GUARDIANS OF DIGITAL RIGHTS: EXPLORING STRATEGIC LITIGATION ON DATA PROTECTION AND CONTENT MODERATION IN THE EU

VALENTINA GOLUNOVA* & SARAH TAS†

Civil society actors play an increasingly prominent role in the protection of digital rights in the EU. Strategic litigation against Big Tech companies is one of the crucial means of furthering their objectives. This article seeks to critically analyse and compare strategic litigation efforts against tech companies with respect to data protection and content moderation. It argues that while the recourse to judicial action by civil society actors varies significantly in different areas of EU digital policy, the recent evolution of the EU regulatory framework on digital services and representative actions is expected to facilitate both strategic litigation and non-judicial means of advocating digital rights. The article begins by emphasising the importance of strategic litigation in fostering accountability of Big Tech. It then examines the legal framework and examples of strategic lawsuits concerning two key practices affecting the exercise of fundamental rights in the digital domain: personal data processing and content moderation. While the article highlights a steadily growing number of data protection cases brought by civil society actors, it also underscores the scarcity of legal actions challenging inadequate or disproportionate moderation practices. Having established this discrepancy, the paper proceeds to explore possible reasons for it by drawing on the literature on legal mobilisation. In doing so, it considers both legal and political opportunities underpinning strategic litigation efforts of civil society actors. In conclusion, the paper reflects on the prospects of strategic litigation of digital rights in the EU.

1 INTRODUCTION

The advent of Big Tech has considerably challenged the exercise of fundamental rights in the digital realm. The large-scale collection and processing of personal data by powerful tech firms threatens the rights to privacy and data protection.[1] Moreover, a wide range of fundamental rights is affected by content moderation on online platforms.[2] It is therefore critical to counter

* Assistant Professor of Digital Democracy, Department of Public Law, Maastricht University.
† Assistant Professor of European and Comparative Administrative Law, Department of Public Law, Maastricht University. The authors are grateful to Elaine Fahey and the anonymous reviewer for their helpful comments. Additionally, the authors would like to thank all the participants of the EUFutures Research Network Workshop (Sciences Po Grenoble-UGA, 2 May 2024) and the Digital Legal Talks conference (Utrecht, 28 – 29 November 2024), for their stimulating questions and remarks.

[1] Rikke Frank Jørgensen and Tariq Desai, 'Right to Privacy Meets Online Platforms: Exploring Privacy Complaints against Facebook and Google' (2017) 35(2) Nordic Journal of Human Rights 106.

[2] Valentina Golunova and Eline Labey, 'Judges of Online Legality: Towards Effective User Redress in the Digital Environment' in Philip Czech et al (eds), *European Yearbook on Human Rights 2022* (Intersentia 2022) 105–106.

harmful practices of Big Tech companies and establish effective mechanisms to ensure their accountability.

The EU is a frontrunner in shaping digital policy. In 2016, the General Data Protection Regulation (GDPR) – one of the most thorough and robust data protection frameworks in the world – was adopted.[3] It both granted EU citizens extensive rights over their personal data as well as elevated global standards for data privacy.[4] In 2022, the EU adopted the Digital Services Act (DSA) as part of the legislative package aimed at creating a safer digital space.[5] It has introduced uniform procedural rules on content moderation to ensure adequate transparency and accountability of providers of intermediary services. However, there are vigorous debates on how to ensure that the rapidly growing body of EU legislation meaningfully protects individuals from the intrusive impact of Big Tech on their fundamental rights. Against this backdrop, civil society actors, such as NGOs, consumer associations, and individual activists, play an important role in advancing the interests of EU citizens. In addition to their policy and advocacy work, some of these actors engage in strategic litigation – a special form of legal mobilisation which implies the use of judicial action to create legal, political or social change beyond the individual case – with the view to protect fundamental rights affected by tech companies.[6]

There is a steadily growing academic interest in strategic litigation in the field of digital rights.[7] However, most existing research focuses on data protection.[8] Scholars primarily address the opportunities and challenges of the bottom-up enforcement of the GDPR, noting how civil

[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 (General Data Protection Regulation) [2016] OJ L119/1 ('GDPR').

[4] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[5] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1 ('DSA').

[6] Kris van der Pas, 'Conceptualising Strategic Litigation' (2021) 11 Oñati Socio-Legal Series 116, 130; Pola Cebulak, Marta Morvillo, and Stefan Salomon, 'Strategic Litigation in EU Law: Who Does It Empower?' [2024] Jean Monnet Working Paper 2/24 9–10 <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02_Pola-Cebulak-Marta-Morvillo-Stefan-Salomon.pdf> accessed 20 December 2024.

[7] See, among others, Quirine Eijkman, 'Indiscriminate Bulk Data Interception and Group Privacy: Do Human Rights Organisations Retaliate Through Strategic Litigation?' in Linnet Taylor, Luciano Floridi, and Bart van der Sloot (eds), *Group Privacy: New Challenges of Data Technologies* (Springer International Publishing 2017); Dennis Redeker, 'Towards a European Constitution for the Internet? Comparative Institutionalization and Mobilization in European and Transnational Digital Constitutionalism' (*GigaNet Annual Symposium,* 2019) <https://www.giga-net.org/2019symposiumPapers/22_Redeker_Towards-a-European_Constitution.pdf> accessed 20 December 2024; Vera Strobel, 'Strategic Litigation and International Internet Law' in Angelo Jr Golia, Matthias C Kettemann, and Raffaela Kunz (eds), *Digital Transformations in Public International Law* (Nomos Verlagsgesellschaft mbH & Co KG 2022).

[8] See, for instance, Laima Jančiūtė, 'Data Protection and the Construction of Collective Redress in Europe: Exploring Challenges and Opportunities' (2019) 9(1) International Data Privacy Law 2; Federica Casarosa, 'Transnational Collective Actions for Cross-Border Data Protection Violations' (2020) 9(3) Internet Policy Review 1; Valentina Golunova and Mariolina Eliantonio, 'Civil Society Actors as Enforcers of the GDPR: What Role for the CJEU?' (2024) 15 Journal of Intellectual Property, Information Technology and E-Commerce Law 182.

society actors seek to resist the unlawful processing of personal data by Big Tech companies.[9] Meanwhile, the analysis of legal mobilisation efforts seeking to counter other contentious practices, such as inadequate or disproportionate content moderation, is severely limited. Consequently, it remains unclear how strategic litigation varies across different areas of the EU digital rulebook and what factors either facilitate or undercut it.

The key objective of this article is to compare the litigation efforts of European civil society actors with regard to data protection and content moderation. As a starting point, it highlights the crucial role of strategic litigation in the protection of digital rights (Section 2). Then, the article analyses litigation efforts of civil society actors with respect to the protection of personal data (Section 3) and content moderation on online platforms (Section 4). In doing so, it considers the legal framework enabling civil society to bring cases before courts and provides an overview of the court cases initiated by civil society actors. Having established the stark disparity in the intensity of strategic litigation, the article proceeds to examine the possible legal and political reasons behind this disparity by leveraging the interdisciplinary scholarship on legal mobilisation (Section 5). Finally, it explores the opportunities and challenges for future litigation efforts in both areas of EU digital law (Section 6).

2 CIVIL SOCIETY ACTORS AS LITIGANTS OF DIGITAL RIGHTS IN THE EU

Strategic litigation is widely seen as a crucial tool for protecting fundamental rights in areas such as migration, environmental protection, and anti-discrimination.[10] There is also a growing consensus that by engaging with courts, civil society actors can make an equally important contribution to the protection of digital rights.[11]

Most importantly, strategic litigation can help shape the legal framework governing the EU's digital economy. The Court of Justice of the EU (CJEU) as well as domestic courts of Member States play a vital role in ensuring a coherent interpretation and application of the newly introduced rules aimed at reining in Big Tech firms. By bringing legal actions, civil society actors can expose potential conflicts between legal norms or gaps in legal protection and encourage

[9] Orla Lynskey, 'The Role of Collective Actors in the Enforcement of the Right to Data Protection under EU Law' in Elise Muir et al (eds), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum* (EUI Working Papers 2017/17) <https://cadmus.eui.eu/bitstream/handle/1814/49324/LAW_2017_17.pdf?sequence=3&isAllowed=y> accessed 20 December 2024; Woojeong Jang and Abraham L Newman, 'Enforcing European Privacy Regulations from Below: Transnational Fire Alarms and the General Data Protection Regulation' (2022) 60(2) Journal of Common Market Studies 283; Inbar Mizarhi-Borohovich, Abraham Newman, and Ido Sivan-Sevilla, 'The Civic Transformation of Data Privacy Implementation in Europe' (2023) 47(3) West European Politics 671.

