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TABLE OF CONTENTS

INTRODUCTION – SPECIAL ISSUE

ARTICLES

INTRODUCTION – SPECIAL ISSUE

EU LAW IN THE ERA OF DIGITISATION: ON STRATEGIC LITIGATION CAUSES, ACTORS AND PROCESSES

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1 OVERVIEW

This Special Issue has been prepared in the framework of **EUFutures**, a research network funded by UACES and the James Madison Charitable Fund, whose main objective is to forge an interdisciplinary network of scholars working on EU law from the perspective of different disciplines, and interested in cross-disciplinary approaches to law and EU integration.[1]

The Special Issue aims to assess the litigation strategies of interest groups in the digital field, at EU level and in the Member States, to analyse why these strategies were chosen, to explain the successes and failures of these interest groups, bottom-up, with a view to assessing the chances of success of future litigation. In doing so we seek to bridge the gap between the literature focusing on the most recent developments of digital law and the literature dealing with strategic litigation. The Special Issue has the overarching aim of demonstrating how integration through law in the EU has shifted decidedly towards a court-centric perspective.

2 EU INTEGRATION THROUGH EU LAW: CONTEMPORARY PERSPECTIVES

Most scholars agree that law has been instrumental in fostering the EU integration process. The seminal work of Cappelleti, Seccombe and Weiler[2] has developed into a mainstream approach known as 'Integration through Law' (ITL), which assumes that EU integration is triggered by law and courts, and more specifically by the European Court of Justice (CJEU). This approach goes as far as saying that the CJEU compensated for the blockades of decision-making in the Council of Ministers at a time when Qualified Majority Voting was not used, i.e. in between the Luxembourg compromise (1966) and the Single European Act (1986). Drawing on this, a large strand of academic literature has developed, showing how

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[1] University of Strathclyde, 'EUFutures: Future-Mapping EU Integration: Inter-disciplinary approaches to connecting EU Law, policy and politics' <https://www.strath.ac.uk/humanities/lawschool/eufutures/> accessed 20 December 2024.
[2] Mauro Cappelletti, Monica Seccombe, and Joseph H H Weiler (eds), *Integration through law: Europe and the American Federal Experience. Vol. 3: Consumer Law, Common Markets and Federalism in Europe and the United States* (New York: Walter de Gruyter & Co 1986).

the Court, sometimes seen as a political actor,[3] exerted judicial activism[4] to influence the development of EU law in many fields.

This is not to say that ITL has become established without being criticized, quite the contrary. Critics even emerged from its de factor Alma Mater, the European University Institute, when a group of legal scholars[5] revisited the ITL doctrine, focusing on its limits and highlighting its normative character. Several developments starting in the 1990s support the claim that law and the CJEU have lost their centrality in EU integration: the increasing use of soft law,[6] the eventual self-restraint of the CJEU,[7] differentiated integration[8] and even disintegration processes[9] such as Brexit and the rise of illiberalism in Poland and Hungary.

However, if ITL has been rightly questioned in the academy, it retains a large number of supporters, from Kelemen[10] arguing that a form of Eurolegalism, replicating the rise of legalism in the United States, has developed in Europe, to Bradford[11] focusing on the so-called 'Brussels effect' whereby European Union rules affect the behaviour of many international actors seeking access to the internal market. In this Special Issue, we argue that ITL remains central but needs to be more and more studied through a bottom-up rather than a top-down perspective.

Top-down approaches focusing on the CJEU remain mainstream among lawyers but also in political science. A large number of publications still analyse the autonomy of the CJEU from the Member States in particular,[12] its influence through continued activism, and the reasons why the judges would exert activism, be it due to an ideological bias towards integration,[13] or over-constitutionalisation.[14]

Bottom-up approaches have developed, helping to refine the ITL approach, and opening up new directions for EU law. Assuming that the CJEU is an embedded actor within

