sphere of competence.

The collective redress mechanism according to § 54 (1) Labour and Social Courts Act only applies in respect of labour law matters pursuant to § 50 (1) of the Labour and Social Courts Act.⁸³ Furthermore, § 54 (1) specifically states that the minimum of three affected employees refers to those currently employed. This requirement must be met at the time of *lis pendens* and should be substantiated within the claimant's action. If the number of affected employees decreases after that point in time, this does no harm to the proceedings except when it decreases to zero.⁸⁴ Only if the defendant (i.e. the relevant employer or employee representative body) challenges this fact do the individual employees' names have to be revealed.⁸⁵ The single employee's consent, however, is not required to act within this remedy, which, again, can be explained by the limited legal effect of the judgment.

3.2.2 Special Characteristics of § 54 (2) labour and social courts Act (social partners)

§ 54 (2) grants the social partners a different kind of collective right to complaint. Within their sphere of action, they can submit an **application for declaration** of the existence or non-existence of rights or legal relations against the adversary social partner directly **to the Supreme Court of Justice**. To give a concrete example, the Economic Chambers can submit an application for declaration against the Austrian Trade Union Federation and *vice versa*. The essential conditions for such an application are:

79. Pursuant to § 53 (1); see also section 4.1.1 above.

80. M. Neumayr in M. Neumayr/G.-P. Reissner, *ZellKomm*³ § 54 ASGG, 15; additionally, on the employees' side, the class action can also be brought by the '*Personalvertretung*', i.e. the representative body of employees in public service; cf OGH 8 Ob A 270/95, DRdA 1997, 4 [E. Eypeltauer], OGH 9 Ob A 251/89, JBI 1990, 534; OGH 9 Ob A 195/05z, ARD 5702/8/2006 = JBI 2007, 121; OGH 9 Ob A 54/04p, ARD 5603/10/2005 [F. M. Adamovic] = ZAS 2006, 231 [G.-P. Reissner].

81. E. Eypeltauer, JBI 1987, 565f; see also M. Neumayr in M. Neumayr/G.-P. Reissner, *ZellKomm*³ § 53 ASGG, 1.

82. See section 2.2 above.

83. For example, civil law disputes between the employer and employee, between employer or employee and organs of the representative bodies of the workforce, or between employees or claims against pension funds (cf section 2.1.1 above).

84. F. Kuderna *Arbeits- und Sozialgerichtsgesetz*, § 54, 7a.

85. OGH 9 ObA 34/91, DRdA 1991/56, 468 [Eypeltauer] = RdW 1991, 299; 9 ObA 392/97 f, DRdA 1998, 361 = ARD 4982/53/98; see also M. Neumayr in M. Neumayr/G.-P. Reissner, *ZellKomm*³ § 54 ASGG Rz 8.

1. The ability of the applicant to take part in collective bargaining;
2. That the relevant matter lies within the applicant's sphere of action;
3. And forms a legal issue concerning a labour law matter (§ 50 Labour and Social Courts Act);⁸⁶
4. Which is of significance to at least three employers or employees, although it must not be linked to a concrete case and concrete persons.

As for the **ability to take part in collective bargaining**, § 54 (2) refers specifically to associations pursuant to §§ 4 to 7 of the Labour Constitution Act. It is important to note, however, that the social partners can exercise their right to collective complaint regardless of whether a collective agreement exists in that sector.⁸⁷ Despite the fact that the law specifically refers to §§ 4 to 7 of the Labour Constitution Act, the Supreme Court of Justice⁸⁸ also continues to grant the right to associations whose ability originates from special laws and not from the Labour Constitution Act.⁸⁹

The acting social partners must substantiate that the underlying circumstances establish a **legal interest** in the declaration, upon which the Supreme Court of Justice decides *ex officio* on the basis of the facts submitted by the applicant.⁹⁰ Furthermore, each association is only entitled to act within its **sphere of action**. In other words, the acting social partner can only submit the application if the topic in question actually concerns, or could concern, employees or employers that the social partner actually represents or should represent.⁹¹ Regarding voluntary associations (in concrete terms, the Austrian Trade Union Federation), this criterion is not to be understood in the sense that each affected person has to be a member of the relevant association. This is also due to the so-called '**outsider effect**'⁹² pursuant to § 12 of the Labour Constitution Act, which establishes that all employees employed by an employer to whom a collective agreement applies, automatically also fall under the scope of the collective agreement in place, whether they are actually a member of the Austrian Trade Union Federation or not.⁹³