[10] See, among others, Lisa Vanhala, 'Anti-Discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics' (2009) 16(5) Journal of European Public Policy 738; Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the *Sharma*, *Neubauer*, and *Shell* Cases' (2021) 22(8) German Law Journal 1484; Annick Pijnenburg and Kris van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route' (2022) 24(3) European Journal of Migration and Law 401.

[11] Strobel (n 7) 263–265; Rohan Grover, 'The Geopolitics of Digital Rights Activism: Evaluating Civil Society's Role in the Promises of Multistakeholder Internet Governance' (2022) 46(10) Telecommunications Policy 1, 2–3.

courts to address these issues in a consumer-friendly manner. In this regard, Strobel rightly notes strategic lawsuits help promote 'a liberal, individual right's centred understanding of internet governance'.[12] Similarly, Teubner and Golia see strategic litigation as one of the instruments for digital constitutionalism, which is understood as a set of public law principles and values adapted to regulate private tech companies.[13] Therefore, judicial actions initiated by civil society can contribute to a more comprehensive protection of fundamental rights in the digital domain.

By launching strategic lawsuits, civil society actors can also alleviate the power asymmetry between powerful, globally operating tech firms and their users. Affected individuals are often either unable or hesitant to seek redress for violations of their rights due to numerous barriers to access to justice.[14] For instance, individuals may be unaware of their rights under EU law, lack access to free or affordable legal representation, or simply believe that judicial action is futile due to an imbalance in power and resources. Having advanced legal skills and mobilisation capacity, civil society actors can face tech firms in courts and demand relief on behalf of victims.[15] Moreover, since harms to digital rights are often collective in nature, civil society actors can consolidate all claims into one single action without having to prove each individual violation, thereby aiming to achieve broader legal change.[16]

Finally, strategic litigation can support the work of administrative authorities tasked with the enforcement of EU legislation targeting the conduct of tech companies. The EU institutions and domestic authorities of Member States are not always able to exercise effective top-down oversight due to inadequate funding or staffing.[17] By turning to courts as the ultimate guarantors of fundamental rights, civil society actors can remedy gaps in the enforcement of the EU legal framework and further one of its key objectives: to ensure the accountability of Big Tech.

Despite the importance of strategic litigation of digital rights, civil society actors continue to face various procedural, organisational, and financial obstacles when confronting Big Tech companies in courts.[18] Furthermore, it remains uncertain whether such actors are equally eager

---

[12] Strobel (n 7) 280.

[13] Gunther Teubner and Angelo Jr Golia, 'Societal Constitutionalism in the Digital World: An Introduction' (2023) 30(2) Indiana Journal of Global Legal Studies 1, 11.

[14] Naomi Appelman et al, 'Access to Digital Justice: In Search of an Effective Remedy for Removing Unlawful Online Content' in Xandra Kramer et al (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar Publishing 2022); Cesar Manso Sayao, 'Access to Justice in Data Protection: The More Things Change, the More They (Seem to Continue to) Stay the Same' (*Digital Freedom Fund*, 25 May 2023) <https://digitalfreedomfund.org/access-to-justice-in-data-protection-the-more-things-change-the-more-they-seem-to-continue-to-stay-the-same/4/> accessed 20 December 2024.

[15] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 9) 677.

[16] Anna van Duin et al, 'Immateriële schadevergoeding in collectieve acties onder de AVG: terug naar de kern' (2024) 6 Nederlands Tijdschrift voor Burgerlijk Recht 136.

[17] Johnny Ryan and Alan Toner, 'Europe's Enforcement Paralysis (2021 GDPR Report): ICCL's Report on the Enforcement Capacity of Data Protection Authorities' (Irish Council for Civil Liberties 2021) <https://www.iccl.ie/wp-content/uploads/2021/09/Europes-enforcement-paralysis-2021-ICCL-report-on-GDPR-enforcement.pdf> accessed 20 December 2024; Julian Jaursch, 'The DSA Draft: Ambitious Rules, Weak Enforcement Mechanisms' (Stiftung Neue Verantwortung 2021) <https://www.stiftung-nv.de/sites/default/files/snv_dsa_oversight.pdf> accessed 20 December 2024.

[18] Heiko Richter, Marlene Straub, and Erik Tuchtfeld (eds), 'To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package' [2021] Max Planck Institute for Innovation and Competition Research Paper No. 21-25 59

to pursue legal action to counter different types of problematic conduct of tech firms. The following sections analyse strategic litigation efforts aimed at challenging the unlawful processing of personal data and inappropriate moderation of content on online platforms.

3 STRATEGIC LITIGATION ON DATA PROTECTION

Civil society actors are argued to serve as the bottom-up 'enforcers of the GDPR'.[19] In fulfilling this role, they not only aid national data protection authorities ('DPAs') but also regularly initiate judicial action to address infringements of data protection rules. This section examines strategic litigation targeting data-driven practices of tech firms which infringe the GDPR. By exploring the legal framework enabling civil society actors to bring representative actions with or without the data subjects' mandate (3.1), as well as analysing court cases involving these actors (3.2), it establishes the steady growth of strategic lawsuits which contribute to strengthening the protection of personal data in the EU.

3.1 LEGAL FRAMEWORK

Before the adoption of the GDPR, there was no EU-wide legal mechanism enabling civil society actors to bring lawsuits concerning the unlawful processing of personal data. The Data Protection Directive ('DPD') – the GDPR's predecessor adopted in 1995 – only enabled associations representing data subjects to lodge claims with supervisory authorities.[20] The right to bring judicial actions in the public interest was, however, entirely dependent on national law of Member States, which led to disparity within the EU. France and Italy, for example, allowed certain organisations, such as consumer associations, to bring collective interest claims before courts, whereas Hungary did not.[21]

With the adoption of the GDPR in 2016 came the harmonised legal rules on representative actions before courts. Article 80 GDPR enables data subjects to mandate a not-for-profit body, organisation or association to exercise the rights to lodge complaints with a supervisory authority (Article 77), bring legal proceedings before a competent judicial authority (Articles 78–79), or receive compensation (Article 82) on their behalf. For a not-for-profit body, organisation or association to be mandated by a data subject to bring a claim, it must comply with four criteria: (1) be not-for-profit; (2) be properly constituted in accordance with national law; (3) have statutory objectives in the public interest, and (4) be active in the field of data protection.[22]

<https://pure.mpg.de/rest/items/item_3345402_5/component/file_3345403/content> accessed 20 December 2024; '5 Years of the GDPR: National Authorities Let down European Legislator' (*noyb*, 23 May 2023) <https://noyb.eu/en/5-years-gdpr-national-authorities-let-down-european-legislator> accessed 20 December 2024.

[19] Golunova and Eliantonio (n 8).

[20] Article 28(4) of Directive 95/46/EC of the European Parliament and 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 [1996] OJ L281/31 ('DPD').

[21] Mariolina Eliantonio et al, 'Standing up for your right(s) in Europe: A Comparative study on Legal Standing (*Locus Standi*) before the EU and Member States' Courts' (EPRS Study 2012) 57–58.

[22] Article 80(1) GDPR.

