'THE POLICE CAR JUST ISN'T FAST ENOUGH': MOBILIZING THE EU REMEDIES SYSTEM IN THE FIELD OF DATA PROTECTION

KRIS VAN DER PAS*

In the field of data protection, several civil society actors engage with the EU remedies system in order to attain their goals. Famous examples include the mobilization of the preliminary reference procedure by Digital Rights Ireland and Max Schrems, but also complaints to the European Union (EU) Commission and letters to the European Data Protection Board are forms of EU legal mobilization. This proliferation of strategies within the EU system raises the question: who are these actors and why do they choose an EU (extra-)legal avenue? This paper explores the use of the EU remedies system by civil society actors in the field of data protection. Firstly, the EU remedies system is set out, including formal legal avenues, such as direct actions and the preliminary reference procedure before the Court of Justice of the EU. Additionally, extralegal, administrative actions are set out, for example the petition to the European Parliament, complaints to the Commission and the Ombudsman, and the European Citizen's Initiative. Afterwards, the paper delves into (EU) legal mobilization theory, to find possible explanations for the use of one or multiple of these avenues by civil society actors. This theory is then tested empirically through interviews with data protection NGOs active in the EU. In this field of law, legal opportunities – especially procedural law – as well as organizational identity determines whether the EU remedies system is mobilized. Other factors that are, in theory, relevant, appear in the analysis in an interconnected way. The research shows how procedural law throughout the EU at national level, but also within the EU system, could be more harmonized and procedural hurdles lowered, in order to provide for effective means of enforcement.

1 INTRODUCTION

Over the last 10 years, there has been an uptick in involvement of EU bodies in the field of data protection. Significantly, on 8 April 2014, the Court of Justice of the EU (CJEU) gave its landmark ruling in the case *Digital Rights Ireland*.[1] In this case, the CJEU declared an EU Directive on the retention of data incompatible with obligations flowing from the EU Charter on Fundamental Rights, specifically Articles 7 and 8 (right to privacy and right to protection of personal data).[2] The name of the case stems from an Irish non-governmental organization (NGO), which started this case at the national, Irish level. Upon request of Digital Rights Ireland, an Irish judge posed a question to the CJEU. This is not the only example of a civil society actor being actively involved in landmark cases in the

* LLM, Postdoctoral researcher Tilburg University

[1] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland en Seitlinger e.a.* EU:C:2014:238.

[2] It concerned Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

field of data protection at EU level. Activist Max Schrems has his name tied to not just one, but two cases on the transfer of data by Facebook from the European Union to the United States.[3] Moreover, Schrems is director of the NGO noyb, which has not at all limited itself to legal action before the CJEU, but is also using other avenues within the EU remedies system (such as filing complaints with data protection authorities) to attain its objectives.[4] A final example are several joined CJEU cases, in which a range of civil society organizations, such as La Quadrature du Net and Privacy International, were involved.[5] These NGOs focus on digital rights and try to advance them through legal strategies.[6]

These examples are forms of legal mobilization, mobilizing the law - through litigation or otherwise – in order to achieve political and/or social goals. This concept was explained by Zemans in 1983 as: 'the law is […] mobilized when a desire or want is translated into a demand as an assertion of one's rights'.[7] Vanhala has, more recently, defined it as 'any type of process by which individual or collective actors invoke legal norms, discourse, or symbols to influence policy, culture, or behavior'.[8] Although these authors were not addressing the EU per se, several authors have specified legal mobilization theory to the EU context.[9] The cases before the CJEU and complaints with data protection authorities are forms of mobilizing the EU legal system – entailing all quasi-judicial mechanisms available at EU level.

Thus, EU law and the EU remedies system are deployed regularly by civil society actors in the field of data protection. Data protection concerns individual's rights to know why and how an organization, public or private, is using one's data. It is significantly tied to privacy rights. In the EU legal framework, there are several ways in which data is protected. As primary EU law, the EU Charter contains the aforementioned right to privacy (in Art. 7) and a specific right to data protection (Art. 8). Moreover, through Art. 52(3), corresponding rights in the European Convention on Human Rights (ECHR) are given effect in the EU legal order.[10] There is also EU secondary law applicable in this field, most importantly the General Data Protection Regulation (GDPR).[11] This Regulation aims to further protect

[3] Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* EU:C:2015:650; Case C-311/18 *Data Protection Commissioner v Facebook* EU:C:2020:559. More recently, a case on a different topic litigated by Schrems has been added to this list, see noyb, CJEU: 'Meta must "minimize" use of personal data for ads' (*noyb*, 04 October 2024) <https://noyb.eu/en/cjeu-meta-must-minimise-use-personal-data-ads.
[4] https://noyb.eu/en/noyb-files-complaint-against-eu-commission-over-targeted-chat-control-ads; https://noyb.eu/en/28-ngos-urge-eu-dpas-reject-pay-or-okay-meta> accessed 20 December 2024.
[5] Joined Cases C-511/18, C-512/18 and C520/18 *La Quadrature du Net v. Premier ministre and others* EU:C:2015:650.
[6] The scope of this article is limited to NGOs, but other actors are also relevant in the field of data protection and EU law, such as trade unions.
[7] Frances Kahn Zemans, 'Legal mobilization: The neglected role of the law in the political system' (1983) 77 The American Political Science Review 690, 691.
[8] Lisa Vanhala, '"Legal mobilization" in Political Science' (Oxford Bibliographies Online, last modified 23 November 2021) <https://www.oxfordbibliographies.com/display/document/obo-9780199756223/obo-9780199756223-0031.xml> accessed 20 December 2024.
[9] Examples include Karen J Alter and Jeanette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33(4) Comparative Political Studies 452; Virginia Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights From the Case of Migrant Rights' (2021) 58(3) Common Market Law Review 751.
[10] This is relevant as the European Court of Human Rights has interpreted Art 8 ECHR, the right to privacy, to also encompass the right to data protection in several cases.
[11] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

