EXPLAINING THE SUCCESS OF LITIGATION STRATEGIES IN THE SCHREMS CASES: A FRAMEWORK FOR ANALYSIS

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This article seeks to explain the success of litigation strategies pursued by interest groups defending a public interest (hereafter public interest groups). We focus on the sub-field of data transfer between the European Union and the United States, where the Court of Justice of the European Union (CJEU), through rulings indirectly triggered by such groups, has invalidated a Commission's decision relating to EU-US arrangements (Safe Harbour in 2015, then Privacy Shield in 2020). To evaluate the likelihood of litigation successes, we propose an analytical model based on five elements derived from the new institutionalist theory: actors and instruments (rational choice institutionalism), processes (historical institutionalism), context and legitimacy (sociological institutionalism). Although we cannot prove that all five elements are necessary conditions for success, we argue that litigation successes in the cases we studied (the Schrems rulings) were very likely because all five elements were combined, even if the relative weight of each element slightly varied.

1 INTRODUCTION

Data privacy has become a growing field of enquiry in law and social sciences.[1] This is based on the empirical development of the production, transfer and management of data, which affects every citizen in all areas of their lives. Every day, companies and public authorities collect and sometimes transfer huge amounts of personal data across borders. This data can be used for legitimate market economy and security purposes. However, data owners face two major threats with regards their privacy: mass surveillance of citizens by national security programs and unwanted use of their data due to business activities. Since the mid-1990s, common EU rules have been established to ensure that personal data enjoy a high level of protection throughout the EU, and to define the conditions under which personal data can be collected and managed. The EU has also sought to regulate the transfer of data outside the continent, with a particular focus on data transfer to the United-States, where most digital multinationals are based.

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[1] Andrew Chadwick, 'Digital Network Repertoires and Organizational Hybridity' (2007) 24(3) Political Communication 283; W Lance Bennet and Alexandra Segerberg, 'The logic of connective action: Digital media and the personalization of contentious politics' in Stephen Coleman and Deen Freelon (eds), *Handbook of Digital Politics* (Edward Elgar Publishing 2015).

Based on EU secondary law (Directive 95/46/EC,[2] replaced by the GDPR),[3] the transfer of personal data to a third country may take place only if the third country in question ensures an 'adequate level of protection'. The Commission can issue a decision stating that the level of data protection in a third state is adequate. In the case of data transfer from Europe to the United States, a first adequacy decision was adopted (Decision 2000/520/EC),[4] based on an EU-US arrangement called Safe Harbour. Following the invalidation of this decision by the Court in *Schrems 1* (case C-362/14),[5] a new framework, the Privacy Shield, was agreed upon in 2016, leading to a second adequacy decision[6] by the Commission, and to a second invalidation by the Court in *Schrems 2* (case C-311/18).[7]

In both cases, litigation strategies pursued by public interest groups – such as NGOs and associations defending what they perceive to be the public interest – were successful. By this, we mean that they succeeded in provoking the invalidation of the adequacy decisions, and therefore of the whole EU-US arrangements. Success, here, is thus defined in a rather restrictive manner: the successes of Schrems in court might not be a success in the sense that it would automatically lead to a better level of protection for the EU citizens.

The invalidation of the adequacy decision may be seen as a surprising outcome for economic, political, and legal reasons as well. Indeed, data transfers from Europe to the US represent a significant amount of business activity and economic interests, that have been facilitated by the EU-US arrangements, and the CJEU is said to be a rather pro-business / pro-market court[8]. Both the Safe Harbour and the Privacy Shield were widely supported by the US government, EU institutions, Member States governments and private companies, and it is never easy for the Court to oppose such a large number of actors in an activist way.[9] The EU-US frameworks for data transfer took the form of external arrangements that could be considered as a commitment of the European Union, and external EU commitments are rarely challenged by the Court.[10]

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[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

[3] 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.

[4] 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441) [2000] OJ L215/7.

[5] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* EU:C:2015:650.

[6] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) [2016] OJ L207/1.

[7] Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems (Schrems 2)* EU:C:2019:1145.

[8] Sacha Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union' (2017) 13(1) European Constitutional Law Review 23; Sacha Garben, 'Balancing social and economic fundamental rights in the EU legal order' (2020) 11(4) European Labour Law Journal 364.

[9] Fabien Terpan and Sabine Saurugger, 'The CJEU and the Parliament's External Powers Since Lisbon: Judicial Support to Representative Democracy?' in Olivier Costa (ed), *The European Parliament in Times of EU Crisis: Dynamics and Transformations* (Palgrave Macmillan 2019).

[10] It is true that the CJEU sometimes gives precedence to EU law over international law (see for example the *PNR* cases: Joined Cases C-317/04 and C-318/04, and the *Kadi* cases: Joined cases C-402/05 P and C-415/05 P) in order to protect the autonomy of the EU legal order. But, first, it is not frequent, and second, the CJEU

Against this backdrop, a question arises: *How can we explain the success of litigation strategies when so many factors push in the opposite direction?*

Answering this question will allow us to understand the conditions that lead to successful litigation strategies, especially those pursued by public interest groups, in the European Union and beyond. It may also provide us with an appropriate analytical framework for discussing the likelihood of success of future litigation. Indeed, the Privacy Shield has been replaced by the EU-US Data Privacy Framework (DPF), which has resulted in a new decision of adequacy adopted by the Commission on 10 July 2023.[11] Privacy groups have already indicated that the DPF is very similar to the Privacy Shield and does not provide sufficient guarantees for EU citizens.[12]

Returning to the invalidation of the previous frameworks (Safe Harbour and Privacy Shield), and the factors explaining the litigation successes in these cases, two main explanations come to mind, both being equally unsatisfactory, for different reasons.