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[3] Karen J Alter, 'The European Court's Political Power' (1996) 19(3) West European Politics 458; Karen J Alter, *The European Court's political power, selected essays* (Oxford University Press 2009).
[4] Hjalte Rasmussen, 'Between Self-restraint and Activism: A Judicial Policy for the European Court' (1988) 13 European Law Review 28; Mark Dawson, Bruno De Witte, and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).
[5] Daniel Augenstein (ed), *'Integration through Law' Revisited: The Making of the European Polity* (Routledge 2016).
[6] Bartolomeo Cappellina et al, 'Ever more soft law? A dataset to compare binding and non-binding EU law across policy areas and over time (2004–2019)' (2022) 23(4) European Union Politics 741.
[7] Renaud Dehousse, *The European Court of Justice: the politics of judicial integration* (Palgrave Macmillan 1998); Oreste Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint' (2004) 5(3) German Law Journal 283.
[8] Frank Schimmelfennig, Dirk Leuffen, and Berthold Rittberger, 'The European Union as a system of differentiated integration: interdependence, politicization and differentiation' (2015) 22(6) Journal of European Public Policy 764; Dirk Leuffen, Berthold Rittberger, and Frank Schimmelfennig, *Integration and differentiation in the European Union: Theory and policies* (Springer 2022).
[9] Hans Vollaard, *European Disintegration: A Search for Explanations* (Springer 2018).
[10] R Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).
[11] Anu Bradford, *The Brussels effect: How the European Union rules the world* (Oxford University Press 2020).
[12] Clifford J Carrubba, Matthew Gabel, and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102(4) American Political Science Review 435; Olof Larsson and Daniel Naurin, 'Legislative override of Constitutional Courts: the case of the European Union' (2016) 70(2) International Organization 377.
[13] Antoine Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).
[14] Susanne K Schmidt, *The European Court of Justice and the policy process: The shadow of case law* (Oxford University Press 2018).

a complex multilevel system,[15] it is important not only to focus on the CJEU and its case-law but also to better understand the actors bringing cases to the Court. The role of the Commission as the guardian of the Treaties has been largely studied, included its eventual self-limitation in bringing infringement cases in the recent period.[16] Similarly, it has been argued that national judges[17] and lawyers[18] have contributed to the empowerment of the CJEU while fulfilling their own objectives through litigation strategies. Some even as a result conceptualize the EU as a 'law state' – 'an unbalanced polity that lacks coercive and administrative capacity and governs primarily through an expansive network of judicial institutions'.[19]

3 FOCUSSING UPON INTEREST GROUPS AND THE METHODS OF EU LAW

Interest groups, defined as 'organised private actors seeking to influence political decision-making',[20] have also made use of strategic litigation among other instruments of influence such as lobbying or using public opinion.[21] The fact that the CJEU has advanced an extensive interpretation of direct effect has benefited to a large number of interest groups, who were offered new avenues to defend their individual rights, before national courts very often, and sometimes before the European courts. The expansion of the EU competences has also offered new opportunities that interest groups have seized, in areas such as anti-discrimination policies[22] or climate change.[23]

The easiest route for strategic litigation by interest groups is at Member States level, through procedures involving national courts, while potentially involving the CJEU if a preliminary reference is made. In addition, interest groups can also have direct access to the CJEU, under restrictive conditions, and bring cases against legal acts of the EU institutions. When it comes to controlling the implementation of EU law by Member States at national level, access to the CJEU is only indirect, and depends on the willingness of the

[15] Sabine Saurugger and Fabien Terpan, *The Court of Justice of the European Union and the Politics of Law* (Palgrave Macmillan 2017).
[16] R Daniel Kelemen and Tommaso Pavone, 'Where have the guardians gone? Law enforcement and the politics of supranational forbearance in the European Union' (2023) 75(4) World Politics 779.
[17] Lisa J Conant, *Justice contained: Law and politics in the European Union* (Cornell University Press 2002).
[18] Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022).
[19] R Daniel Kelemen et al, 'Research Seminar, Constructing the European Law State' (*Institut Barcelona Estudis Internacionals* 2024) <https://www.ibei.org/en/research-seminar-constructing-the-european-law-state_327510> accessed 20 December 2024.
[20] 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.
[21] Rachel A Cichowski, *The European Court and Civil Society* (Cambridge University Press 2007); Margaret McCown, 'Interest Groups and the European Court of Justice' in David Coen and Jeremy Richardson (eds), *Lobbying in the European Union* (Oxford University Press 2009).
[22] Lisa Vanhala, Making Rights a Reality? Disability Rights Activists and Legal Mobilization (Cambridge University Press 2010).
[23] Joana Setzer, Harj Narulla, Catherine Higham and Emily Bradeen, *Climate litigation in Europe – A summary report for the European Union Forum of Judges for the Environment* (The Grantham Research Institute on Climate Change and the Environment, LSE, 2022); Elizabeth Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) 11(2) Transnational Environmental Law 263.

Commission, acting as the guardian of the Treaties, to follow a demand made by an interest group and to bring a case before the CJEU.

Not all interest groups choose to litigate. Jacquot and Vitale,[24] for instance, have shown that women lobbies, contrary to Roma lobbies, usually opt against litigation, favouring an insider strategy based on proximity with decision-makers. While an important strand of the literature has sought to explain the successes of interest groups when lobbying the EU institutions,[25] fewer studies try to understand why strategic litigation in general and certain litigation strategies in particular are pursued by interest groups, beyond the analysis of individual cases. A large quantitative study[26] as well as some qualitative studies,[27] have tried to find out the factors determining the choice to litigate. But, once the choice is made to bring a case before a court, what makes this strategic choice successful, or more likely to be successful?