citizen's fundamental rights in the digital age. Consequently, there are remedies within the EU system available to those whose rights are potentially violated. These are formal legal avenues, mainly procedures before the CJEU, but also administrative avenues, as complaints can be launched with, for example, the European Commission and the European Ombudsman.

In bottom-up studies on legal mobilization, civil society actors are inquired as to their use of the law or certain legal procedures.[12] Specifically for EU law, such studies can tell us something about the asserted rise of Eurolegalism, a move away from regulation through bureaucrats to a system of 'regulation through litigation'.[13] A strong legal framework at EU level has led some authors to conclude that EU law is mobilized,[14] while others argue that there is also a certain dependency on 'framing' of issues in an EU-favorable manner by civil society actors.[15] The field of data protection provides for an interesting case study to assess EU legal mobilization and the rise of Eurolegalism. The examples from the introductory paragraph give the indication that EU law and the EU remedies system are mobilized frequently in this field, but do all data protection civil society actors engage this actively at EU level? Or are there several 'repeat-players'[16] who give this impression? This paper investigates the empirical reality of EU legal mobilization in the field of data protection, answering the question: Why and how do civil society organizations in the field of data protection use EU (extra-)legal avenues to attain their goals?

This question has two distinct elements to it. The first is why organizations would mobilize EU law or the EU remedies system, and secondly, if they do, what specific EU (extra-)legal avenues they use and why. This research specifically looks at different types of data protection organizations, who mobilize the law as their main activity or very rarely engage with legal systems. Moreover, different levels of EU legal mobilization are taken into account, with some NGOs (such as noyb) being very active EU legal mobilizers while others are not.

The paper proceeds as follows. Firstly, the EU remedies system is set out in Section 2.1, providing the procedural legal and administrative framework within which civil society actors can take recourse. Secondly, and also as part of the theory, existing literature on (EU) legal mobilization is explained in Section 2.2, to provide possible explanations for the use of EU law and the EU remedies system. Section 3, then, explains first why the field of data protection was selected and what EU legal sources are applicable in this field (Section 3.1), after which the empirical method of data collection (through interviews) and data analysis is explained (Section 3.2). Section 4 analyses the data collected and provides for some reflections on the theory, explaining why and how the interviewed NGOs navigate the EU remedies system. Lastly, Section 5 gives some concluding remarks.

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[12] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46(3) Law & Society Review 523; Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland and Italy' (2018) 51(3) Comparative Political Studies 380; Passalacqua (n 9).
[13] R Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).
[14] Alter and Vargas (n 9); Tommaso Pavone, *The Ghostwriters* (Cambridge University Press 2022).
[15] Kris van der Pas, 'All That Glitters Is Not Gold? Civil Society Organisations and the (non-) Mobilisation of European Union Law' (2024) 26(2) Journal of Common Market Studies 525.
[16] Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) Law and Society Review 95.

2 SETTING THE SCENE: EU REMEDIES & OPPORTUNITIES

2.1 EU REMEDIES SYSTEM

As explained in the introduction, EU law has been alleged to be of vital importance for EU integration, i.e. Integration Through Law (ITL).[17] In bottom-up studies, the role of civil society actors in engaging with EU law has been explored, upon which the current article builds. Two different aspects of ITL and EU law are set out here: firstly, the EU remedies system, entailing all quasi-judicial mechanisms available for mobilization (and hence, for ITL). Secondly, the role of EU Legal Opportunity Structures, meaning the opportunities that EU law creates for legal mobilization (Section 2.2). Other relevant procedural avenues exist, such as the European Court of Human Rights (ECtHR), but given the scope of this special issue, this strategy is not set out here.

The EU remedies system[18] brings a great many distinct avenues with which the system can be mobilized by civil society actors, at first glance. These avenues can be roughly divided into two types: judicial avenues and extralegal (administrative) avenues. The first, judicial avenues, are in particular procedures before the CJEU. The main advantage of these judicial avenues is the legally binding decision that is the result of CJEU proceedings. Three mechanisms of these judicial avenues are direct actions, in which individuals and organizations can take a case straight to the CJEU. These are the action for annulment (Art. 263 Treaty on the Functioning of the EU, TFEU), the action for failure to act (Art. 265 TFEU), and the action for damages (Arts. 268 and 340 TFEU). The first two actions, that can be used to target EU legislative action or inaction, have as a major obstacle that private parties have to prove that they are directly and individually concerned.[19] It has been attempted numerous times by NGOs, specifically in the area of legal mobilization on the topic of climate change, to circumvent these criteria, but unsuccessfully.[20] The action for damages is suitable if one wants to complain about damage suffered due to violations of EU law by EU institutions, however, such a breach of EU law must be sufficiently serious, which forms a high threshold.[21]

Next to these direct judicial avenues, there are also two more indirect ones. The first of these is the preliminary reference procedure (Art. 267 TFEU). This procedure works via the national judicial route, where a national judge has the possibility to pose a question to the CJEU on the interpretation of the Treaties (TFEU and the Treaty on the EU, TEU), and/or on the validity and interpretation of acts of EU institutions. The decision to refer a question to the CJEU, thus, is dependent on the willingness of the national judge and not in

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[17] Mauro Cappelletti, Monica Seccombe, and Joseph H H Weiler (eds), *Integration through law: Europe and the American Federal Experience. Vol. 3: Consumer Law, Common Markets and Federalism in Europe and the United States* (New York: Walter de Gruyter & Co 1986).