Contrary to § 54 (1) Labour and Social Courts Act, this proceeding takes place between two associations within the group of the social partners; it has to be submitted directly to the Supreme Court of Justice and is not attached to a specifically determined group of persons. Yet, the requirement of at least **three affected employees or employers** could be seen as problematic or rather ineffective in relation to its provability. In fact, the Supreme Court of Justice decides upon the fulfilment of this requirement only based on the facts submitted by the applicant.⁹⁴ The names of

86. See section 2.1.1 above.

87. Cf OGH 9 ObA 513/89, SZ 62/217 = *ecolex* 1990, 305.

88. Cf OGH 9 Ob A 84/15s, DRdA-infas 2016/48, 81 (W. Kozak); Regarding the capacity of the ORF itself to take part in collective bargaining: OGH 9 Ob A 803/94, ARD 4649/17/95 = ARD 4693/16/95 = *infas* 1995 H 3, 13 A 52 = *Arb* 11.351; OGH 29.3.2006, 9 Ob A 155/05t.

89. This jurisprudence has been criticised by F. Marhold as the Supreme Court's interpretation exceeds the wording of the law; cf F. Marhold, 'Antragsberechtigung Kollektivvertragsfähiger Körperschaften im Besonderen Feststellungsverfahren', *ASoK* 2016, 242; F. Marhold/M. Friedrich, *Österreichisches Arbeitsrecht*³ 2016, 460.

90. OGH 23.06.2004, 9 ObA 150/03d.

91. M. Neumayr § 54 ASGG para 21.

92. The 'outsider effect', together with other mechanisms provided for by collective labour law, ensures, in the end, that all employees in a specific sector are subject to the collective agreement, regardless of whether they are a member of the concluding party, i.e. the Austrian Trade Union Federation, or not. They only need to be employed by an employer to whom a collective agreement applies, which is the case with the vast majority of employers. Cf in more detail E. Brameshuber, 'The importance of Sectoral Collective Bargaining in Austria' loc cit.

93. OGH 9 ObA 507/88, DRdA 1990/1, 35 [K. Grillberger].

94. M. Neumayr in M. Neumayr/G.-P. Reissner, *ZellKomm*³ § 54 ASGG Rz 9.

the respective persons do not have to be revealed for that purpose. Therefore, a coherent argumentation in that regard is essential to the admissibility of the application.

3.3 Right to appeal in case of dismissal (§ 105 of the labour constitution Act)

In Austria, employers and employees enjoy the freedom to give notice, i.e. the right of both contracting parties to terminate the employment unilaterally and at will.⁹⁵ Both parties have a mutual interest in certain regulations to prevent the other party from ending the contract abruptly or in an arbitrary manner, however. The law therefore provides (mainly for employment relationships for an indefinite period) a certain protection against unwarranted dismissal by means of obligatory periods of notice and, in most cases, also termination dates that must be observed by both parties. Moreover, the legislator also aims at protecting certain employees – namely, those employed by an employer with a workforce of at least five employees – in a typically weaker position from termination on unlawful grounds, unfair social grounds or other impermissible reasons. The respective provisions in force also include collective labour law aspects, as the works council's reaction (if a works council exists) determines the employee's scope of action.⁹⁶