4 THE PURPOSE OF SPECIAL ISSUE

The purpose of this Special Issue is to study the use of strategic litigation by interest groups and uncover the factors determining the successes (and potential successes) of these strategies, in the past and for the future.

In the framework of this Special Issue, and to ensure an element of coherence between the papers, strategic litigation consists of '(the intention of) legal action through a judicial mechanism in order to secure an outcome, either by an affected party or on behalf of an affected party'.[28] The objective of these strategies might be to create legal change, political change and/or social change. Strategic litigation is thus understood here as form of legal mobilization to influence policies and political processes used by many actors.[29] The use of this definition does not aim to be definitive, and we recognise that, although widely used, the term strategic litigation has a variety of highly contestable meanings. Despite the proliferation of the term and its salience for EU law, no specific definition of the term can be said to accurately capture the breadth of emerging activity.[30] New definitions and understanding of

[24] 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.
[25] Andreas Dür and Dirk De Bièvre, 'The question of interest group influence' (2007) 27(1) Journal of Public Policy 1; Andreas Dür, 'Interest groups in the European Union: How powerful are they?' in Jan Beyers, Rainer Eising, and William Maloney (eds), *Interest Group Politics in Europe* (Routledge 2013).
[26] Andreas Hofmann and Daniel Naurin, 'Explaining interest group litigation in Europe: Evidence from the comparative interest group survey' (2021) 34(4) Governance 1235.
[27] Karen J Alter and Jeanette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33(4) Comparative Political Studies 452; Pieter Bouwen and Margaret Mccown, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' in David Coen, *EU Lobbying: Empirical and Theoretical Studies* (Routledge 2008); Lisa Conant et al, 'Mobilizing European Law' (2018) 25(9) Journal of European Public Policy 1376; Jasper Krommendijk and Kris van der Pas, 'To Intervene or not to Intervene: Intervention Before the Court of Justice of the European Union in Environmental and Migration Law' (2022) 26(8) The International Journal of Human Rights 1394.
[28] Kris van der Pas, 'Conceptualising strategic litigation' (2021) 11(6(S)) Oñati Socio-Legal Series S116-S145.
[29] Pola Cebulak, 'Mapping the potentials and pitfalls of using European law for strategic litigation against illiberal reforms' (2024) 20 International Journal of Law in Context 379.
[30] See further Pola Cebulak, Marta Morvillo, and Stefan Salomon, 'Strategic litigation in EU law: Who does it empower?' (*Jean Monnet Working Papers*, 2024) <https://jeanmonnetprogram.org/wp-

the term entail a greater need to capture its methodological elements and the means by which it is considered and addressed. We argue, accordingly, that strategic litigation should become an important field of research in different areas of law at national, EU as well as international law, and specifically as a methodology question. It also represents an important intersection in EU law between law and politics worth of further exploration.

Existing studies have focused on different areas such as international criminal justice,[31] climate change,[32] human rights,[33] and social law.[34] This Special Issue focuses on 'digital law', broadly framed so as to include digital aspects of other policy fields. 'Digital law', as a relatively recent field of EU law, can be seen as a legal (battle)field where interest groups not only lobby EU institutions but also implement litigation strategies. European Union digital law has developed as an emerging field with many recent specific laws such as, for instance, the GDPR, the Digital Markets Act, the Digital Services Act, the AI Act, Data Governance Act and the NIS directives. Digital activities also have the potential to impact other EU policies from competition law to internal market law and consumer protection. Digital activities, governance and law-making also increasingly permeates EU external relations law. The extraordinary span of law-making unsurprisingly has many consequences. The increasing body of legislation relating to the digital domain is likely to generate many cases and rulings. Indeed, the case-law of the CJEU on digital issues is expanding. Many disputes brought before the courts have opposed two categories of litigants: economic interest groups, including the Big Tech, defending their material interests, and interest groups acting in the name of citizens.[35] An examination of the use of strategic litigation in this field is thus a timely endeavour.

To answer our research question, we look at both actors and structures. Focusing on actors will help us to provide a comprehensive understanding of the litigation process, from the choice to litigate, to the outcome of the strategy (success or failure before courts). Focusing on structures will allow us to assess changes in substantive and institutional/procedural law in order to assess whether these changes may or may not increase the chances of success of strategic litigation.