The GDPR further clarifies that Member States may empower any body, organisation or association which fulfils the abovementioned criteria to initiate administrative or judicial proceedings without a data subject's mandate, except for claims for compensation.[23] In practice, only some Member States expressly provided for this possibility in their legislation. France, for example, secures the right of certain organisations to bring a class action (under certain conditions) where several individuals suffer harm from a similar breach of data protection law.[24] Germany also allows consumer organisations to bring collective actions in the interests of consumers in specific areas (such as advertising, market and opinion research, credit bureaux).[25] This frames the right to representation within a national and fragmented component, thus taking an opposite approach than the one adopted for consumer protection.[26] Thus, while the GDPR formally establishes a European right to collective action, it falls short of stipulating a right to a European class action.[27]

The Representative Actions Directive ('RAD') adopted in 2020 provides further opportunities for strategic litigation on data protection. This directive seeks to enhance the enforcement of collective interests of consumers by securing the right of qualified entities designated by the Member States to bring representative actions against traders infringing EU legislation (including the GDPR).[28] Notably, qualified entities may seek injunctive measures without being mandated by individual consumers.[29] However, Member States can choose between an opt-in and opt-out procedure when laying down rules on redress measures.[30] Hence, neither the GDPR nor the RAD fully tackles the fragmentation of domestic legal frameworks on representative actions.[31]

3.2 STRATEGIC LITIGATION IN PRACTICE

Civil society actors began to litigate in the field of data protection in the early 2010s. During that time, consumer associations were at the forefront of litigation. For example, the Federation of

[23] Article 80(2) GDPR.
[24] Article 37 of Loi n°78-17 of 6 January 1878 relative à l'informatique, aux fichiers et aux libertés, as modified by Ordonnance n°2018-1125 of 12 December 2018.
[25] §2 of Gestetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstössen (Unterlassungsklagengesetz – UklaG), 2001, modified in 2024.
[26] Gloria González Fuster, 'Article 80 Representation of data subjects' in Christophe Kuner, Lee A Bygrave, and Christopher Docksey (eds), *The EU General Data Protection Regulation (GDPR) – A Commentary* (Oxford University Press 2020) 1142–1152.
[27] Eduardo Ustaran and Christine Gateau, 'The General Data Protection Regulation timidly opens the doors to data class actions in Europe' (*Hogan Lovells*, 27 June 2018) <https://www.engage.hoganlovells.com/knowledgeservices/insights-and-analysis/the-general-data-protection-regulation-timidly-opens-the-doors-to-data-class-actions-in-europe> accessed 20 December 2024.
[28] Article 4 and Annex I, point 56 of 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 ('RAD'). See also Marina Federico, 'European Collective Redress and Data Protection: Challenges and Opportunities' [2023] Media Laws 17 <https://core.ac.uk/download/572634136.pdf> accessed 27 August 2024.
[29] Article 8(3) RAD.
[30] Article 9(2) RAD.
[31] Fernando Gascón Inchausti, 'A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November' (2021) 18(2) Zeitschrift für das Privatrecht der Europäischen Union 61.

German Consumer Organisations (Verbraucherzentrale Bundesverband e.V., the *vzbv*) sued Facebook for the misuse of personal data collected via the Friend Finder for advertising purposes before domestic courts in Germany. The Landgericht Berlin and the Kammergericht Berlin established the violation, which was then confirmed by the German Federal Court of Justice (BGH).[32] In France, early litigation efforts were spearheaded by the consumer rights group UFC-Que Choisir. In 2014, it sued Google, Twitter, and Facebook before the Tribunal de grande instance (TGI) de Paris (now the Tribunal judiciaire de Paris), claiming that these companies' terms and conditions violated data protection laws. Almost five years later, the TGI partially satisfied the plaintiff's claims, declaring several clauses incompatible with French and EU law.[33]

With the adoption of the GDPR, civil society-led litigation efforts increased significantly. While consumer associations continued to actively engage with courts,[34] other types of actors, such as human rights NGOs also started to get involved in data protection litigation.[35] Some of the most impactful cases were filed before Dutch courts. For instance, a significant strategic lawsuit was brought against Meta by the foundation Data Privacy Stichting in collaboration with the Dutch consumer rights organisations Consumentenbond. In March 2023, the Amsterdam District Court ruled that Facebook Ireland unlawfully processed personal data of its Dutch users.[36] The two organisations have also indicated their intention to institute new legal proceedings concerning Facebook's allegedly unlawful transfer of personal data of Dutch citizens to the US.[37] A historic success was also achieved by the NGO Worker Info Exchange, which, together with the App & Delivery Couriers Union, sued Uber and Ola in the Netherlands

[32] Landgericht Berlin, judgment of 6 March 2012, Az. 16 O 551/10; Kammergericht Berlin, judgment of 24 January 2014, Az. 5 U 42/12; Bundesgerichtshof, judgment of 14 January 2016, Az. I ZR 65/14.

[33] Tribunal de Grande Instance (TGI) de Paris, judgment of 12 February 2019, UFC-Que Choisir v Google; TGI de Paris, judgment of 7 August 2018, UFC-Que Choisir v Twitter; TGI de Paris, judgment of 9 April 2019, UFC-Que Choisir v Facebook. In 2023, the Paris Court of Appeal confirmed the TGI's judgment and ordered Twitter to pay 100,000 euros to UFC-Que Choisir. See Paris Court of Appeal, judgment of 4 May 2023, UFC-Que Choisir v Twitter Inc.

[34] See, for instance, Kammergericht Berlin, judgment of 8 April 2016, Bundesverband der Verbraucherzentralen and Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v WhatsApp Inc; Kammergericht Berlin, judgment of 6 November 2017, Facebook Ireland Ltd v Bundesverband der Verbraucherzentralen and Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.; Landgericht Berlin, judgment of 30 October 2023, Bundesverband der Verbraucherzentralen and Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v LinkedIn Ireland Unlimited Company; 'Action de Groupe Contre Google' (*UFC-Que Choisir*, 26 June 2019) <https://www.quechoisir.org/action-ufc-que-choisir-vie-privee-donnees-personnelles-action-de-groupe-contre-google-n68403/> accessed 20 December 2024.

[35] See, for example, 'The End of Private Communication? GFF Files Lawsuit against Facebook's Automated Scanning of Messenger Messages' (*GFF – Gesellschaft für Freiheitsrechte e.V.*, 20 July 2023) <https://freiheitsrechte.org/en/ueber-die-gff/presse/pressemitteilungen/pr_chatcontrol_facebook> accessed 20 December 2024; 'Action de groupe Internet Society France VS Facebook: Facebook s'estime au-dessus des lois' (*Internet Society France*, 26 March 2019) <https://www.isoc.fr/ebastille-mars-2019/> accessed 20 December 2024.

[36] Amsterdam District Court, judgment of 15 March 2023, C/13/683377 / HA ZA 20-468.

[37] Gerard Spierenburg, 'Consumentenbond en DPS winnen Facebookzaak' (*Consumentenbond*, 15 March 2023) <https://www.consumentenbond.nl/internet-privacy/consumentenbond-en-dps-winnen-baanbrekende-privacyzaak-tegen-facebook-en-starten-nieuwe-zaak> accessed 20 December 2024.

on behalf of drivers from the UK and one driver based in Portugal.[38] In 2021, the District Court of Amsterdam ordered the two companies to disclose data on driver surveillance systems.[39] In April 2023, the Court of Appeal in Amsterdam confirmed the judgment of the lower court, rejecting Uber's and Ola's arguments that the provision of the requested information would expose their trade secrets.[40] This case demonstrates that civil society managed to leverage the GDPR rules not only to counter the unlawful processing of personal data but also to advocate gig workers' rights. A number of compelling strategic data protection lawsuits have also been brought in other Member States, such as Belgium[41] and Portugal.[42]

Apart from initiating proceedings before national courts of Member States, civil society actors have also indirectly engaged with the CJEU. Admittedly, the CJEU has not been the main target of strategic litigation due to the stringent rules on the legal standing under Article 263 TFEU, making it next to impossible for NGOs to bring actions for annulment.[43] Some NGOs have managed, nevertheless, to indirectly mobilise the CJEU through preliminary reference procedures.[44] In addition, civil society actors played an increasing role as third party interveners or observers. To give an example, several French as well as European and international NGOs, including Article 19, Fondation pour la liberté de la presse, and Internet Freedom Foundation, participated in the French case involving Google and the French DPA concerning the territorial scope of the right to be forgotten.[45]