[18] The use of this term is derived from Melanie Fink (ed), *Redressing Fundamental Rights Violations by the EU* (Cambridge University Press 2024).

[19] Case 25/62 *Plaumann* EU:C:1963:17.

[20] Jan Darpö, 'Pulling the trigger. ENGO standing rights and the enforcement of environmental obligations in EU law' in Sanja Bogojević and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018); Ludwig Krämer, 'Climate change, human rights and access to justice' (2019) 16 Journal for European Environmental & Planning Law 21.

[21] See Case C-352/98 P *Bergaderm and Goupil v Commission* EU:C:2000:361 para 43.

the hands of the civil society actor.[22] At the same time, there are examples of domestic judges taking into account requests for a preliminary reference by private parties.[23] An advantage of this procedure is that there are no further requirements for standing or limitations for legal arguments in the procedure before the CJEU. A last indirect judicial avenue is the possibility to intervene in CJEU proceedings as a third party. In contrast to third-party intervention before the European Court of Human Rights, intervention in both direct actions and the preliminary reference procedure is rather difficult.[24] Intervention in direct actions requires that a party has an interest in the case, and additionally a party must accept a case as they find it (so it can only support grounds of one of the parties).[25] Intervention in the preliminary reference procedure is dependent on national procedural rules, as the right to intervene must have already been granted at the national level.

The second type of avenues are the extralegal, administrative and informal avenues within the EU remedies system. The first two of these are possibilities of raising an issue with an EU institution, entailing the petition to the European Parliament (EP, Art. 227 TFEU) and the complaint to the European Commission (Art. 258 TFEU). The former is a mechanism through which any topic can be brought to the attention of the EP, which is a co-legislator within the EU.[26] The matter has to affect the individual or legal person bringing the petition, but this is broadly interpreted.[27] The EP has full discretion over what to do with the petition and there is no guarantee nor influence over follow-up. The complaint to the Commission, similarly, has a potential broad scope, as any breach of EU law can be brought to the Commission's attention.[28] It is a low effort complaint, via a form,[29] after which the Commission can start infringement proceedings against public authorities which can even result in litigation before the CJEU (Art. 260 TFEU). Nevertheless, similar to the petition to the EP, there is no obligation for the Commission to act upon the complaint.

Another administrative complaint mechanism is the one before the European Ombudsman (Art. 228 TFEU). Such complaints should concern the maladministration in the activities of an EU body. Again, there is no influence as to the follow-up by the Ombudsman, and additionally, any decision taken by the Ombudsman is non-binding. A different extralegal avenue is the European Citizen's Initiative (Art. 24 TFEU). With this mechanism, EU citizens can collect autographs (from at least one million citizens from seven

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[22] Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar Publishing 2022); Monika Glavina, 'The Reality of National Judges as EU Law Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Slovenia and Croatia' (2021) 17 Croatian Yearbook of European Law and Policy 1.

[23] Passalacqua (n 9).

[24] Jasper Krommendijk and Kris van der Pas, 'To Intervene or not to Intervene: Intervention Before the Court of Justice of the European Union in Environmental and Migration Law' (2022) 26(8) The International Journal of Human Rights 1394.

[25] Art. 40 Statute of the CJEU.

[26] Henri de Waele, 'The Right to Petition, EU Citizens and the European Parliament: Rise of the Triad?' in Davor Jancic (ed), *The Changing Role of Citizens in EU Democratic Governance* (Bloomsbury Publishing 2023).

[27] According to the EP itself, see Pablo Abril Marti and Georgiana Sandu, 'The right to petition' (*Fact Sheets on the European Union*, May 2024) <https://www.europarl.europa.eu/factsheets/en/sheet/148/le-droit-de-petition> accessed 20 December 2024.

[28] See European Commission, 'Report a breach of EU law by an EU country' (<https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level_en> accessed 20 December 2024.

[29] See <https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/> accessed 20 December 2024.

EU Member States), with which a request for specific EU legislation can be made. The proposed legislation must fall, of course, within the competences of the EU. Lastly, there are several informal ways of engaging with the EU remedies system. For example, civil society actors can influence CJEU cases in the background, by providing expertise to lawyers in a case or producing a public statement.[30] Other informal involvement can be found in the example mentioned in the introduction of the NGO noyb and 27 other NGOs urging the European Data Protection Board to take a certain decision. Thus, via public statements EU bodies can be called upon to act in a certain way. Similar to several of the previous avenues in the EU remedies system, there is a severe lack of control over what happens with such a call to action.

In sum, the judicial avenues before the CJEU are less flexible and more difficult to access than the extralegal avenues discussed in this Section. At the same time, CJEU decisions are authoritative and legally binding, which makes them perhaps more attractive than any of the administrative, extralegal mechanisms. Moreover, with the latter, there is often no control over the procedure and outcome, with the only possibility of presenting a one-off complaint to a certain institution. Lastly, these avenues might require more effort in the implementation phase after a decision is taken, as the decisions are often non-binding.