First, it is tempting to tell the story of a privacy activist, Max Schrems, who challenged the Big Tech with a bold and persistent strategy.[13] While there is some truth to this story, it does not provide a comprehensive explanation of the litigation success. Many activists use litigation strategies with a lot of energy and expertise without having any success in court.

Secondly, a legal positivist explanation would see the two judgments simply as the law being applied by the Court: EU law needs to be interpreted, and this interpretative function has been given to the CJEU by the treaties. However, if one assumes that judges have some room of manoeuvre when deciding a case and cannot be seen as the 'mouth of the law', then one has to accept that the Court could have delivered another interpretation in the *Schrems* cases. Interestingly enough, the Court's rulings in the *Schrems* cases have been criticised by the legal doctrine, particularly but not only in the United States.[14] As a result, we argue that the reasons why the Court made this particular decision are most certainly to be found in the judgments themselves, but they also stem from other considerations, which are not solely legalistic.

We argue that explanations lie in between the micro-level story of a successful activist and the partial explanation based on a refusal to see the law as a complex object, open to different interpretations, and multiple use by actors. An approach combining law and political science is well-suited to uncover the reasons behind litigation strategies and the factors explaining litigation successes. More specifically, this paper attempts to build a bridge

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also tries to make an 'interpretative conciliation' between EU and international law, in order to avoid challenging the validity of an international agreement.

[11] Commission Implementing Decision EU 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework (notified under document C(2023)4745) [2023] OJ L231/118.

[12] For example: noyb, 'European Commission gives EU-US data transfers third round at CJEU' (*noyb*, 10 July 2023) <https://noyb.eu/en/european-commission-gives-eu-us-data-transfers-third-round-cjeu> accessed 20 December 2024.

[13] Hannah Kuchler, 'Max Schrems: the man who took on Facebook — and won' (*Financial Times*, 5 April 2018) <https://www.ft.com/content/86d1ce50-3799-11e8-8eee-e06bde01c544> accessed 20 December 2024.

[14] Jeffery Atik and Xavier Groussot, 'A Weaponized Court of Justice in *Schrems II*' (2021) 4(2) Nordic Journal of European Law 1; Janvier Parewyck, '"Schrems II" Judgment C-311/18: Application of Charter Rights to Data Protection and Effective Remedy Beyond Eu Borders – A State of Play and a Critical Reflection Two Years Later' (2023) 16(1) Review of European Administrative Law 87.

between, on the other hand, the literature focusing on the interest groups, their *Action Repertoires* and resources, their impact on policy making and policy implementation, and, on the other hand, the literature on law, compliance, and judicial politics.

Combining law and political science to better understand why certain strategies are effective before the courts may seem overly ambitious, even presumptuous. It is true that establishing proof in this respect is a real challenge, as certain sources, such as interviews with judges, are not available. This should not prevent us from looking for broad, contextual explanations, nor should it prevent us from thinking about ways of verifying the validity of these explanations. To this end, this article proposes an analytical model based on the three new institutionalist approaches: historical, rational choice and sociological.[15] This model assumes that the success of litigation strategies can be explained by a series of factors including: actors, instruments, processes, context, and legitimacy. These elements focus both on litigants (interest groups) and the courts (especially the CJEU), but also on the interaction between litigants and courts. This analytical framework is not meant to provide irrefutable proof of the successes and failures of litigation strategies; it more modestly suggests possible explanations, and provides some avenues for future research into this topic.

In the following sections we will use rational choice institutionalism to study actors and instruments (Section 2), historical institutionalism to explain processes (Section 3), and sociological institutionalism to analyse context and legitimacy (Section 4).

2 ACTORS AND INSTRUMENTS

Rational choice institutionalism employs a functionalist logic where the creation and design of institutions is a consequence of rationally anticipated effects. Interest groups are rational actors who organise themselves to achieve their interests. We therefore need to look at how the actors (public interest groups) adapt their organisation (expertise) and their resources to their strategic goals (challenging data transfer from Europe to the US) and how they choose and use the right (legal) instruments to achieve these goals.

2.1 ACTORS: PUBLIC INTEREST GROUPS WILLING TO LITIGATE

Interest groups are organisations that seek to influence policy outcomes according to their political interests[16]. They have different ways and means of defending their interests in the European system. They can lobby national or EU institutions, try to shape the public opinion, or they can bring cases before national courts or the CJEU. These *action repertoires* are not uniformly used among public interest groups. Their use may vary across policy sectors or according to the choices made at the level of each organization.

In this section, we argue that **the stronger the place of litigation in the *action repertoires* of many interest groups, the more likely the success of the litigation strategy**. The central idea is that public interest groups in this area do not only lobby, but

[15] Sabine Saurugger, 'Institutional approaches' in Sabine Saurugger, *Theoretical approaches to European Integration* (Palgrave Mcmillan 2013).

[16] Jan Beyers, Rainer Eising, and William Maloney, 'Researching Interest Group Politics in Europe and Elsewhere: Much We Study, Little We Know?' (2008) 31(6) West European Politics 1103; Emiliano Grossman and Sabine Saurugger, 'Les groups d'intérêt : action collective et stratégies de représentation' (Armand Colin 2012).

also use the courts as a central means to achieve their goals,[17] and they devote significant resources to this end, which increases the likelihood of a success. In order to confirm this assumption, we need to find a high involvement of many NGOs in litigation and a large number of resources devoted to this goal.