In sum, strategic litigation on data protection has become more dynamic and impactful throughout the years. However, in addition to bringing judicial actions, civil society actors also use other pathways to strengthen compliance with data protection rules by Big Tech companies. In this regard, the privacy group noyb started several projects, including a campaign on 'cookie banners' under which it filed 422 complaints against data protection authorities in the EU.[46] Additionally, civil society actors regularly bring complaints before DPAs.[47] Thus, civil society actors seek to use both judicial and non-judicial means of rights contestation to address data protection issues. At the same time, strategic litigation appears to be a crucial mechanism for upholding the protection of personal data. It allows for broader policy or legal changes and allow

[38] Giovanni Gaudio, 'Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?' (2024) 40(1) International Journal of Comparative Labour Law and Industrial Relations 91, 105–109.
[39] District Court of Amsterdam, judgments of 11 March 2021, C/13/687315 / HA RK 20-207, C/13/692003 / HA RK 20-302 and C/13/689705 / HA RK 20-258.
[40] Amsterdam Court of Appeal, judgments of 4 April 2023, 200.295.742/01, 200.295.747/01 and 200.295.806/01.
[41] Stichting Onderzoek Marktinformatie (SOMI), 'NGO Files Belgium TikTok Mass Claim' (*Stichting Onderzoek Marktinformatie (SOMI)*, 31 October 2024) <https://somi.nl> accessed 20 December 2024.
[42] 'Ius Omnibus v TikTok (<13)' (*Ius Omnibus*) < https://iusomnibus.eu/ius-omnibus-v-tiktok-under-13/ > accessed 20 December 2024; 'Ius Omnibus v TikTok (≥ 13)' (*Ius Omnibus*) <https://iusomnibus.eu/ius-omnibus-v-tiktok-over-13/> accessed 20 December 2024.
[43] Article 263 of the Treaty on the Functioning of the European Union [2012] OJ C326/47 ('TFEU').
[44] See, for instance, Case C-191/15 *Verein für Konsumenteninformation* EU:C:2016:612; Case C-319/20 *Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV* EU:C:2021:979; Case C-757/22 *Meta Platforms Ireland v Bundeserverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV* EU:C:2024:598.
[45] Case C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)* EU:C:2019:772.
[46] noyb, 'Cookie Banners' <https://noyb.eu/en/project/cookie-banners> last accessed 10 December 2024.
[47] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 9) 681–693.

civil societies to challenge the adequacy of general laws or decisions. Secondly, courts can award damages to individuals and offer an effective remedy against decisions taken by DPAs. Finally, court cases help draw public attention to systemic issues in the field of data protection.

4 STRATEGIC LITIGATION ON CONTENT MODERATION

As seen in Section 3, civil society actors actively engage in data protection litigation. However, the unlawful processing of personal data is just one of the many threats posed by the advent of Big Tech. Content moderation practices of online platforms also considerably threaten the rights and legitimate interests of their users. The failure to promptly detect and remove illegal content may, for instance, lead to violations of human dignity or the rights of the child. Conversely, the removal of legitimate content by online platforms can infringe on freedom of expression. This Section examines strategic litigation efforts on content moderation. In the similar vein, it first outlines the legal framework which provides civil society with access to courts (4.1) and then proceeds to review cases brought by civil society actors in different Member States of the EU (4.2).

4.1 LEGAL FRAMEWORK

The DSA builds upon the common EU legal framework governing the platform economy. The e-Commerce Directive, which was adopted in 2000, became the first regulatory instrument which addressed the provision of information society services.[48] However, the light-touch rules of the e-Commerce Directive, coupled with similar *laissez-faire* regulatory approaches taken in other jurisdictions, have allowed global online platforms to gain substantial economic and societal influence.[49] This concern inspired the EU to adopt a stricter approach to the regulation of information society services. As part of the Digital Single Market of 2015, the Commission undertook to propose further legislation enhancing the responsibility of online platforms while protecting fundamental rights.[50] This strategy resulted in the adoption of sector-specific legislation which introduced additional obligations for certain types of providers in relation to specific categories of content.[51] Notably, neither the e-Commerce Directive nor sector-specific legislation on digital services established any mechanism for representative actions by civil society actors. However, the (now repealed) Injunctions Directive enabled qualified entities to

[48] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.
[49] Giovanni De Gregorio, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society' (2018) 11 European Journal of Legal Studies 65, 71–77.
[50] Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM(2015) 192 final.
[51] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/19; Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L172/79.

bring actions for an injunction under the e-Commerce Directive before courts or administrative authorities of Member States.[52]

The adoption of the DSA has brought about compelling opportunities for strategic litigation. Although the DSA does not contain an equivalent of Article 80 GDPR, the right of qualified entities to bring judicial proceedings to protect collective interests of consumers against the infringements of the DSA is explicitly provided in the RAD.[53] In many Member States, the transposition of the RAD has necessitated a significant revision of pre-existing domestic law.[54] Hence, the new ambitious requirements introduced by the DSA, coupled with the harmonised rules on representative actions, provides fruitful soil for strategic litigation. At the same time, the DSA also provides other mechanisms allowing civil society actors to demand transparency and accountability of online platforms.[55] Article 53 DSA secures the right of any body, organisation or association mandated by the recipient of the service to bring complaints against providers of intermediary services before Digital Services Coordinators (DSCs) – national authorities tasked with the enforcement of the DSA – where the recipient in question is located or established.[56] Furthermore, recipients of intermediary services can mandate a legal person or a public body to exercise their rights via non-judicial redress mechanisms, such as notice and action mechanisms (Article 16), internal complaint-handling mechanisms (Article 20), and out-of-court dispute settlement bodies (Article 21).[57] Therefore, the DSA clearly acknowledges the crucial role of civil society actors in asserting the rights of users of online platforms.

4.2 STRATEGIC LITIGATION IN PRACTICE

Since content moderation on online platforms sparks a wide range of concerns for fundamental rights, national courts of Member States are increasingly faced with cases dealing with the shortcomings of moderation practices.[58] However, only few of these cases have been launched or supported by civil society actors. One of the most well-known strands of litigation concerned racist and anti-Semitic content on online platforms. The very first lawsuit in this regard was filed by two French NGOs – The Union of Jewish Students of France (URJF) and The International League Against Racism and Anti-Semitism (LICRA) – against the US corporation Yahoo! before the TGI of Paris in 2000. The plaintiffs alleged that Yahoo! allowed the sale of Nazi memorabilia

[52] Article 2 and Annex I of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 110/30.
[53] Annex I, point 68 RAD.
[54] Bahadir Yilmaz, 'Representative Actions Directive Tracker' (*Wolf Theiss*, 16 May 2024) <https://www.wolftheiss.com/insights/representative-actions-directive-tracker/> accessed 20 December 2024.
[55] Martin Husovec, 'Will the DSA work?' (*Verfassungsblog*, 9 November 2022) <https://verfassungsblog.de/dsa-money-effort/> accessed 20 December 2024; Niklas Eder, 'Making Systemic Risk Assessments Work: How the DSA Creates a Virtuous Loop to Address the Societal Harms of Content Moderation' (*SSRN*, 26 June 2023) 13–18 <https://papers.ssrn.com/abstract=4491365> accessed 20 December 2024.
[56] Article 53 DSA.
[57] Recital 149 DSA.
[58] See, for example, Federal Constitutional Court of Germany, decision of 22 May 2019, 1 BvQ 42/19 (Der Dritte Weg v Facebook Ireland Ltd); Amsterdam District Court, decision of 13 October 2020, Stichting Smart Exit, Stichting Viruswaarheid and Plaintiff sub 3 v Facebook; Tribunale di Roma, judgment of 5 December 2022, CasaPound v Mera Plarforms Ireland Ltd.

on its auction website in violation of Article R645-1 of the French Criminal Code, which prohibited the wearing or exhibiting of items resembling organisations or persons found guilty of crimes against humanity. In 2000, the TGI agreed with the URJF and LICRA and ordered Yahoo! to prevent access to auctions displaying Nazi items as well as preclude its users from accessing related content should it appear in Yahoo!'s search results.[59] The case caused significant transatlantic controversy as Yahoo! brought the proceedings before the US District Court for the Northern District of California, arguing that the judgment was incompatible with the First Amendment. While the court sided with Yahoo!, the US Court of Appeals for the Ninth Circuit eventually reversed this decision after finding that the district court had no personal jurisdiction over LICRA and EUJF.[60] Hence, the case was a resounding victory for European civil society.