2.2 EU LEGAL OPPORTUNITY STRUCTURES

Different scholars have studied the mobilization of the law, or 'turn to the courts', both from a socio-legal and political science perspective. The question answered in their work is: under what conditions does legal mobilization take place? The first of these studies focused on political opportunities, or Political Opportunity Structures (POS), to explain strategy choice by social movements.[31] Protesting, but litigation also, are considered 'outside' strategies, used when there are no political opportunities (or if one is a political 'outsider').[32] Hilson subsequently coined the term Legal Opportunity Structures (LOS),[33] which has been most developed by Andersen.[34] These studies take legal opportunities, such as rules on standing, as point of departure to explain when civil society actors turn to the courts. The premise of both LOS and POS is that these structures can be more open or more closed, which influences strategy choice. Especially LOS have gained traction in recent years in studies on legal mobilization. LOS can be divided into a tripartite structure: the procedural legal framework, the substantive legal framework, and judicial receptiveness.[35] Procedural law

[30] This has been done in the field of migration and asylum by UNHCR, see UNHCR, 'UNHCR Interventions before the Court of Justice of the EU' (UNHCR, July 2024) <https://www.unhcr.org/publications/unhcr-interventions-court-justice-eu> accessed 20 December 2024.
[31] Herbert Kitschelt, 'Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies' (1986) 16(1) British Journal of Political Science 57.
[32] Aude Lejeune and Julie Ringelheim, 'The Differential Use of Litigation by NGOs: A Case Study on Antidiscrimination Legal Mobilization in Belgium' (2023) 48(4) Law & Social Inquiry 1365.
[33] Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9(2) Journal of European Public Policy 238.
[34] Ellen Ann Andersen, *Out of the Closets and Into the Courts: Legal Opportunity. Structure and Gay Rights Litigation* (University of Michigan Press 2004).
[35] Kris van der Pas, *The 'Strategy' in Strategic Litigation: The Why and How of Strategic Litigation by Civil Society Organizations in the Field of Asylum Law in Europe* (Europa Law Publishing 2024). Based on inter alia Gianluca de Fazio, 'Legal Opportunity structure and social movement strategy in Northern Ireland and southern United States' (2012) 53(1) International Journal of Comparative Sociology 3.

entails the aforementioned rules on standing, but also rules on admissible claims. Substantive law consists of all (inter)national law applicable to a certain case (including soft law). Judicial receptiveness refers to the willingness of judges to decide positively on certain claims brought by social movements.

The EU presents new Legal Opportunity Structures.[36] Procedurally, the CJEU forms an extra, legal avenue beyond national courts.[37] Nevertheless, the accessibility of the CJEU, as discussed in Section 2.1, is limited. Procedural hurdles, such as the requirements of direct and individual concern, or the dependency on a national judge, 'close' this Legal Opportunity Structure. Current research on EU legal mobilization does not view the other, extralegal/administrative avenues presented in Section 2.1 as offering a widening of EU LOS, but this research regards these avenues as opening EU LOS. In terms of the substantive legal framework, EU law has provided for a new catalogue of rights.[38] This advantage of EU law (over national law) can increase legal mobilization.[39] Even more so, Passalacqua argues that you need available EU legal stock that presents a comparative advantage over national law, which can then lead to more 'open' EU LOS.[40] Lastly, as to judicial receptiveness, the CJEU is sometimes regarded and described as an 'activistic' court, making EU legal mobilization more attractive.[41]

POS and LOS exist externally from the organizations pursuing legal mobilization strategies. Other research has pointed out the relevance of internal, organizational factors in the decision to mobilize the law. Characteristics of organizations, such as their resources, networks and identity, can also play a role in this regard.[42] Two main organizational factors are deducted from the literature here as vital when it comes to mobilizing the EU remedies system. The first of these is the relevance of resources, entailing both financial and human resources. Building on the seminal work of Galanter, it has been argued that 'repeat-players', i.e. litigants who have built up expertise in litigation, are more likely to litigate successfully.[43] Translating this to an EU context, authors have emphasized the relevance of 'Euro-expertise'.[44] A second organizational factor that is influential, can be described as internal framing processes that happen within organizations.[45] The perceptions of litigants on political and legal opportunities, influenced by the identity of their organization, can play an important role in strategy choice. For example, an organizational pursuing legal strategies only with staff that has (almost) exclusively a legal background, is more likely to frame a certain issue as a legal issue and pursue a legal strategy to attain a certain objective. From an

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[36] Lisa Conant et al, 'Mobilizing European Law' (2018) 25(9) Journal of European Public Policy 1376.
[37] Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge University Press 2010) 257.
[38] Tanja A Börzel, 'Participation Through Law Enforcement: The Case of the European Union' (2006) 39(1) Comparative Political Studies 128; Rhonda Evans Case and Terri Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48(2) Journal of Common Market Studies 221.
[39] Johan Karlsson Schaffer, Malcolm Langford, and Mikael Rask Madsen, 'An Unlikely Rights Revolution: Legal Mobilization in Scandinavia Since the 1970s' (2024) 42(1) Nordic Journal of Human Rights 11.
[40] Passalacqua (n 9).
[41] Henri De Waele and Anna van der Vleuten, 'Judicial Activism in the European Court of Justice – The Case of LGBT Rights' (2011) 19(3) Michigan State Journal of International Law 639.
[42] Conant et al (n 36) 1382.
[43] Galanter (n 16).
[44] Passalacqua (n 9). See also Evans Case and Givens (n 38).
[45] Vanhala, 'Is Legal Mobilization for the Birds?' (n 12); Pas 'All That Glitters Is Not Gold?' (n 15).