On the first aspect, we need to see whether litigation has taken an important place in the strategies developed by these organizations. This can be found by looking at the number of public interest groups involved in litigation related to Safe Harbour and Privacy Shield. It is sometimes said that most of the cases were brought by one individual, Maximilian Schrems, without whom nothing would have happened. Indeed, the two rulings that led to the invalidation of the Safe Harbour and the Privacy Shield were initiated by Max Schrems. However, and without minimising the personal importance of Max Schrems, the story cannot be limited to one individual's fight against the digital giants and state powers. Although Schrems began his fight as an individual concerned about his privacy, in *Schrems 1* he was supported by Digital Rights Ireland Ltd, an NGO 'working to protect the fundamental right to privacy through court action at national and European level and through public activism'.[18] In *Schrems 2*, another organisation, the Electronic Privacy Information Centre (EPIC), intervened. EPIC is a non-profit organisation based in Washington DC, whose mission is to 'secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation'.[19]

Between *Schrems 1* and *Schrems 2*, Schrems himself founded his own privacy non-profit organisation in 2017 – NOYB ('My Privacy is None of Your Business')[20] – as a way to structure his activities. Other NGOs have also been involved in litigation. Digital Rights Ireland Ltd brought their own case before the General Court of the CJEU (T-670/16), with the support of a group of four French NGOs, three of which deal precisely with data protection issues (La Quadrature du Net,[21] French Data Network,[22] Fédération des Fournisseurs d'Accès à Internet Associatifs)[23] while the fourth one (Union Fédérale des Consommateurs, UFC Que Choisir) has a broader purpose related to consumer protection.[24] In the opposite camp, the interests of the digital industry were represented by BSA Business Software Alliance Inc. and Microsoft corporation. The three French privacy NGOs mentioned above also brought a case at EU level (T-738/16) supported by UFC Que Choisir, against the Commission, which was supported by a group of Member States, BSA, Microsoft and Digital Europe, a federation defending the interests of digital companies.

In addition to NGOs directly involved in these cases, many other NGOs provided indirect support through public declarations, letters and position papers. We found that at

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[17] See also Sophie Jacquot and Tommaso Vitale, 'Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level' (2014) 21(4) Journal of European Public Policy 587.

[18] Digital Rigts Ireland (homepage) <https://www.digitalrights.ie/> accessed 20 December 2024.

[19] Electronic Privacy Information Center (homepage) <https://epic.org/about/> accessed 20 December 2024.

[20] noyb (homepage) <https://noyb.eu/en> accessed 20 December 2024.

[21] La Quadrature du Net (homepage) <https://www.laquadrature.net/> accessed 20 December 2024.

[22] French Data Network (homepage) <https://www.fdn.fr/> accessed 20 December 2024.

[23] Fédération des Fournisseurs d'Accès à Internet Associatifs (FFDN, homepage) <https://ffdn.org/> accessed 20 December 2024.

[24] Union Fédérale des Consommateurs, UFC Que Choisir (homepage) <https://www.quechoisir.org/> accessed 20 December 2024.

least 71 different organisations took a public position in support of the Austrian activist (see Annex 1). In the months following the decision in *Schrems 1*, 30 leading digital and consumer protection NGOs issued a statement in October 2016 entitled 'Fundamental rights are fundamental', celebrating the success of Max Schrems.[25] Another group of 39 organizations sent a joint letter to both Secretary Penny Pritzker (US Department of Commerce) and EU Commissioner Věra Jourová (Justice, Consumers and Gender Equality) on 13 November 2015, calling for a comprehensive update to privacy and data protection laws, and proposing more transparency, redress mechanisms, and stronger enforcement of data protection rules.[26] And on 16 March 2016, 27 NGOs signed a coalition letter stating that, in their opinion, the Privacy Shield arrangement between the United States and the European Union does not meet the standards set by the CJEU.[27] Since then, NGO support has been continuous.

A second way of assessing NGO's willingness to litigate is to look at the resources involved. Apart from the fact that many activists and NGOs have been involved in, or supported litigation, we need to look at the resources they devoted to these activities. Resources that favour access to courts are of different kinds: financial, organisational, social and societal.[28] NGOs in the digital field often point to the fact they have limited financial resources, and they rely heavily on donations or crowdfunding. However, what matters the most here is their ability to mobilise legal expertise.

Of course, Max Schrems, who was a PhD candidate in law when he started his litigation activities, has developed a strong expertise in this area, starting with his PhD, publishing books, giving lectures, creating blogs and websites. But apart from Schrems himself, many of these NGOs have organised themselves in such a way that they can include litigation in their action repertoires. One of NOYB's main activities is filing GDPR complaints against Data Protection Authorities (DPAs)[29] and companies,[30] but it also provides legal advice to citizens on how to defend their rights in court. Of the 23 people working for NOYB, 13 are senior or junior lawyers. Digital Rights Ireland is an experienced litigator, having won a landmark victory at the Court of Justice in the Data Retention Directive case. Its Chairman, Dr. TJ McIntyre, is a Lecturer in law at University College Dublin. La Quadrature du Net is used to taking legal action at national level, against the French government or the so-called GAFAM (Google Amazon Facebook Apple Microsoft).

In the post-*Schrems 2* era, we still have the same group of NGOs ready to fight the new EU-US Data Privacy Framework (DPF) between the EU and the US. They remain organised and can build on the expertise they have developed in the past.

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[25] 'Fundamental Rights are Fundamental' (*EDRi*, 28 October 2015) <https://edri.org/our-work/fundamental-rights-are-fundamental/> accessed 20 December 2024.
[26] <https://thepublicvoice.org/EU-US-NGO-letter-Safe-Harbor-11-15.pdf> accessed 20 December 2024.
[27] <https://www.accessnow.org/wp-content/uploads/2016/03/Priv-Shield-Coalition-LtrMar2016.pdf> accessed 20 December 2024.
[28] Sabine Saurugger and Fabien Terpan, *The Court of Justice of the European Union and the Politics of Law* (Palgrave Macmillan 2017).
[29] 'Overview of noyb's GDPR complaints by DPA' (*noyb*) <https://noyb.eu/en/project/dpa> accessed 20 December 2024.
[30] 'Overview of noyb's GDPR complaints' (*noyb*) <https://noyb.eu/en/project/cases> accessed 20 December 2024.