After their early success, French NGOs continued to resort to courts to further their objectives. In 2013, the UEJF also won a case before the TGI of Paris against Twitter (now X), in which it sought to compel it to disclose the details of accounts which spread an anti-Semitic hashtag.[61] After that, six French NGOs, including URJF, LICRA, SOS Racisme, SOS Homophobie, J'acccuse, and the Movement Against Racism and for Friendship between Peoples (MRAP) initiated new legal proceedings against Twitter, aiming to urge it to share information about measures taken to combat hate speech on the basis of Articles 6-I.3 and 6-I.7 of the French Law for Trust in the Digital Economy. In July 2021, the Tribunal de Paris ordered Twitter to submit all the documents related to 'the material and human resources' used to combat illegal content as well as information concerning the handling of complaints filed by users.[62] The judgment was confirmed by the Paris Court of Appeal in January 2022.[63]

The litigation efforts of French NGOs have arguably inspired civil society-led judicial actions outside of France. In January 2023, digital rights NGOs HateAid and the European Union of Jewish Students (EUJS) filed a lawsuit before the Berlin regional court against Twitter, arguing that the platform had failed to remove antisemitic posts in violation of its own terms and conditions.[64] The lawsuit was motivated by the litigants' ambition to establish whether individuals and civil society actors can confront platforms in courts without showing direct and personal damage caused by the content in question.[65] In 2024, however, the lawsuit was

[59] TGI de Paris, judgment of 22 May 2000, UEJF and Licra v Yahoo! Inc and Yahoo France.
[60] *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme*, 145 F.Supp.2d 1168 (N.D. Cal., 2001); *Yahoo! Inc. v La Ligue Contre Le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).
[61] TGI de Paris, judgment of 24 January 2013, Union des Étudiants Juifs de France and J'accuse! ... action internationale pour la justice v Twitter, Inc.
[62] Tribunal de Paris, judgment of 6 July 2021, UEJF and others v Twitter Inc.
[63] Paris Court of Appeal, judgment of 20 January 2022, UEJF and others v Twitter Inc.
[64] 'The Twitter Landmark Case: HateAid and the European Union of Jewish Students Submit Landmark Case' (*HateAid*, 25 January 2023) <https://hateaid.org/en/twitter-landmark-case-antisemitism/> accessed 19 March 2024.
[65] ibid.

dismissed due to lack of jurisdiction. The two NGOs indicated their intention to appeal against this decision.[66]

Other civil society actors have engaged in litigation with a different goal, namely to counter the unjustified removal of content on online platforms in violation of freedom of expression. A landmark lawsuit was filed by the Civil Society Drug Policy Initiative ('SIN'), a Polish NGO, against Facebook before the District Court of Warsaw. Endorsed by the Polish digital rights NGO Panoptykon Foundation, it became an important advocacy tool against the 'private censorship' of online platforms.[67] The case concerned the removal of SIN's fanpages and groups on Facebook and one of the accounts on Instagram which infringed Facebook's own Community Standards. SIN's judicial action was based on Article 16 of the Polish Act on Private International Law of 2011, which guarantees the right to seek judicial protection of their personality rights. In 2019, the court delivered an interim measures ruling, temporarily prohibiting Facebook from blocking SIN's pages or posts.[68] Almost five years later, it ruled that SIN's pages and groups was blocked unlawfully.[69] Remarkably, the court also confirmed that it had jurisdiction to hear the case and decide it under Polish law, even though Meta argued that the claim should have been brought in Ireland, where the company is established.

Although NGOs or other entities have not initiated legal action under the DSA yet, the new legal framework has already been invoked in judicial proceedings brought by Dutch entrepreneur and legal expert Danny Mekić against X before the District Court of Amsterdam. The plaintiff alleged that the platform had violated Articles 12 and 17 DSA by failing to designate a single point of contact for rapid and clear communication and by removing his account from search suggestions without explanation. In July 2024, the court declared that X had violated the relevant provisions of the DSA and established that one of the clauses of X's User Agreement, which enabled the platform to limit access to various functionalities of its service without any reason, was unfair.[70] Although the lawsuit was filed by Mekić in his personal capacity, it is arguably of strategic nature since, as noted by Leerssen, Mekić acted as a 'trailblazer', leveraging the novel legal rules to effect change beyond his individual case.[71] Notably, Mekić also won parallel proceedings against X under the GDPR, whereby he argued the breach of his data access rights following the unlawful restriction placed on his account.[72] The court ordered X to comply with Mekić's data access requests under Articles 15 and 22 GDPR under threat of fine of €4,000

---

[66] European Union of Jewish Students, '#TwitterTrial: X Finds Loophole: Strategic Lawsuit Only Possible in Ireland' (*EUJS*, 14 August 2024) <https://eujs.org/press-releases/twittertrial-x-finds-loophole-strategic-lawsuit-only-possible-in-ireland/> accessed 20 December 2024.

[67] Panoptykon Foundation, '"SIN vs Facebook": First Victory against Privatised Censorship' (*European Digital Rights (EDRi)*, 17 July 2019) <https://edri.org/our-work/sin-vs-facebook-first-victory-against-privatised-censorship/> accessed 20 December 2024.

[68] District Court of Warsaw, judgment of 11 June 2019, IV C 608/19.

[69] 'Win against Facebook. Giant Not Allowed to Censor Content at Will' (*Panoptykon Foundation*, 14 March 2024) <https://en.panoptykon.org/sin-wins-against-facebook> accessed 20 December 2024.

[70] District Court of Amsterdam, judgment of 5 July 2024, ECLI:NL:RBAMS:2024:3980.

[71] Paddy Leerssen, 'The DSA's First Shadow Banning Case - DSA Observatory' (*DSA Observatory*, 6 August 2024) <https://dsa-observatory.eu/2024/08/06/the-dsas-first-shadow-banning-case/> accessed 20 December 2024.

[72] District Court of Amsterdam, judgment of 4 July 2024, ECLI:NL:RBAMS:2024:4019.

for each day of non-compliance. Hence, the plaintiff managed to effectively mobilise the EU legal framework in both areas to bring X to account for the violation of his rights.

While there have been a number of important strategic court cases on content moderation before national courts, relevant actors have so far never attempted to indirectly engage with the CJEU. It remains to be seen, however, whether civil society actors might be more willing to interact with the CJEU in cases concerning the interpretation and application of the DSA.

5 ANALYSIS OF STRATEGIC LITIGATION EFFORTS IN THE AREAS OF DATA PROTECTION AND CONTENT MODERATION

As demonstrated in Sections 3 and 4, strategic litigation on data protection is both robust and impactful, while litigation concerning content moderation practices is much rarer. This Section examines this asymmetry from both legal and political points of view. It first lays out the theoretical framework by synthesising the literature on legal and political opportunity structures in the EU (5.1). Drawing on the insights gained, this Section then explores why civil society actors actively engage in data protection litigation but remain hesitant to seek access to courts on content moderation issues (5.2).

5.1 FACTORS UNDERPINNING LEGAL MOBILISATION: LEGAL AND POLITICAL OPPORTUNITY STRUCTURES

Strategic litigation efforts vary significantly across different fields of EU law.[73] Accordingly, there is a long-standing academic debate on the factors that promote or curtail such efforts. Scholars recognise both internal factors (characterising the actors or movement involved in strategic litigation) and external factors (pertaining to the environment where strategic litigation takes place). [74] Internal factors include, inter alia, resources, the movement's identity, and inter-organisational relations.[75] Despite their prominence in the literature on legal mobilisation, such factors arguably provide limited insight into why civil society actors actively litigate in the area of data protection but are much more hesitant to do so in the field of content moderation. The analysis presented in Section 3 suggests that there is a rapidly developing strategic litigation movement which has a distinct identity and a common objective, which is to uphold privacy of EU citizens. At the same time, organisations that take the lead in bringing strategic lawsuits under the GDPR have a broad mandate as they aspire to strengthen the position of consumers in many different areas. Therefore, they could potentially use their resources, networks and expertise to take legal action against Big Tech companies only with regard to the unlawful processing of personal data but also other types of infringements outside the ambit of the data

[73] Lisa Conant et al, 'Mobilizing European Law' (2018) 25(9) Journal of European Public Policy 1376, 1378.
[74] Kris van der Pas, 'Legal Mobilization in the Field of Asylum Law: A Revival of Political Opportunity Structures?' (2023) 44(3) Recht der Werkelijkheid 14, 15.
[75] Aude Lejeune, 'Litigating with or against Other Groups? The Influence of Inter-Organisational Relations on Legal Mobilisation in Europe' (2020) 18 Comparative European Politics 840, 847–852; Cebulak, Morvillo and Salomon (n 6).

protection regime. For this reason, this article focuses on examining external factors shaping the dynamic of strategic litigation.