EU law perspective, this means that EU law must be part of the expertise of an organization and must be viewed as an advantageous source.[46] On a final note, it has been emphasized that individuals with this expertise can also play an important role in EU legal mobilization.[47]

3 METHODOLOGY

3.1 CASE STUDY: DATA PROTECTION & FUNDAMENTAL RIGHTS

The present paper looks at the field of data protection as a sub-field of EU law in which legal mobilization has taken place. Several landmark CJEU cases in this field of law have been brought by civil society actors, as shown in the introduction. EU Legal Opportunity Structures, specifically the substantive legal framework, is particularly strong in the field of data protection. The Charter of Fundamental Rights, but also the more specialized GDPR, offer NGOs a range of tools that can be used in litigation and administrative action. For example, the GDPR contains a range of specific rights to 'data subjects', i.e. natural persons whose personal data is processed, in chapter 3. These include e.g. the right to transparent information, the right to access, and the right to be forgotten. For NGOs specifically, data subjects can give them the power to lodge a complaint with a data protection authority on their behalf (Art. 80(1) GDPR).[48] It is important to note that this procedure starts at the national level, but national data protection authorities are required to apply EU law. Aside from these substantive provisions, previous successful litigation before the CJEU opens up EU LOS. Next to litigation at CJEU level, the other administrative action that is available further incentivizes NGOs to use the EU remedies system, such as complaints with the Ombudsman, European Commission, or attempts to mobilize the European Data Protection Board via letters.[49]

At the same time, EU LOS do not give unlimited possibilities. Despite the Charter having become binding EU primary law, the CJEU and the EU legal framework are not considered ideal for fundamental rights protection.[50] This is related to the market-based (or four freedoms-based) rationale that still underpins the European Union. Even more so, the procedural legal framework at EU level offers more closed opportunities. Access to formal legal avenues, via direct actions or the preliminary reference procedure, is difficult (as shown in the previous section). The administrative avenues, up until now left out in research on EU legal mobilization, open up LOS to some extent as these procedures are more easily accessible. At the same time, the influence on these procedures is limited as there is no control over what happens with complaints and letters, and the outcomes are often not

[46] Alter and Vargas (n 9); Passalacqua (n 9).
[47] Pavone (n 14).
[48] Art. 80 GDPR also gives other options for NGOs, such as collective actions, but these are optional for Member States to implement at national level and do not appear to be used (yet) in the field of data protection. See also on this Federica Casarosa, 'Transnational collective actions for cross-border data protection violations' (2020) 9(3) Internet Policy Research <https://policyreview.info/articles/analysis/transnational-collective-actions-cross-border-data-protection-violations> accessed 20 December 2024.
[49] It should be noted, however, that in the field of data protection there is still a lot of legislative development. This could mean that there are political opportunities to influence this process, and less resources by civil society are devoted to legal mobilization. This is not the focus of this paper.
[50] Elise Muir, 'Reshuffling Our Understanding of Fundamental Rights Law in Europe: An EU Lawyer's Research Agenda' (2021) 2 European Human Rights Law Review 142.

legally binding.[51] This mixed picture of EU LOS makes it relevant to empirically assess the role of the EU remedies system in the work of data protection NGOs. The strong legal framework and examples of EU legal mobilization in the past makes it interesting to explore the question: Why (or why not) and how is the EU remedies system explored in the field of data protection?

3.2 METHODS & APPROACH

In order to answer the main research question, the current research has proceeded from interviews with NGO representatives. NGOs working in the field of data protection have been selected as the 'cases', as the study makes use of a case study research design.[52] The empirical data collection, through semi-structured interviews, makes it possible to find out more about the rationale behind the use of EU law and remedies at EU level by NGOs. The NGOs have been found via the website of the European Digital Rights Network (EDRi), which is the main network uniting NGOs working on digital rights in Europe.[53] Every NGO member of EDRi was contacted for the purpose of this research, if an email address of the NGO was available.[54] If the NGO did not respond, a reminder was sent. Some organizations did not have the time or resources to participate in an interview. Others replied that they did not engage with EU law nor the EU remedies system at all, which is why they were unwilling to participate. Through snowballing, other interviewees were found. In the end, a total of 8 interviews have been held with representatives from seven NGOs in March and April 2024. The list of NGOs interviewed can be found in Annex 1. These NGOs have, as Section 4 will show, very different levels of EU legal mobilization, with some only very rarely engaging with others and others mainly pursuing EU legal strategies. Only senior-level staff, such as lawyers, directors and board members have been interviewed. The interviews have been anonymized and the interview data has been attributed to the NGO as a whole.

During the interview, NGO representatives were inquired about which strategies their NGO used, NGO characteristics (such as resources, collaboration and staff), and most importantly, use of EU legal mobilization and rationale behind this (non-)use. The data from the interviews has been supplemented with publicly available information, such as the case law (that came up during the interviews), press releases on NGO websites, and news articles. Triangulation of the interviews with other information prevents to a certain extent the one-sided picture that can be presented in interviews, including socially desirable answers.