2.2 INSTRUMENTS: STRONG LEGAL ARGUMENTS MADE BY THE LITIGANTS.

Law is an instrument used by actors to achieve their objectives. When interest groups lobby, their aim is to influence decision-making so that the law, when adopted, meets their objectives. When they litigate, they use legal arguments to either challenge the law (when the law does not meet their objectives) or ensure that the law is applied (when the law is, in their view, inappropriate). In the case of data transfers, the law (adequacy decisions facilitating data transfers based on EU-US arrangements) has been opposed and challenged by privacy groups. The latter have adopted different litigation strategies and developed legal arguments to win cases. Here we assume that **the stronger the legal arguments used by the litigants, the more likely the success of the litigation strategy**.

Evaluating the strength of legal arguments allows us to add a legal doctrinal perspective to the analysis. As already pointed out in previous publications, the Privacy Shield did not meet all the requirements of the CJEU ruling in *Schrems 1*.[31] It was not institutionalised enough to avoid negative judicialisation, i.e. invalidation by the CJEU.[32]

Admittedly, the European Commission's 2016 adequacy decision strengthened the oversight of the Privacy Shield. Three reports were submitted by the European Commission to the European Parliament and the Council, on the basis of three rounds of annual joint reviews by the EU and US authorities, which took place respectively in Washington, D.C., on 18–19 September 2017, in Brussels, on 18–19 October 2018, and in Washington, D.C., on 12–13 September 2019. It can thus be argued that, contrary to the Safe Harbour agreement, and in line with requirements of the Court in *Schrems 1*, the European Commission has carried out its own assessment of the protection of data transferred from the EU to the US. While these reports found some progress in the way US authorities protect the privacy of EU citizens, overall the US legislation did not provide for the necessary limitations and safeguards against US surveillance programmes. Ultimately, the Privacy Shield, just like the Safe Harbour,[33] only covered soft arrangements where US authorities make political declarations about their willingness to protect the data of EU citizens, declarations that were accompanied by a few rare changes in the EU legal system.[34]

The Court had to assess how these soft arrangements comply with the hard obligations contained in both the European Charter of Fundamental Rights (Art. 7 on respect for private and family life, home and communications, and Art. 8 on the right to the protection of personal data) and secondary law (Directive 95/46/EC then GDPR). Although the CJEU has reviewed the validity of hard law acts (adequacy decisions), these acts have been

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[31] Fabien Terpan, 'EU-US Data Transfer from Safe Harbour to Privacy Shield: Back to the Square One?' (2018) 3(3) European Papers 1045; Fabien Terpan, 'Le Privacy Shield et l'échange de données entre l'Union européenne et les Etats-Unis' in Constance Chevallier-Govers (Dir), *L'échange des données dans l'espace de liberté, de sécurité et de justice* (Mare et Martin 2017).

[32] Elaine Fahey and Fabien Terpan, 'Torn Between Institutionalisation & Judicialisation: The Demise of the EU-US Privacy Shield' (2021) 28(2) Indiana Journal of Global Legal Studies 205.

[33] Christopher Kuner, 'Reality and Illusion in EU Data Transfer Regulation post Schrems' (2017) 18(4) German Law Journal 881.

[34] Elaine Fahey and Fabien Terpan, 'The Future of the EU-US Privacy Shield' in Elaine Fahey (ed), *The Routledge Handbook on Transatlantic Relations* (Routledge 2023).

considerably weakened by the fact they depended heavily on the content of soft (EU-US) arrangements.

The legal mechanisms put in place by the US authorities proved insufficient to avoid annulment by the Court (in *Schrems 2*). On the commercial side, companies certified under the Privacy Shield were subject to stricter obligations regarding personal data received from the European Union. The duration of data retention and the ability to share data with third parties have been limited. Information rights were granted to EU citizens. However, enforcement remained limited and dependent on the Federal Trade Commission. Regarding surveillance by US authorities, the new mechanisms, in particular the new permanent Ombudsman and the PCLOB (Privacy and Civil Liberties Oversight Board), also appeared insufficient and unlikely to prevent significant interference by the US authorities. Most importantly, there was still no effective administrative or judicial remedy for EU citizens whose personal data were transferred.

In short, while the level of protection in the EU has increased, with Articles 7 and 8 of the European Charter of Fundamental Rights and the GDPR, the guarantees provided by the United States have not been sufficiently strengthened.

What has changed with the EU-US new Data Privacy Framework (DPF)? Is the DPF a facsimile of the Privacy Shield or is it strong enough to avoid invalidation? If the changes brought about by the DPF are serious enough, it means that the legal arguments of the NGOs are weaker and the chances of success of the litigation strategies have decreased.

3 PROCESSES: LITIGATION SUCCESS BREEDS LITIGATION STRATEGIES

Historical institutionalism explains how past decisions affect institutions and shape the behaviour of actors. Path dependency is the central concept. Applied to case law, it means that past cases in a policy area influence the behaviour not only of courts but also of interest groups. The assumption here is that previous rulings, and previous successes in litigation strategies, have raised expectations about the likelihood of success in future litigation.

Thus, we assume that **the more litigants draw their actions on previous successful litigation strategies, the more likely the success of the litigation strategy**. Three periods must be distinguished: before *Schrems 1*; between *Schrems 1* and *Schrems 2*; after *Schrems 2*.

First, before *Schrems 1*, the case law of the Court of Justice of Luxembourg has followed the development of the right to privacy and the protection of personal data within the European Union. This evolution took place initially at the level of secondary law, with Directive 95/46/EC (later replaced by the GDPR), Directive 2002/58/EC, Directive 2006/24/EC, Framework-Decision 2008/977/JHA (later replaced by Directive 2016/680). But the development was clearly reinforced at 'constitutional' level, with the adoption of the European Charter of Fundamental Rights -and more specifically Article 7 ('right to respect for his private and family life, his home and his correspondence') and Article 8 ('right to the protection of personal data concerning him or her')- and its transformation into a legally binding text in 2009.