External factors traditionally comprise legal opportunity structures (LOS) and political opportunity structures (POS). LOS are a central focus in the legal scholarship on mobilisation. It comprises substantive factors, such as the justiciability of the legal framework, as well as procedural aspects, such as the rules on standing and the costs of proceedings.[76] Some authors distinguish between national and EU-wide LOS.[77] Several recent scholarly works have also highlighted the importance of subjective perception of LOS by litigants.[78]

In contrast to LOS, POS is a broader notion which includes various features of the political system, such as its centralisation, the possibility to engage in a dialogue with public authorities, as well as resonance and legitimacy of the ideas presented.[79] Given the dynamic nature of POS, it is important to account for both structural and fluctuating elements of POS. The latter includes, for instance, the emergence of 'windows of opportunity' strengthening a movement's momentum for a particular cause.[80]

The relationship between LOS and POS remains contested among scholars. On the one hand, research on social movements demonstrates that the two concepts are closely intertwined, meaning that an open political environment can contribute to more robust legal action.[81] On the other hand, there is a widely made argument that limited political opportunities urge civil society to resort to litigation as a means of asserting their claims.[82] Hence, it is contended that litigation becomes less relevant when the political system is more open to various kinds of actors and their agendas. Some academic works have also investigated why civil society actors prioritise judicial recourse over other avenues of redress available.[83] The analysis of both LOS and POS as well as the complex interplay between them contributes to a more comprehensive understanding of

---

[76] See, for instance, Ellen Ann Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2006) 17–26; 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, 384–385.

[77] Conant et al (n 73) 1378–1384.

[78] See, for instance, 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, 14; Kris van der Pas, 'All That Glitters Is Not Gold? Civil Society Organisations and the (Non-)Mobilisation of European Union Law' (2023) 64(2) Journal of Common Market Studies 525, 536–537.

[79] Christoph Engel, 'The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and Its Normative Consequences' (2001) 7(2) European Law Journal 151, 152–160; Marc Hooghe, 'The Political Opportunity Structure for Civil Society Organisations in a Multilevel Context: Social Movement Organisations and the European Union' in William A Maloney and Jan W Van Deth (eds), *Civil Society and Governance in Europe: From National to International Linkages* (Edward Elgar Publishing 2008) 72–74.

[80] Marco Giugni, 'Political Opportunity: Still a Useful Concept?' in Michael Hanagan and Chris Tilly (eds), *Contention and Trust in Cities and States* (Springer Netherlands 2011) 272.

[81] See, for instance, 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, 527.

[82] 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, 1392.

[83] Vanhala, 'Anti-Discrimination Policy Actors and Their Use of Litigation Strategies' (n 10) 745–751; Sonja Buckel, Maximilian Pichl, and Carolina A Vestena, 'Legal Struggles: A Social Theory Perspective on Strategic Litigation and Legal Mobilisation' (2024) 33(1) Social & Legal Studies 21, 23–24.

legal mobilisation and its prospects in the field of unlawful data processing and content moderation.

5.2 EXAMINING THE ASYMMETRY BETWEEN STRATEGIC LITIGATION EFFORTS IN THE FIELD OF DIGITAL RIGHTS

Having unpacked the concepts of LOS and POS in the context of legal mobilisation in the EU, this Section applies them to elucidate the dynamics of strategic litigation in the field of digital rights. It begins by examining legal opportunities facilitating data protection litigation while noting the potential lack thereof which hinders similar efforts in regard to content moderation (5.2[a]). It then proceeds to analyse political opportunities underlying strategic litigation in these two areas (5.2[b]).

5.2[a] Legal Opportunities

Sections 3 and 4 revealed significant differences in the EU legal framework governing data protection and content moderation. While the EU-wide rules on the protection of personal data were first laid down in the last decade of the 20th century and subsequently strengthened by the GDPR, a comprehensive legal framework on content moderation has been established only recently. Therefore, civil society actors had more opportunities to gain expertise in data protection and elaborate strategies for leveraging the relevant rules before courts. At the same time, in the majority of content moderation lawsuits discussed in Section 4, NGOs had to find creative ways to invoke domestic criminal and civil law of Member States against online platforms. Since it is more challenging to demonstrate the infringements of rights by content moderation without the possibility to rely on the legal framework specifically aimed to address it, civil society actors may have been discouraged from pursuing judicial action in this area.

The adoption of the DSA offers civil society a much-needed common legal regime for bringing lawsuits concerning inadequate or disproportionate content moderation practices. However, the provisions of the GDPR are more explicit and precise than that of the DSA, which arguably makes them easier to apply in the judicial proceedings. The former sets forth stringent principles and obligations concerning the processing of personal data, while the latter leaves significant leeway to online platforms to manage user-generated content according to their terms and conditions.[84] Hence, civil society actors could successfully sue online platforms for violations of procedural obligations, but would likely encounter difficulties when seeking to compel platforms to remove content which is permitted under the platforms' terms and conditions or to reinstate content which they chose to prohibit.

In addition to the substantive legal framework, procedural rules regulate the standing of civil society actors appear to play an important role in shaping strategic litigation of digital rights.

[84] Mattias Wendel, 'Taking or Escaping Legislative Responsibility? EU Fundamental Rights and Content Regulation under the DSA' in Antje von Ungern-Sternberg et al (eds), *Content Regulation in the European Union: The Digital Services Act* (Schriften des IRDT 2023) 81–82 < https://irdt-schriften.uni-trier.de/index.php/irdt/catalog/book/3> accessed 20 December 2024.

While the first civil society-led lawsuits precede the GDPR, which first introduced a (partially) harmonised mechanism of representative actions, Article 80 GDPR, even despite its criticism, seems to have provided an extra push for strategic litigation in this field. The crucial role of civil society in data protection litigation has also been explicitly acknowledged by the CJEU, which sees it as an integral element of the effective protection of the rights of data subjects.[85] However, an EU-wide legal basis for judicial actions under the DSA has been introduced only recently. Since many Member States took a restrictive approach to representative actions prior to the RAD's adoption, civil society actors may have been discouraged from initiating court proceedings with the view to challenge problematic content moderation practices of online platforms. Moreover, since the DSA offers many alternative means of civic engagement and rights contestation, it remains to be seen whether civil society actors would be inclined to resort to judicial action or give preference to non-judicial alternatives, such as out-of-court dispute settlement bodies which are being established in different Member States.[86]

Finally, the asymmetry between strategic litigation efforts concerning data protection and content moderation could also be attributed to factors beyond the scope of EU secondary legislation. Cebulak, Morvillo and Salomon argue, for instance, that apart from classic procedural and substantive features of LOS, constitutional underpinnings of the legal system are equally important for explaining the dynamic of strategic litigation.[87] Accordingly, civil society actors may also be more eager to bring data protection lawsuits due to the outstanding constitutional importance of privacy and data protection in the EU legal order as recognised under Article 16 TFEU.[88] Given its prominence, some scholars even call it a 'super-fundamental right'.[89] In comparison to the right to data protection, freedom of expression – the key fundamental right impacted by content moderation – is treated much more cautiously in the EU. In contrast to the near absolutist approach to free speech in the US,[90] the scope of freedom of expression in Europe is defined more narrowly, with limitations imposed under both EU law as well as domestic law of Member States. As a result, civil society may be less keen on initiating or participating in strategic litigation on content moderation.