[51] It should be noted that EU institutions have, at times, (quasi-)litigated in other ways or have tried to influence EU legal development through academic work (articles in the Common Market Law Review and speeches of CJEU presidents are notable examples). As the focus of this article is on NGOs, these actions are not taken into account.

[52] Robert Yin, *Case Study Research and Applications: Design and Methods* (6th edn, SAGE Publishing 2017).

[53] European Digital Rights (EDRi) website <https://edri.org/> accessed 20 December 2024.

[54] For example, for Alternatif Bilisim (https://alternatifbilisim.org/), no email address was retrievable.

4 ANALYSIS

4.1 FINDINGS ON LOW LEVELS OF EU LEGAL MOBILIZATION

One interviewee recalled a conference on data protection in California in 2017, which happened right after the GDPR entered into force. The fear of many of the representatives from the data industry was that the GDPR would spark a wave of litigation, through individual complaints, but also through class action.[55] As it turns out, this did not occur. In general, rather low levels of EU legal mobilization could be found for several of the NGOs interviewed. Despite the existence of EU LOS, interviewees representing these NGOs indicated that they did not often engage with EU law and/or the EU remedies system. Several explanations for this can be found, mostly at the organizational level.

Firstly, a few NGOs indicated that they do not have a legal focus. They, for example, focus mostly on informing the public, engaging with legislative developments, and the media. A primary example is the Deutsche Vereinigung für Datenschutz (DVD). DVD has a quarterly magazine/newsletter that is published on their website, which informs the general public about data protection. When it comes to EU law and the EU remedies system, the magazine has two editions about European developments like the GDPR.[56] Similarly, NGOs such as DVD and Digital Republic indicated that they have a strong national focus. Therefore, it is not directly relevant in their eyes to engage with EU law and the EU remedies system often. Moreover, the NGO Gesellschaft fur Freiheitsrecht (GFF) indicated that their national focus is influenced by Legal Opportunity Structures: the German Constitution has a strong legal framework on data protection and the right to privacy, and it is easier (procedurally) to get a case to the Constitutional Court than the CJEU. Tied to GFF's focus on government surveillance, the GDPR is less relevant according to the interviewee. Thus, there appears to be a certain tradeoff, already indicated in the literature, as EU law needs to be viewed as advantageous over national law. For GFF, this is not the case. Moreover, organizational identity and LOS are linked as this example shows.

Surprisingly, the only non-EU NGO, Electronic Frontier Norway (EFN), does engage with EU law and has considered to engage with the European Free Trade Association (EFTA) Court, which interprets the agreement on the European Economic Area (EEA).[57] EFN indicated that it is aware of CJEU judgments on data protection that have to be implemented at the national, Norwegian level, because of the EEA. Nevertheless, access to the EFTA Court is limited, and therefore it has decided not to engage with that Court.[58] This is similar to obstacles for accessing the CJEU, closing EU (and thus also EEA) LOS. This NGO is considering more direct political avenues, such as complaining to members of the

[55] The GDPR contains an optional clause for class action in national litigation in Art. 80(2), but this has not been implemented by any EU Member State.
[56] Deutsche Vereinigung für Datenschutz, 'Aktuelle DANA-Ausgaben' <https://www.datenschutzverein.de/kategorie/dana/dana-aktuelle-ausgaben/> accessed 20 December 2024.
[57] More logically, EFN is involved in ECtHR cases as well, see Elektronisk Forpost Norge, 'The privacy saga with Norwegian Social Service continues' (*EDRi*, 6 March 2024) <https://edri.org/our-work/the-privacy-saga-with-norwegian-social-service-continues/> accessed 20 December 2024.
[58] See Jarne de Geyter, 'Revisiting the standing debate before the EFTA Court through the lens of post-Lisbon EU developments regarding locus standi' (2023) 6(3) Nordic Journal of European Law 130.

European Parliament who appear to be receptive. At the same time, other extra-legal or informal avenues within the EU remedies system (such as a petition to the EP) are not considered.

On a final note, NGOs that display low levels of EU legal mobilization often do mobilize EU law or with the EU remedies system in collaborative efforts. An example of this is that NGOs co-sign letters developed by other NGOs in relation to EU legal developments. Examples of such letters are those drafted by the EDRi and noyb.[59] Therefore, relations with other NGOs influence EU legal mobilization as well. In sum, it appears the EU LOS cannot be awarded decisive influence when it comes to mobilization of the EU remedies system in the field of data protection, but rather organizational identity (and focus) appears to be the most explanatory factor.

4.2 ENGAGEMENT WITH THE EU SYSTEM

Other NGOs that were interviewed engage more actively with the EU remedies system in a variety of ways. Nevertheless, even those that do, had mixed feelings about the usefulness of the system. One interviewee indicated that 'the EU system does not have the va va voom', in other words, it is not quick enough and not very efficient for enforcement of rules on data protection. This Section elaborates on the most used avenues within the EU remedies system, which are litigation (at national level and before the CJEU), the use of Art. 80(1) GDPR, and working via the European Commission. Other avenues, such as informal involvement or a petition to the EP, were not brought up out of own motion by the interviewees or only briefly mentioned. It can be inferred from this that the NGOs themselves do not view other avenues as important and useful.