Pursuant to § 105 of the Labour Constitution Act, the employer must inform the works council of their intention to terminate the employment relationship. Within one week the works council can state its position on the dismissal, which then again has an impact on the employee's possibilities of challenging it before a court. Any notice given by the employer to the employee before the expiry of that period is void according to paragraph 2, except when the works council has already delivered its opinion at that time. It can either oppose, withhold its reaction or approve of the termination. In case of approval, the employee can only challenge the termination pursuant to the reasons listed under item 1. The possibility to challenge the termination on unfair social grounds (§ 105 (3) item 2) is in this case precluded pursuant to paragraph 6 *leg cit.* If the work council opposes the termination, however, it can challenge the termination, provided the employee asks the works council to do so. Only if the works council does not exercise this right can the employee take action on their own. The works council's decision on whether to oppose the termination or not is, to that extent, of the utmost importance, as the court is only obliged to make a social comparison with regard to social hardship, i.e. on whether other employees would be socially less affected by termination, if the works council opposes the termination or in cases in which the dismissal is economically motivated. In this case, the dismissal would be deemed to be socially unjust.

It is important to note, however, that the possibility of challenging a termination by means of this general protection against dismissal is possible only in respect of companies that reach the threshold for establishing a works council, i.e. those with at least five employees. For this right to challenge a termination to come into existence, however, a works council does not actually have to be established, i.e. in companies without a works council, the employees themselves can challenge the termination, for example, on the grounds of social injustice. In other words, it is (only) in establishments with fewer than five employees that this possibility to challenge a termination according to § 105 Labour Constitution Act does not

95. N. Melzer-Azodanloo, *Labour Law in Austria*, para 453.

96. Cf N. Melzer-Azodanloo, *Labour Law in Austria*, para 457 ff and M. Windisch-Graetz, *Arbeitsrecht II – Sachprobleme*¹⁰, 271.

apply. Thus, by incorporating these legal remedies within the framework of the Labour Constitution Act, the legislator precludes employees of very small businesses from exercising them.⁹⁷

Apart from the fact that the works council hereby acts only on behalf of one employee, additionally, for the legal remedy to be considered truly collective in nature, the initiation would have to be unattached to the single employee's interest. That is not the case in respect of § 105 Labour Constitution Act, as the works council is not enabled to act on behalf of the employee against their will.⁹⁸

Thus, the participation of the works council in the process of terminating the employment relationship is not a device of collective redress *stricto sensu*, because the representative body only acts on behalf of a single employee. Nonetheless, the works council's involvement has a great impact on the enforcement of the employee's right to challenge the termination. With respect to the general objectives of collective redress, such as unburdening the judiciary and the individual employee, the enforcement can be described as partly 'collective' when exercised by the works council.

3.4 Enforcement of company agreements

At establishment level the employer and the competent staff representative body can conclude company agreements. The law or collective agreements must define which matters can be subject to such agreements (§ 29 of the Labour Constitution Act).⁹⁹

§ 96 et seq provide that different kinds of company agreements can be concluded, with the differences resulting not only from the matters to be regulated but also from the enforcement and the different options as regards termination of the agreements. § 96 (1) lists matters that are subject to **necessary company agreements**, which means that the employer cannot take any action without the consent of the works council in that regard. Similarly, the matters enlisted in § 96a (1) are also linked to necessary company agreements. In contrast to § 96, this regulation provides for an alternative solution as the employer can turn to the conciliation board¹⁰⁰ for **compulsory arbitration** if they fail to obtain the works council's consent. If the employer wants to implement a system to process the employees' data or systems for the purposes of evaluating them, the works council's consent is mandatory, for example, but can be replaced by the conciliation board if called upon by the employer. Within the framework of § 97 (1) item 1 to 6a this possibility to call upon the conciliation board is also open to the works council (**enforceable company agreements**). The other matters listed in § 97 (1) are, however, only facultative and can therefore only be concluded by mutual agreement.

By means of enforceable company agreements, the works council can co-determine a large part of the working conditions, for example, the starting and ending times of daily working hours or arrangements for rest breaks and work-time distribution (working time per week, distribution of shifts, etc.). Another commonly used type of company agreement is the so-called 'social plan'. In the case of a change in the business, but also, for example, in case of mass redundancies, the

97. Nevertheless, protection against dismissal is still granted to those employees as they can challenge a termination *contra bonos mores*.