5.2[b] Political Opportunities

The discrepancy between strategic litigation on data protection and content moderation appears to stem from the broader societal and political context as well. A key factor in this respect concerns the centrality of the right to privacy to European democracy as a whole. For instance,

[85] Case C-40/17 *Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV* EU:C:2019:629 para 51; Case C-319/20 *Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV* EU:C:2022:322 para 73.
[86] Daniel Holznagel, 'Art. 21 DSA Has Come to Life' (*Verfassungsblog*, 5 November 2024) <https://verfassungsblog.de/art-21-dsa-fundamental-rights-certification/> accessed 20 December 2024.
[87] Cebulak, Morvillo and Salomon (n 6) 29–30.
[88] Article 16 TFEU.
[89] See, for instance, Oreste Pollicino, 'Data Protection and Freedom of Expression Beyond EU Borders: EU Judicial Perspectives' in Federico Fabbrini, Edoardo Celeste, and John Quinn (eds), *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing 2021) 81.
[90] Amendment I to the Constitution of the United States.

as contended by Seubert and Becker, the protection of privacy has become an important tool for fostering democratic practices in the EU.[91] Edward Snowden's revelations in 2013 also made privacy an integral issue in transatlantic politics, as the EU actively opposed the US government's mass surveillance programs and consistently emphasised its commitment to safeguarding the private life of its citizens.[92] Therefore, civil society actors contesting the unlawful processing of personal data in court may see it not only as a mechanism of the bottom-up enforcement of the GDPR but also as a way to uphold the values of the rule of law and democracy more generally. At the same time, since freedom of expression, as well as other rights impacted by content moderation, do not carry the same weight in the EU's democracy politics, litigation in this area may be considered less crucial.

The more active involvement of civil society actors in litigation against unlawful data processing can also be attributed to the existence a broader social movement advocating the protection of personal data both within and beyond the EU.[93] Jang and Newman, for instance, link the growing strategic litigation efforts in the field of data protection to the mechanism of 'transnational fire alarms' – a governance tool enabling third parties to support policy implementation – encoded in the GDPR.[94] 'High-profile impact litigation' is named as one of the means of remedying the breaches of data protection rules which may otherwise be overlooked by EU or national supervisory authorities.[95] Furthermore, Lehoucq and Tarrow have identified a gradually emerging transatlantic movement dedicated to defending privacy.[96] An important role in this movement is played by Max Schrems – an Austrian privacy activist and lawyer widely known for challenging Facebook's unlawful data transfer of personal data to the US, which ultimately led to the invalidation of two Commission's adequacy decisions in 2015 and 2020.[97] However, there is no similar social movement devoted to protecting fundamental rights affected by content moderation practices of online platforms either within the EU or across the Atlantic. Even though the DSA somewhat replicates the mechanism of 'transnational fire alarms', it is uncertain whether it will foster robust, civil society-led litigation since there is a glaring lack of consensus on the principles and values that should underpin content moderation. As seen in Section 4, civil society actors who have confronted online platforms in court so far have pursued very different goals, with some seeking to force platforms to moderate content more diligently, while others concerned about the restrictive impact of moderation decisions on

---

[91] Sandra Seubert and Carlos Becker, 'The Democratic Impact of Strengthening European Fundamental Rights in the Digital Age: The Example of Privacy Protection' (2021) 22(1) German Law Journal 31, 39–42.
[92] David Cole and Federico Fabbrini, 'Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across Borders' (2016) 14(1) International Journal of Constitutional Law 220, 221.
[93] Emilio Lehoucq and Sidney Tarrow, 'The Rise of a Transnational Movement to Protect Privacy' (2020) 25(2) Mobilization: An International Quarterly 161, 171–174.
[94] Jang and Newman (n 9) 286–288.
[95] ibid 293.
[96] Lehoucq and Tarrow (n 93) 174–178.
[97] Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* EU:C:2015:650; Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Maximilian Schrems* EU:C:2020:559. More recently, Schrems also indirectly mobilised the CJEU in a case concerning the processing of sensitive personal data relating to one's sexual orientation. See Case C-446/21 *Maximilian Schrems v Meta Platforms Ireland Ltd, formerly Facebook Ireland Ltd (Communication of data to the general public)* EU:C:2024:834.

freedom of expression. The absence of a common agenda could hinder the formation of a broader movement focused on enhancing the accountability of Big Tech in the context of content moderation.

6 CONCLUSION

It is widely agreed that strategic litigation plays a crucial role in shaping the development and strengthening the enforcement of EU law. By litigating against Big Tech companies, civil society actors can significantly enhance the protection of digital rights. Even though the EU has adopted the much-needed measures to enhance transparency and accountability of tech firms, the engagement of civil society with courts remains essential for upholding the legal framework in place. This article has demonstrated, however, that while strategic litigation serves as an important tool for challenging the unlawful processing of personal data, civil society actors are reluctant to bring legal actions concerning inadequate or disproportionate content moderation practices of online platforms. The asymmetry in litigation efforts can be linked to unequal legal and political opportunities in these two areas. Both substantive and procedural rules of the GDPR have bolstered civil society-led judicial actions. Until recently, however, the harmonised legal rules on the provision of information society services as well as on collective actions in this field were limited. The adoption of the DSA, which provided a far-reaching legal framework on content moderation, and the RAD, which established new EU-wide rules on representative actions, is expected to provide a strong impetus to strategic litigation targeting various flaws of online platforms' moderation practices. At the same time, it is highly likely that civil society actors will prefer using administrative recourse, such as submitting complaints to DSCs, or explore non-judicial pathways, such as engaging out-of-court dispute settlement bodies.

Another factor which could impede active civil society-led litigation on content moderation is a lack of unity among actors involved, which stems from the lack of uniform understanding of what normative standards should guide online platforms when handling user-generated content. However, the DSA, along with similar legal frameworks in other jurisdictions, is likely to stimulate the emergence of such standards in the future, thereby contributing to the formation of a cohesive social movement advocating fairer content moderation practices. Once the legal and political backdrop enables civil society actors to effectively challenge different forms of conduct by Big Tech companies both in and outside of courtrooms, they will be able to create a greater impact in addressing the misuse of corporate power more broadly.

LIST OF REFERENCES

Andersen E A, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2006)
DOI: https://doi.org/10.3998/mpub.17550

Appelman N et al, 'Access to Digital Justice: In Search of an Effective Remedy for Removing Unlawful Online Content' in Kramer X et al (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar Publishing 2022)
DOI: https://doi.org/10.4337/9781802203820.00018

Bradford A, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020)
DOI: https://doi.org/10.1093/oso/9780190088583.001.0001

Buckel S, Pichl M, and Vestena C A, 'Legal Struggles: A Social Theory Perspective on Strategic Litigation and Legal Mobilisation' (2024) 33(1) Social & Legal Studies 21
DOI: https://doi.org/10.1177/09646639231153783

Casarosa F, 'Transnational Collective Actions for Cross-Border Data Protection Violations' (2020) 9(3) Internet Policy Review 1
DOI: https://doi.org/10.14763/2020.3.1498

Cebulak P, Morvillo M, and Salomon S, 'Strategic Litigation in EU Law: Who Does It Empower?' [2024] Jean Monnet Working Paper 2/24 9–10 <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02_Pola-Cebulak-Marta-Morvillo-Stefan-Salomon.pdf> accessed 20 December 2024

Cole D and Fabbrini F, 'Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across Borders' (2016) 14(1) International Journal of Constitutional Law 220
DOI: https://doi.org/10.1093/icon/mow012

Conant L et al, 'Mobilizing European Law' (2018) 25(9) Journal of European Public Policy 1376
DOI: https://doi.org/10.1080/13501763.2017.1329846

De Fazio G, 'Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States' (2012) 53(1) International Journal of Comparative Sociology 3
DOI: https://doi.org/10.1177/0020715212439311

De Gregorio G, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society' (2018) 11 European Journal of Legal Studies 65

Eder N, 'Making Systemic Risk Assessments Work: How the DSA Creates a Virtuous Loop to Address the Societal Harms of Content Moderation' (*SSRN*, 26 June 2023) <https://papers.ssrn.com/abstract=4491365> accessed 20 December 2024
DOI: https://doi.org/10.2139/ssrn.4491365