Reflecting this evolution, data protection rulings prior to *Schrems 1* have gradually evolved towards a more protective CJEU case-law. From the early 2000s, with the

Österreichischer Rundfunk judgment of 2003,[35] to 2014, with the *Google Spain*[36] and the *Digital Rights Ireland*[37] judgements, the case law of the Court of Justice has gradually evolved towards a more assertive approach of data protection.[38] The famous *Google Spain* ruling, even though it concerned dereferencing (right to be forgotten) and not EU-US data transfers, can be seen as a qualitative leap, showing that the Court was becoming much more pro-privacy, which raised the expectations of the litigants. In the *Digital Rights Ireland* case (CJEU, 8 April 2014, *Digital Rights Ireland Ltd & Michael Seitlinger and Others*, C-293/12 & C-594/12), the Court was asked to give a preliminary ruling on the validity of Directive 2006/24, following on a reference from the Irish High Court and a reference from the Austrian Constitutional Court. The Court found that the legislature had failed to preserve the balance between the protection of personal data and the pursuit of the objective of combating organised crime and terrorism, and declared the legislation invalid.

In short, the Court's case law has become more protective of privacy and personal data, reflecting the constitutionalisation of these rights at European level, which may have given rise to hopes that the Court would invalidate Safe Harbour.

Secondly, and similarly, the success of the litigation in *Schrems 1* created expectations about a second invalidation, leading to several cases brought by privacy groups before different courts at Member State level, and then at EU level.[39] The General Court and the Court of Justice dealt with four main cases after *Schrems 1*. The first one (*Maximilian Schrems v Facebook Ireland Ltd.*, C-498/16) was initiated by Max Schrems himself at national level, and led to a preliminary reference made by the Austrian Supreme Court of Justice. The Court of Justice ruled that class actions against Facebook in Austria are inadmissible, but it gave Schrems a partial victory when it said that he was entitled to bring individual actions in the courts of his place of residence (Austria), even though Facebook is based in Ireland. A second case (*Digital Rights Ireland Ltd. v European Commission*, T-670/16)[40] was an action for annulment brought by Digital Rights Ireland, with the support of French NGOs, while a third case (*La Quadrature du Net and Others v. European Commission*, T-738/16), another action for annulment, was brought by the same French NGOs. In both cases, the General Court rendered its judgement after the Court of justice ruling in *Schrems 2* (the fourth case), stating that there was no longer any need to adjudicate on their actions, as the Commission adequacy decision on the Privacy Shield had already been invalidated.

The most striking feature of the 2015-2020 period was the greatest propensity to litigate, which can easily be explained by the fact that Max Schrems' success against the Safe Harbour foreshadowed another possible success against the Privacy Shield.

Similarly, the *Schrems 2* ruling has confirmed that the CJEU is serious about protecting the individual rights of the European citizens, which comforted the position of the privacy

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[35] Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* EU:C:2003:294.
[36] Case C-131/12 *Google Spain* EU:C:2014:317.
[37] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238.
[38] See also: Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* EU:C:2008:727; Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662.
[39] Case C-498/16 *Schrems v Facebook Ireland* EU:C:2018:37; Case T 670/16 *Digital Rights Ireland Ltd v. European Commission – Order of the General Court (Second chamber)* EU:T:2017:838; Case T-738/16 *La Quadrature du Net v Commission* EU:T:2020:638; Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems* EU:C:2019:1145.
[40] Case T-670/16 *Digital Rights Ireland Ltd. v European Commission* EU:T:2017:838.

NGOs and their willingness to litigate in this field. On 6 September 2023, Philippe Latombe, a member of the French Parliament and a member of the CNIL, the French DPA, submitted two challenges to the General Court in order to first, suspend the agreement and second, declare it invalid. The first one -an application for interim relief (T-553/23 R) was dismissed by the General Court, finding that Mr Latombe did not prove the urgency of the measures requested: he did not demonstrate that the DPF would cause him personal and irreparable harm. We are now waiting for the second ruling on the annulment action (T-553/23). On the other hand, NOYB, the NGO of which Max Schrems is the honorary chairman, has also announced an intention to challenge the DPF but is waiting for the General Court's judgement.

4 CONTEXT AND LEGITIMACY

Sociological institutionalism holds that a 'logic of appropriateness' guides the behaviour of actors. This can be applied to both public interest groups and courts. The former claim to defend the interests of citizens whose privacy is threatened by corporations and US authorities. The latter may be more inclined to issue activist rulings when the protection of fundamental rights is at stake. Perceptions of what is appropriate may change over time. It results from the interaction between the social context and actors: actors tend to shape the way appropriateness is perceived by their environment (interest groups advocating privacy to a large audience), but the context also shapes actors' perceptions.

The same branch of new institutionalism also argues that actors need legitimacy to justify their existence and to survive. Again, this could be said of privacy groups (who seek the support of the wider public) but also of courts, and the CJEU in particular. It can be argued that the CJEU, more than national courts, needs legitimacy to support its judgements, precisely because it is a supranational court.[41]

4.1 CONTEXT: PRIVACY BECOMING A SALIENT ISSUE

The assumption here is that **the more salient the issue raised by the litigants, the more likely the success of the litigation strategy.** The salience of privacy issues increased enormously in 2013 with the revelations made by Edward Snowden about the extent of the global internet surveillance by the NSA and other agencies. As a result, the political context changed dramatically, a few months before the Court rendered its decision in *Schrems 1*. Whereas until 2013 the privacy debate had mainly focused on the activities of tech companies such as Google and Facebook, Snowden's revelations shifted the focus to the intelligence activities of US authorities, and how they used the data collected by digital companies.