Litigation at national level and before the CJEU was considered by NGOs that engage actively with EU law, such as noyb and Digital Rights Ireland, as a useful strategy. These NGOs have a particular focus on the EU and EU law. Decisions from the judiciary are binding, whereas administrative decisions are less strong, which is reason for noyb to engage with the CJEU more. These NGOs have been involved in 'classic' CJEU cases via the preliminary reference procedure on data collection and retention. However, both NGOs indicated that this procedure is rather slow. Digital Rights Ireland, therefore, is trying to find new ways, with other types of EU legislation, to protect data rights. In the Irish system, the NGO is planning to make use of EU consumer law and damages claims to hold big tech companies to account. Digital Rights Ireland wants to make use of the new Representative Actions Directive in this regard.[60] The Irish system offers the opportunity, as a common law system, to claim a lot of damages. Thus, LOS in Ireland are open to the envisioned type of action. High damages are necessary, according to Digital Rights Ireland, because the fines of the Commission are relatively low, which decreases impact of those fines according to the NGO. Another NGO that is exploring a similar type of action is Digital Republic, looking into collective redress in the Bulgarian system. Thus, there appears to be a shift from

[59] Deutsche Vereinigung für Datenschutz, 'Offene Briefe / Stellungnahmen / Gutachten' (*DVD*, 02 March 2024) <https://www.datenschutzverein.de/2023/09/offene-briefe-stellungnahmen-gutachten/> accessed 20 December 2024.

[60] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1.

individual to collective action in (EU) legal mobilization in data protection. Here, however, the NGO has difficulty in convincing Bulgarian judges of the relevance and application of EU law. The interplay between the EU level and the national level is, therefore, also important for EU legal mobilization, similar to what Passalacqua has argued for the 'open EU LOS'.

Only one NGO interviewed engages actively with Art. 80(1) GDPR. Noyb collects individual complaints and chooses to follow up on them if they have a broader (EU-wide) relevance. In these complaints, noyb indicated that there is a choice in terms of the national data protection authority that is addressed. Therefore, the NGO engages in 'forum shopping', selecting the authority that is fast, whose decisions are respected most, etc. In Austria, for example, the administrative decision by a data protection authority is rendered relatively fast compared to other Member States. The Netherlands and Ireland are also considered suitable, however, the procedure in court is rather expensive in these states. In order to carry out this strategy, noyb has employees from a wide range of EU jurisdictions who speak different languages. As a follow-up to these decisions by data protection authorities, the NGO is looking into which national judge is more likely to put a preliminary reference to the CJEU. Thus, it is looking into where, at the national level, EU LOS is most favorable. In relation to other strategies, noyb indicated that litigation is considered most effective, while other strategies it has used within the EU remedies system (such as informally sending letters and filing a complaint with the Ombudsman) are regarded more as signaling and a side activity.

Numerous times during the interviews, reference was made to the European Commission and its role. Most notably, one interviewee indicated that 'the police car isn't fast enough', meaning that the Commission as enforcer (through infringement proceedings) is too slow.[61] This perspective of the NGOs in the field of data protection can be corroborated with recent findings by academics on the role of the Commission as enforcer more generally.[62] Recent legislation, such as the Digital Markets Act and the Digital Services Act,[63] on data protection awards an increasingly bigger role for this actor. Therefore, several NGOs (noyb, GFF and Data Rights) are looking into ways to engage with the Commission more. This is somewhat paradoxical to the view on the Commission as an insufficient enforcer.

4.3 GENERAL REFLECTIONS ON (EU) LEGAL MOBILIZATION

As a final part of this analysis, some overarching comments are made here on (EU) legal mobilization by the NGOs interviewed in the field of data protection. The first observation

[61] Infringement proceedings are required if national (data protection) authorities do not apply EU law.
[62] This can be academically corroborated with recent research, see R Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (*ssrn*, 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918> accessed 20 December 2024. These authors conclude that infringement proceedings by the Commission are significantly lower now than they were in the past.
[63] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1.

is related to the legal resources required for legal mobilization. The second is related to legal culture in different EU Member States. The third focuses on the aspect of time.

In relation to legal resources, litigation is an expensive strategy and requires a lot of expertise. Thus, legal resources matter. Digital Rights Ireland indicated that it has a loose structure with very few employees, to prevent a high payroll for cases that drag on for many years. Other organizations, such as DVD, recognize their own limited legal resources and decide to place focus elsewhere. Legal resources in relation to expertise on national level legislation is one thing, nevertheless, for EU legal mobilization knowledge is required about the supranational level as well. This type of legal resource is still missing in some NGOs, which makes mobilizing the EU remedies system not as attractive as national level mobilization. Next to legal resources, other expertise was highlighted as well during the interviews as relevant in this field of law, namely tech resources. Noyb, for example, has several IT experts, who are necessary in gathering evidence for legal cases. Thus, there is a certain interplay between financial resources (as litigation is expensive), legal resources, and other expertise such as technical knowledge.

On a different note, relevant in light of EU legal mobilization is the legal culture present within an EU Member State. It appears that the NGOs in some EU Member States find it easier to invoke arguments of EU law at national level, which indicates that the national judiciary is receptive to these arguments. Even more so, in a non-EU Member State such as Norway, an NGO is using EU law actively. Legal culture and to what extent EU law is welcomed in this culture, therefore, plays a role. Moreover, the receptiveness towards human rights arguments plays a role. As stated above, human rights can play a significant role in data protection litigation. The interviewee from the Bulgarian NGO indicated that the legal culture in that state influences how their case is dealt with by judges, as Bulgaria is a newer culture and human rights are not (yet) an intricate part of the legal system. This makes it more difficult to use human rights arguments.