Eijkman Q, 'Indiscriminate Bulk Data Interception and Group Privacy: Do Human Rights Organisations Retaliate Through Strategic Litigation?' in Taylor L, Floridi L, and van der Sloot B (eds), *Group Privacy: New Challenges of Data Technologies* (Springer International Publishing 2017)
DOI: https://doi.org/10.1007/978-3-319-46608-8_7

Eliantonio M et al, 'Standing up for your right(s) in Europe: A Comparative study on Legal Standing (*Locus Standi*) before the EU and Member States' Courts' (EPRS Study 2012)

Engel C, 'The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and Its Normative Consequences' (2001) 7(2) European Law Journal 151
DOI: https://doi.org/10.1111/1468-0386.00125

Gascón Inchausti F, 'A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November' (2021) 18(2) Zeitschrift für das Privatrecht der Europäischen Union 61
DOI: https://doi.org/10.9785/gpr-2021-180205

Gaudio G, 'Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?' (2024) 40(1) International Journal of Comparative Labour Law and Industrial Relations 91
DOI: https://doi.org/10.54648/ijcl2024002

Giugni M, 'Political Opportunity: Still a Useful Concept?' in Hanagan M and Tilly C (eds), *Contention and Trust in Cities and States* (Springer Netherlands 2011)
DOI: https://doi.org/10.1007/978-94-007-0756-6_19

Golunova V and Eliantonio M, 'Civil Society Actors as Enforcers of the GDPR: What Role for the CJEU?' (2024) 15 Journal of Intellectual Property, Information Technology and E-Commerce Law 182

Golunova V and Labey E, 'Judges of Online Legality: Towards Effective User Redress in the Digital Environment' in Czech P et al (eds), *European Yearbook on Human Rights 2022* (Intersentia 2022)
DOI: https://doi.org/10.1017/9781839703447.005

González Fuster G, 'Article 80 Representation of data subjects' in Kuner C, Bygrave L A, and Docksey C (eds), *The EU General Data Protection Regulation (GDPR) – A Commentary* (Oxford University Press 2020)
DOI: https://doi.org/10.1093/oso/9780198826491.003.0126

Grover R, 'The Geopolitics of Digital Rights Activism: Evaluating Civil Society's Role in the Promises of Multistakeholder Internet Governance' (2022) 46(10) Telecommunications Policy 1
DOI: https://doi.org/10.1016/j.telpol.2022.102437

Hooghe M, 'The Political Opportunity Structure for Civil Society Organisations in a Multilevel Context: Social Movement Organisations and the European Union' in Maloney W A and Van Deth J W (eds), *Civil Society and Governance in Europe: From National to International Linkages* (Edward Elgar Publishing 2008)
DOI: https://doi.org/10.4337/9781848442870.00013

Jančiūtė L, 'Data Protection and the Construction of Collective Redress in Europe: Exploring Challenges and Opportunities' (2019) 9(1) International Data Privacy Law 2
DOI: https://doi.org/10.1093/idpl/ipy022

Jang W and Newman A L, 'Enforcing European Privacy Regulations from Below: Transnational Fire Alarms and the General Data Protection Regulation' (2022) 60(2) Journal of Common Market Studies 283
DOI: https://doi.org/10.1111/jcms.13215

Jørgensen R F and Desai T, 'Right to Privacy Meets Online Platforms: Exploring Privacy Complaints against Facebook and Google' (2017) 35(2) Nordic Journal of Human Rights 106
DOI: https://doi.org/10.1080/18918131.2017.1314110

Lehoucq E and Tarrow S, 'The Rise of a Transnational Movement to Protect Privacy' (2020) 25(2) Mobilization: An International Quarterly 161
DOI: https://doi.org/10.17813/1086-671x-25-2-161

Lejeune A, 'Litigating with or against Other Groups? The Influence of Inter-Organisational Relations on Legal Mobilisation in Europe' (2020) 18 Comparative European Politics 840 DOI: https://doi.org/10.1057/s41295-020-00212-7

—— and Ringelheim J, 'The Differential Use of Litigation by NGOs: A Case Study on Antidiscrimination Legal Mobilization in Belgium' (2023) 48(4) Law & Social Inquiry 1365
DOI: https://doi.org/10.1017/lsi.2022.54

Lynskey O, 'The Role of Collective Actors in the Enforcement of the Right to Data Protection under EU Law' in Muir E et al (eds), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum* (EUI Working Papers 2017/17) <https://cadmus.eui.eu/bitstream/handle/1814/49324/LAW_2017_17.pdf?sequence=3&isAllowed=y> accessed 20 December 2024

Mizarhi-Borohovich I, Newman A, and Sivan-Sevilla I, 'The Civic Transformation of Data Privacy Implementation in Europe' (2023) 47(3) West European Politics 671
DOI: https://doi.org/10.1080/01402382.2023.2184108

Peel J and Markey-Towler R, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the *Sharma*, *Neubauer*, and *Shell* Cases' (2021) 22(8) German Law Journal 1484
DOI: https://doi.org/10.1017/glj.2021.83

Pijnenburg A and van der Pas K, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route' (2022) 24(3) European Journal of Migration and Law 401
DOI: https://doi.org/10.1163/15718166-12340135

Pollicino O, 'Data Protection and Freedom of Expression Beyond EU Borders: EU Judicial Perspectives' in Fabbrini F, Celeste E, and Quinn J (eds), *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing 2021)
DOI: https://doi.org/10.5040/9781509940691.ch-006

Redeker D, 'Towards a European Constitution for the Internet? Comparative Institutionalization and Mobilization in European and Transnational Digital Constitutionalism' (*GigaNet Annual Symposium,* 2019) <https://www.giga-net.org/2019symposiumPapers/22_Redeker_Towards-a-European_Constitution.pdf> accessed 20 December 2024

Richter H, Straub M, and Tuchtfeld E (eds), 'To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package' [2021] Max Planck Institute for Innovation and Competition Research Paper No. 21-25 <https://pure.mpg.de/rest/items/item_3345402_5/component/file_3345403/content> accessed 20 December 2024

Seubert S and Becker C, 'The Democratic Impact of Strengthening European Fundamental Rights in the Digital Age: The Example of Privacy Protection' (2021) 22(1) German Law Journal 31
DOI: https://doi.org/10.1017/glj.2020.101

Strobel V, 'Strategic Litigation and International Internet Law' in Golia A Jr, Kettemann M C, and Kunz R (eds), *Digital Transformations in Public International Law* (Nomos Verlagsgesellschaft mbH & Co KG 2022)
DOI: https://doi.org/10.5771/9783748931638-261

Teubner G and Golia A Jr, 'Societal Constitutionalism in the Digital World: An Introduction' (2023) 30(2) Indiana Journal of Global Legal Studies 1

van der Pas K, 'Conceptualising Strategic Litigation' (2021) 11 Oñati Socio-Legal Series 116, 130
DOI: https://doi.org/10.35295/osls.iisl/0000-0000-0000-1226

——, 'All That Glitters Is Not Gold? Civil Society Organisations and the (Non-)Mobilisation of European Union Law' (2023) 64(2) Journal of Common Market Studies 525, 536–537
DOI: https://doi.org/10.1111/jcms.13515

——, 'Legal Mobilization in the Field of Asylum Law: A Revival of Political Opportunity Structures?' (2023) 44(3) Recht der Werkelijkheid 14
DOI: https://doi.org/10.5553/rdw/138064242023044003002

van Duin A et al, 'Immateriële schadevergoeding in collectieve acties onder de AVG: terug naar de kern' (2024) 6 Nederlands Tijdschrift voor Burgerlijk Recht 136

Vanhala L, 'Anti-Discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics' (2009) 16(5) Journal of European Public Policy 738
DOI: https://doi.org/10.1080/13501760902983473

——, '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
DOI: https://doi.org/10.1177/0010414017710257

——, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46(3) Law & Society Review 523
DOI: https://doi.org/10.1111/j.1540-5893.2012.00505.x

Wendel M, 'Taking or Escaping Legislative Responsibility? EU Fundamental Rights and Content Regulation under the DSA' in von Ungern-Sternberg A et al (eds), *Content Regulation in the European Union: The Digital Services Act* (Schriften des IRDT 2023) < https://irdt-schriften.uni-trier.de/index.php/irdt/catalog/book/3> accessed 20 December 2024