Unsurprisingly, in the context of the Snowden revelations, the number of CJEU rulings dealing with data protection has increased, resulting in a landmark ruling granting a kind of 'right to be forgotten' (C-131/12),[42] but even more so at three landmark rulings limiting the surveillance activities of public authorities. The first one annulled the EU's Data Retention

[41] Mark A Pollack, 'The Legitimacy of the European Court of Justice' in Nienke Grossman et al (eds), *Legitimacy and International Courts* (Cambridge University Press 2018).
[42] *Google Spain* (n 36). Later on, however, another CJEU decision has somehow limited the scope of the right to be forgotten, Case C-507/17 *Google v CNIL* EU:C:2019:772.

Directive (C-293/12 & C-594/12),[43] while the second one, targeting mass surveillance at national level, declared the imposition of general and indiscriminate data retention obligations on providers of electronic communications services is a breach of EU law (C-203/15 and C 698/15).[44] The third is the CJEU ruling in *Schrems 1*.

Clearly, Snowden's revelations have made the issue of EU-US data transfer more salient. Although it may be difficult to prove causality (direct influence of the context on the position of the European judges'), the existence of a correlation between a specific context pointing to the threat posed by mass surveillance programmes and the decision in *Schrems 1* is indeed significant. The Court of Justice does not refer directly to Edward Snowden in *Schrems 1*, it mentions, in the section presenting the dispute in the main proceedings, that Max Schrems referred to Snowden's revelations in support of his complaint. The Court also recalls the way in which the High Court of Ireland, which made a reference to the Court of Justice for a preliminary ruling, approached the issue of surveillance in this context, as serving 'necessary and indispensable objectives in the public interest' but also demonstrating 'significant over-reach on the part of the NSA and other federal agencies'.

A quick look at the media articles published by major newspapers from different countries should at least show that the media coverage of the issue tended to present mass surveillance in a negative way, which the judges could not ignore if they read morning newspapers, as Blauberger et al. argued in 2020[45]. In the years before the judgement in Schrems 1 (2013-2015), we found 237 references to Snowden in the Frankfurter Allegemeine Zeitung, 929 in Le Monde, 269 in Corriere Della Serra. And we found 81 occurrences of the Safe Harbour in the Frankfurter Allegemeine Zeitung, 39 in Le Monde, and only 7 in Corriere Della Serra.

In 2020, when the Court issued its second *Schrems* ruling, it could be argued that the salience of the issue was somewhat lower, as we are seven years on from Edward Snowden's revelations. However, other contextual factors have contributed to making the issue of surveillance just as salient as it was in 2015. Indeed, it has become clear when *Schrems 2* is issued by the Court, that Russia or private players such as Cambridge Analytica pose a major threat to privacy, and beyond that to our democratic societies, by interfering in electoral processes. As a reminder, Cambridge Analytica is a British company that specialises in psychographic profiling and collecting data from social networks to predict electoral behaviour. In short, Cambridge Analytica harvested data from Facebook users, without permission, to build a programme capable of predicting and influencing the choices of American voters. The story was brought to light in March 2018 by The New York Times and The Observer, a sister publication of The Guardian. Although it was mainly about the US election – and Cambridge Analytica's influence on right-wing parties – Europe was also directly affected, in particular with the potential impact on Brexit.

In this context, it is not surprising that the Privacy Shield remained a controversial topic in the media, and even more since the election of Donald Trump as US president in November 2016, who has governed in a way that has undermined the principles of liberal democracy, including privacy.

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[43] Digital Rights Ireland (n 37).
[44] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB/ Watson* EU:C:2016:970.
[45] Michael Blauberger et al, 'ECJ judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence' (2020) 25(10) Journal of European Public Policy 1422.

In the years leading up to the *Schrems 2* judgment (2018-2020), we found 685 references to Cambridge Analytica in the Frankfurter Allegemeine Zeitung, 275 in Le Monde and 216 in Corriere Della Serra. And we found we found 59 occurrences of the Privacy Shield in the Frankfurter Allegemeine Zeitung, 14 in Le Monde and only 3 in Corriere Della Serra. Media coverage of the Privacy Shield and the *Schrems* case may vary from country to country and from newspaper to newspaper. However, the salience of surveillance issues remained high in the run-up to the *Schrems 2* ruling.

4.2 LEGITIMACY: THE CJEU IN SEARCH OF SUPPORT

We argue in this section that the Court defends privacy groups because it needs legitimacy. This is based on the assumption that **the more litigants match the Court's willingness to gain legitimacy, the more likely the success of the litigation strategy.**

Arguably, legitimacy can be seen in different ways. One could argue that the CJEU is primarily interested in legitimacy with respect to the EU legislator, Member State governments and national courts (Lenaerts 2013). This would support the idea that the Court should have upheld the EU-US arrangements, as they were the result of a large consensus between the Commission and the Member States. Indeed, many Member States intervened in the various cases relating to Safe Harbour and Privacy Shield, always in support of the Commission and its adequacy decisions.

Rather, our argument here is that the CJEU is seeking legitimacy from the public at large. In order to gain support and legitimacy from the public, the Court needs to present itself as a defender of the citizens and their individual rights.[46] While Hermansen, Pavone and Boulaziz, concede that 'broadcasting judicial policymaking in salient policy areas like individual rights risks attracting intergovernmental *backlash*', they also argue that 'What tends to distinguish effective from ineffective ICs is their capacity to cultivate support networks in society that render them less dependent on intergovernmental support'.[47]

It is difficult to prove that it was actually the case in the data transfer rulings. The principle of secrecy that governs the work of the CJEU makes it difficult to uncover the intentions of the judges. The mere fact that both the judgements and Opinions of the Advocate Generals in *Schrems 1* and *Schrems 2* were the subject of press releases[48] could show that the Court wanted to reach a wide audience, but most landmark rulings are publicized in this way. A content analysis of both the Court's rulings and the Opinions of Advocate Generals, shows a clear focus on the citizen's rights. In the Opinion of the Advocate General Bot in *Schrems 1*, delivered on 23 September 2015, the word 'citizen' has 30 occurrences, while it appears 6 times in the Court's ruling. Similarly, we found 11 references to the citizens in the Opinion of Advocate General Saugmandsgaard Øe in *Schrems 2*, delivered on 19 December 2019, and 8 in the ruling itself. A proper legal analysis of the judgments confirms that the Court takes data protection seriously, but this may simply be because the