98. M. Windisch-Graetz, *Arbeitsrecht II – Sachprobleme*¹⁰, 271.

99. Cf G. Löschnigg, *Arbeitsrecht*¹³ 3/203; W. J. Pfeil in S. Gahleitner/R. Mosler (eds), *Arbeitsverfassungsrecht (Band 2)*⁵ 2015; A. Gerhartl, *Betriebsvereinbarungen* 2017.

100. See section 2.1.3 above.

works council can enforce an agreement to prevent, resolve or mitigate the negative consequences for the employees.

The Labour and Social Courts set up a conciliation board for compulsory arbitration only when the employer (or, in the case of enforceable company agreements, the works council) submits an application. The conciliation board is not considered a court but rather an independent collegial administrative body. Nevertheless, it enables staff representative bodies to enforce collective labour law matters on their behalf. Therefore, it can be considered an effective tool that is also widely used in practice.

4. Summary and outlook

Among the various forms of collective redress that can be discerned within the outlined scope, the declaratory proceedings in § 54 of the Labour and Social Courts Act, in particular, have proved to be effective and are broadly considered to contribute to legal certainty.¹⁰¹ The questions dealt with in procedures according to § 54 para 2 Labour and Social Courts Act concern multiple employment relationships. Thus, the declaratory procedure ensures legal certainty not only for one employer, but for all employers in a sector. One major pitfall of this procedure, however, is that it is not binding for the single employer or employee. In other words, unless the employer observes the outcome of the § 54(2) Labour and Social Courts Act voluntarily (or is pushed to observe it by its representative association), in the end, the single employee again must file an individual claim.

The Supreme Court of Justice's opinion that representative action according to § 29 of the Consumer Protection Act does not apply to employment is also a setback for employees' representative associations. With respect to unlawful general terms and conditions in that regard, apart from the seldom-used possibility of an individual claim, the only possibility of legal redress is a non-binding declaratory judgment within the legal remedy of the collective right to complaint (§ 54 Labour and Social Courts Act). It follows from this that the relevant employer can only be forced to observe the judgment through other – individual – litigation on the part of each affected employee, an option rarely exercised, considering the fact that in most cases the employee is interested in continuing to work for the employer. Consequently, in this scenario, there is no value added in suing the employer collectively. Therefore, the collective complaint procedure does not serve the desired objectives when suing the employer for unlawful general terms and conditions.

The assessment is different as regards representative action pursuant to the Federal Act against Unfair Competition, which is also applicable to business practices concerning labour related matters. Because of the assertion by a representative association and the potentially resulting injunctive relief, employees do not have to take action and the employer is obliged to act according to the judgment due to its binding effect.

Nevertheless, the scope of the constructs that are used in practice to deal with mass procedure situations illustrate very clearly that progress is still necessary. This results mainly from the lack of collective redress concerning the bundling of individual claims with binding effect on all claimants and without assignment of the claims. The Austrian-type class action only partly meets these objectives, but still requires the assignment of the claims to one association or person, a prerequisite which is deemed to form a major psychological obstacle. It is still the most effective way

101. Cf. G. E. Kodek, 'Entwicklung und Reformbedarf in der Arbeits- und Sozialgerichtsbarkeit – neue Herausforderungen', *DRdA* 2012, 555.

to achieve binding results within mass procedure situations, however, and therefore has given rise to criticisms of the test system or model cases.

Thus, at least to some extent, further enhancement of collective redress in labour (and social security) law by the legislator is necessary and could, for example, be attained by expanding the scope of application of the proceedings pursuant to § 54 of the Labour and Social Courts Act. One proposed suggestion is to extend the right of the works council according to § 54 (1) of the Labour and Social Courts Act. In other words, in contrast to the current limited ability to file an action for a declaratory judgment only, it is suggested that the works council should also be able to file for a cease-and-desist order in the name of employees.¹⁰² Further reforms advocated by scholars, as well as practitioners, concern the creation of a legal instrument to bundle claims for civil procedures in general, which would also benefit employees' claims, for example, in cases in which the employer constantly, and on a company-wide basis, violates working time provisions, resulting in unpaid overtime.

102. G. E. Kodek, *DRdA* 2012, 559.