On a final note, time matters. Already mentioned in this Section is the duration of litigation. The Digital Rights Ireland case, decided in 2014 by the CJEU, is still not completely closed and implemented at the national level, according to the name-giving NGO. Cases in general are not completely closed after a judgment has been rendered and implementation is a huge problem. One interviewee, now working for Data Rights, was involved in the CJEU case *La Quadrature du Net* and is still attempting to convince the authorities (both governments and businesses) about what the judgment actually requires.[64] Also related to the aspect of time is the timing of cases. For example, one interviewee indicated that terrorist attacks can influence public opinion on data protection (to decrease data protection for security reasons) and that this can influence acceleration or slowing down of cases. It matters, for public opinion, when a case is brought and gets media attention. Finally, in relation to time, the field of data protection is rather new. EU legislation on the topic is not decades old, which could indicate that litigation and/or other action is still to come.

[64] For example, the interviewee indicated that the judgment requires authorities to let persons know if they have been subjected to surveillance (paras 91-92 of the judgment), but this is not implemented in practice.

5 DISCUSSION & CONCLUSION

This study has attempted to show what factors influence EU legal mobilization by NGOs in the field of data protection. In this Section, some reflections on the theoretical framework are provided, in order to further develop theorizing on legal mobilization. Legal Opportunity Structures, as part of this theory, plays a dubious role in the analysis above. First, some aspects of LOS can be considered more important than other. The binding nature of decisions by an authority is valued higher, for example, than better access. This finding can be retrieved from the fact that despite procedural hurdles, the NGOs in this study prefer the CJEU over better accessible administrative avenues. This might not be surprising in light of the goals in data protection: improving rights protection is (seemingly) strongest with legal precedents. Nevertheless, administrative/extra-legal avenues in the EU remedies system appear underexplored. These avenues, as stated in Section 2.1, do not require a lot of effort and the outcomes of these procedures can have a direct or indirect impact. Moreover, the authorities that are called upon are authoritative EU bodies. Although it was not mentioned by the interviewees, it could be that the lack of control and unclear outcome of these procedures plays a role in the non-use.

Additionally, the EU system does not appear favorable when it comes to LOS and the procedural legal framework, which likely influences the low levels of EU legal mobilization. Despite a strong substantive legal framework in the field of data protection, the procedural hurdles are perhaps just too high. Related to this external aspect of LOS are the internal legal resources of the NGOs. In order to actually get a case to the CJEU, it requires legal knowledge of the EU procedural and substantive legal framework ('Euro-expertise', as mentioned in Section 2.2). Many data protection NGOs do not have this expertise in-house, but do have knowledge of national law and use constitutional law, as the German NGOs have indicated. Another link can be made here with organizational identity and aims: NGOs adapt their strategies and staff to what they want to achieve. If this aim is to inform the public, it does not make a lot of sense to focus on legal strategies. At the same time, there appears to be room for mobilizing (EU) law to attain goals.

When the EU system is mobilized, there seems to be a currently ongoing shift from individual to collective action in the field of data protection. Strategies that center on individuals have been attempted in the past, but through collective action and new EU law (for example the Representative Actions Directive), NGOs want to make more impact. When mobilizing, an interplay of LOS both at EU and national level, as well as internal legal resources, are relevant. For example, noyb deploys employees from the different EU Member States in order to engage in forum shopping and select the jurisdiction to make the most impact. Additionally, noyb has tech experts in-house, as these are needed for building a litigation strategy. Thus, legal resources are not the only type of expertise needed. As an overarching mark, despite the picture painted in Section 1, EU legal mobilization in the field of data protection is done by a few 'repeat-players' and is not widespread throughout the EU.

This low engagement with the EU remedies system is very likely related to the procedural hurdles part of the EU system, but also the fact that every EU Member State has a different procedural legal system. In order to allow for effective enforcement, harmonization of procedural law throughout the EU at national level and lowering of procedural hurdles (such as the *Plaumann* criteria) within the EU system is necessary. If not,

the legal resources required to engage with EU law at national level and make use of the EU remedies system will likely be too much of a barrier for many NGOs for EU legal mobilization. At the same time, the EU remedies system seems underexplored, especially the administrative legal avenues. 'New' avenues or other creative ways could be found as well, as for example Electronic Frontier Norway wants to call upon members of the EP. In this sense, the boundaries between legal mobilization and political mobilization are perhaps fading. In line with more recent US literature,[65] it would prove fruitful in the future to look at mobilization campaigns and the role of the law therein holistically, as opposed to focusing on one strategic litigation case. Moreover, more fields of (EU) law are still to be explored in light of (EU) legal mobilization, in order to provide a clearer theoretical picture of factors that influence the use of the law.

[65] Scott Cummings, *An Equal Place: Lawyers in the Struggle for Los Angeles* (Oxford University Press 2021).

Annex 1

List of NGOs interviewed

- Digital Rights Ireland
- Noyb
- Gesellschaft fur Freiheitsrechte
- Electric Frontier Norway
- Deutsche Vereinigung fur Datenschutz
- Digital Republic
- Data Rights

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