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[46] Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).
[47] Silje Hermansen, Tommaso Pavone, and Louisa Boulaziz, 'Leveling and Spotlighting: How the European Court of Justice Favors the Weak to Promote its Legitimacy' (*APSA Preprints*, 09 April 2024) <https://preprints.apsanet.org/engage/apsa/article-details/6614579d91aefa6ce12324d9> accessed 20 December 2024.
[48] For *Schrems 1*, see: Press Release N°117/15. For *Schrems 2*: Press Release N°165/19 and Press Release N°91/20.

arguments put forward by the applicant were strong (see our second hypothesis) in a context where the developments in primary law (European Charter of Fundamental Rights became legally binding in 2009) made them even stronger.

Although no definitive proof can be provided, it is not unlikely that the Court of Justice rulings have responded to public concerns. In 2015, special Eurobarometer 431[49] showed that the public feels their privacy is under threat. 69% of respondents said they were worried that authorities and private companies holding information about them might sometimes use it for a different purpose than the one it was collected for. The level of trust in the way national public authorities manage their citizens' data is quite low, with only 31% saying they are confident. And for 89% of respondents, it is important to have the same rights and protection over their personal data regardless of the country in which the authority or private company offering the service is established. There seems to be continuity in the perception of the public opinions, as the results of Eurobarometer 431 are quite similar to those of Eurobarometer 359,[50] the previous Eurobarometer dedicated to data protection and privacy issues.

While the jurisprudence of the Court correlates with the perceptions of the public opinions in the EU, this does not prove causality. It may or may not be a sign that the Court is actively seeking legitimacy in the public. But what is clear from the judgments that have been handed down is that the Court is not particularly seeking the legitimacy of governments in the area under scrutiny. If we consider that every court needs legitimacy, the legitimacy that the CJEU is seeking in the *Schrems* judgments is that of citizens in general.

5 CONCLUSION

In this article, we seek to explain the success of the litigation strategies pursued by public interest groups in the field of data transfer from the EU to the USA by five main elements derived from rational choice institutionalism (actors and instruments), historical institutionalism (processes) and sociological institutionalism (context and legitimacy).

In the *Schrems* cases, we argue that litigation has taken an important place in the strategies developed by these actors, as evidenced mainly by the number of public interest groups involved in litigation and the legal expertise they mobilise. In terms of instruments, we conclude from a legal analysis that NGOs developed strong legal arguments based on hard law, to which the Commission has mainly countered with political commitments, at best soft law, on the part of the American authorities. The section on processes showed that a path dependency phenomenon is clearly visible, with: 1) the case-law of the CJEU prior to *Schrems 1* raising expectations about an invalidation of the Safe Harbour; 2) the *Schrems 1* ruling triggering several new cases leading to the invalidation of the Privacy Shield; 3) the outcome of *Schrems 2* leading to challenges to the Data Privacy Framework. Finally, the context may be playing out in two directions. The salience of privacy issues has increased tremendously in 2013 with the revelations made by Edward Snowden, at a time when the CJEU issued its decision in *Schrems 1*, and it remained quite high a few years later, when the Privacy Shield was invalidated. This may have influenced the Court. Similarly, the search for

[49] <https://data.europa.eu/data/datasets/s2075_83_1_431_eng?locale=en> accessed 9 October 2024.
[50] <https://data.europa.eu/data/datasets/s864_74_3_ebs359?locale=en> accessed 9 October 2024.

legitimacy in the public can be seen as a reason why the Court favoured a pro-privacy jurisprudence. However, both contextual elements are difficult to demonstrate.

While it is debatable whether the presence of all five elements is a necessary condition for success, we argue that litigation success is very likely when all five elements are present. The balance between the different elements may vary. For example, the context weighs more heavily for *Schrems 1* than for *Schrems 2*, but on the other hand processes weigh more heavily for *Schrems 2* than *Schrems 1*. But in both cases, the five elements of our model were present, which increased the likeliness of litigation successes.

It remains to be seen how these factors will combine in relation with the new Data Privacy Framework adopted in July 2023. As mentioned above, a member of the French Parliament filed two actions with the General Court, first to suspend the agreement and second to declare it invalid. While the General Court rejected the first request, we are awaiting its judgement on the second, knowing that the privacy interest groups, in particular NOYB, are ready to fight a legal battle.

Annex 1: List of NGOs that have taken a stance in favour of privacy in the *Schrems* cases.

Denomination	Location	Hyperlink
Access Now	New York, USA (2009)	https://www.accessnow.org/
Advocacy for Principled Action in Government	USA	No website available
AKVorrat		https://listen.akvorrat.org/mailman/listinfo/akv-international
American Civil Liberties Union (ACLU)	New York City, USA (1920)	https://www.aclu.org/
American-Arab Anti-Discrimination Committee (ADC)	Washington D.C., USA (1980)	http://www.adc.org/
Amnesty International USA	New York, USA (1977)	https://www.amnestyusa.org/
Association for Technology and Internet (APTI)	Romania	https://www.apti.ro/
Belgian League of Human Rights	Brussels, Belgium (1901)	https://www.liguedh.be/
Bill of Rights Defense Committee	Washington DC, USA (1960)	https://www.rightsanddissent.org/
Bits of Freedom (Bof)	Amsterdam, Netherlands (2000)	https://www.bof.nl/
Bulgarian Helsinki Committee (BHC)	Sofia, Bulgaria (1992)	https://www.bghelsinki.org/en/
Center for Digital Democracy (CDD)	Washington, DC (2001)	https://www.democraticmedia.org/
Centre for Peace Studies	Zagreb, Croatia (1997)	https://www.cms.hr/en
Chaos Computer Club Vienna (c3w)	Vienna, Austria	http://www.ccc.de/
Code Red		https://www.codered.org/
Constitutional Alliance	USA (2008)	http://constitutionalalliance.org/

Consumentenbond	The Hague, Netherlands (1953)	https://www.consumentenbond.nl/
Consumer Action	San Francisco, California, USA (1971)	https://www.consumer-action.org/
Consumer Federation of America	Washington D.C., USA (1963)	https://consumerfed.org/
Consumer Watchdog	Santa Monica, USA (1985)	http://www.consumerwatchdog.org/
Cyber Privacy Project (CPP)	Skopje, North Macedonia	cyberprivacyproject.org/
Defending Rights & Dissent (prior: Defending Dissent/Bill of Rights Defense Committee)	Washington D.C., USA (1960)	https://rightsanddissent.org/
Digitalcourage	Germany	https://digitalcourage.de/
Digital Rights Ireland	Kilkenny, Ireland	https://www.digitalrights.ie/
Digitale Gesellschaft e.V.	Berlin, Germany (2010)	https://digitalegesellschaft.de/
Electronic Frontier Finland (EFFi)	Helsinki, Finland (2001)	https://effi.org/
Electronic Frontier Foundation (EFF)	San Francisco, USA (1990)	https://www.eff.org/
Electronic Privacy Information Center (EPIC)	Washington D.C., USA (1994)	https://www.epic.org/
Epicenter.Works (prior: AKVorrat)	Vienna, Austria (2010)	https://epicenter.works/
European Association for the Defense of Human Rights (AEDH)	Brussels, Belgium (2000)	http://www.aedh.eu/en/

European Consumer Organisation (BEUC)	Brussels, Belgium (1962)	http://www.beuc.eu/
European Digital Rights (EDRi)	Brussels, Belgium (2002)	https://edri.org/
European Digital Rights Ireland	Kilkenny, Ireland	https://www.digitalrights.ie/
Electronic Frontier Foundation (EFF)	San Francisco, California (1990)	https://www.eff.org/
Fédération des Fournisseurs d'Accès à Internet Associatifs	France (2011)	https://ffdn.org/
Fight for the Future	Worcester, Massachusetts, US (2011)	https://www.fightforthefuture.org/
Forbrukerrådet (Consumer Council of Norway)	Norway	https://www.forbrukerradet.no/
Free Legal Advice Centers (FLAC)	Dublin, Ireland (2006)	https://www.flac.ie/index.html
French League of Human Rights	Paris, France (1898)	https://www.ldh-france.org/
French Data Framework	Paris, France (1992)	https://www.fdn.fr/
Friends of Privacy (USA)	Jackson, New Jersey, USA (1980)	http://www.af-ye.org/privacy-policy
Gesellschaft für Freiheitsrechte (GFF)	Berlin, Germany (2015)	https://freiheitsrechte.org/
Government Accountability Project	Washington, DC, USA (1977)	https://whistleblower.org/
Human Rights Watch	New York City, USA (1978)	https://www.hrw.org/de
Hungarian Civil Liberties Union (HCLU)	Budapest, Hungary (1994)	https://tasz.hu/en

Initiative fur Netzfreiheit	Vienna, Austria (2015)	https://igf-austria.at/initiativenetzfreiheit/
International Association of Privacy Professionals (IAPP)	Portsmouth, USA (Global Headquarters) and Brussels, Belgium (European Office) (2000)	https://iapp.org/
Irish Council for Civil Liberties	Dublin, Ireland (1976)	https://www.iccl.ie/
IT-Political Association of Denmark (IT-Pol)	Frederiksberg, Denmark (2002)	https://itpol.dk/presentation-of-it-pol
Italian Coalition for Civil Liberties (CILD)	Rome, Italy (2014)	https://cild.eu/en/
La Quadrature du Net (LQDN)	Paris, France (2008)	https://www.laquadrature.net/
Liberty	London, England (1934)	https://www.libertyhumanrights.org.uk/
Ligue des Droits de l'Homme (France) (LDH)	Paris, France (1989)	https://www.ldh-france.org/missions-de-la-ldh/
Netzpolitik	Berlin, Germany (2002)	https://netzpolitik.org/
Norwegian Consumer Council	Oslo, Norway (1953)	https://www.forbrukerradet.no/kontakt-oss
NOYB - European Center for Digital Rights ('Non Of Your Business')	Vienna, Austria (2017)	https://noyb.eu/?lang=de
Open Rights Group	London, England (2005)	https://www.openrightsgroup.org/
Panoptykon Foundation	Warsaw, Poland (2009)	https://en.panoptykon.org/

Patient Privacy Rights	Austin, Texas, USA	https://patientprivacyrights.org/
Pistaljka	Belgrade, Serbia (2010)	https://pistaljka.rs/
Privacy International (PI)	London, United Kingdom (1990)	https://www.privacyinternational.org/
Privacy Rights Clearinghouse	San Diego, California, US 1992)	https://www.privacyrights.org/
Privacy Times	USA (1981)	http://www.privacytimes.com/
Protect (Public Concern at Work)	London, England (1993)	https://protect-advice.org.uk/
Public Citizen	Washington, D.C., and Austin, Texas US (1971)	https://www.citizen.org/
Restore the Fourth	Belmont, Massachusetts, US (2013)	https://restorethe4th.com/
Transatlantic Consumer Dialogue (TACD)	London, United Kingdom (1998)	http://tacd.org/
UFC Que Choisir	Paris, France (1951)	https://www.quechoisir.org/
Verein für Konsumenteninformation (VKI)	Vienna, Austria (1961)	https://vki.at/
Vrijscrift	Workum, The Netherlands (1998)	https://vrijschrift.org/

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