5 KEY ELEMENTS OF SPECIAL ISSUE

The different contributions to this Special Issue study several sub-fields of EU law in different but complementary ways. They identify key cases and issues, the main interest groups involved, their litigation strategies (and how these fit into an overall strategy), and the legal instruments and legal procedures of use in a strategic litigation context. Against this

content/uploads/JMWP-02_Pola-Cebulak-Marta-Morvillo-Stefan-Salomon.pdf > accessed 20 December 2024.

[31] Florian Jeßberger and Leonie Steinl, 'Strategic litigation in international criminal justice: Facilitating a View from Within' (2022) 20(2) Journal of International Criminal Justice 379.

[32] Jacqueline Peel and Hari M Osofsky, 'Climate change litigation' (2020) 16(1) Annual Review of Law and Social Science 21.

[33] Helen Duffy, *Strategic human rights litigation: understanding and maximising impact* (Bloomsbury Publishing 2018); Andrew Novak, *Transnational Human Rights Litigation* (Springer International Publishing 2020).

[34] Ruth Dukes and Eleanor Kirk, 'Legal Change and Legal Mobilisation: What Does Strategic Litigation Mean for Workers and Trade Unions?' (2024) 33(4) Social & Legal Studies 479.

[35] Valentina Golunova and Mariolina Eliantonio, 'Civil Society Actors as Enforcers of the GDPR: What Role for the CJEU?' (2024) 15 J. Intell. Prop. Info. Tech. & Elec. Com. L. 180.

background, the contributions look to both legal and political explanations in order to test two main assumptions.

First, reasons for litigation successes and failures are of a purely legal nature. For example, the main decisions of the CJEU in favour of privacy can be explained by the fact that privacy and data protection have acquired a constitutional status with the EU Charter of Fundamental Rights becoming legally binding. Many NGOs choose to litigate in the digital sector because they know that they are likely to win the case. The success or failure depends on the type of litigation strategy that has been chosen by the interest groups (e.g. litigation at domestic level vs litigation at EU level, when possible).

Second, the reasons for litigation successes and failures are mainly of a political nature. They reflect the respective weight of actors and the interplay of influences within the European Union, where legislative processes have possibly been dominated by elites, Big Tech and watered down through strategic lobbying. This is not to say that the courts necessarily rule in favour of Big Tech. NGOs can compensate for their lack of resources by joining forces, coordinating and adjusting their strategies to maximise their chances of success.

6 OVERVIEW OF ARTICLES

Drawing on different fields, including law, political science and public administration, the articles focus upon the theory and practice of our research question.

Van der Pas shows how, in the field of data protection, several civil society actors engage with the EU remedies system in order to attain their goals. This proliferation of strategies within the EU system raises the question: who are these actors and why do they (not) choose an EU (extra-)legal avenue? This paper explores the use of the EU remedies system by civil society actors in the field of data protection. It shows how procedural law throughout the EU, but also within the EU system, could be more harmonized and procedural hurdles lowered, in order to provide for effective means of enforcement.

Terpan and Saurugger seek to explain the success of the litigation strategies pursued by public interest groups in transatlantic data transfers and argue litigation has taken an important place in the strategies developed by these actors, as evidenced mainly by the number of public interest groups involved (at least indirectly) in litigation and the legal expertise they mobilise. In terms of instruments, they 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 search for legitimacy in the public can be seen as an additional reason why the Court favoured a pro-privacy jurisprudence.

Golunova and Tas assess approaches to strategic litigation against tech companies in the areas of data protection and online content regulation by mapping out strategic litigation lawsuits concerning two crucial practices affecting the enjoyment of fundamental rights in the digital domain – personal data processing and content moderation. The paper reflects upon ways to close the gap between the existing strategic litigation efforts of civil society actors in response to different challenges to digital rights.

Fasel focuses on the strategic litigation by social media companies against the Austrian Communication Platforms Act, a member state law adopted during the transition period

from the E-Commerce Directive to the DSA. The paper's case study shows how companies successfully used EU internal market principles to challenge the Austrian law, paradoxically aligning their interests with the European Commission's goal of preventing legal fragmentation within the EU. It argues that it is important to consider the role of the DSA in the context of the EU's ambitions for industrial strategic autonomy and digital sovereignty.

Tzanou and Vogiatzoglou show how mobilization is an emerging field yet one demonstrating many shortcomings from a socio-legal studies perspective. They show how first, a lack of collective action reveals a gap in the recognition of collective data protection harms. Second, a lack of actors and problems from this area of mobilisation, reveal the problems of data protection mobilisation before the CJEU and the changes this has effectuated. Third, a prevailing legal problem has been the protection of the data protection rights of the majority, thus placing its experiences at the top of the hierarchy of EU data protection problems compared to those of minoritized data subjects.

Fahey examines the place of EU law in the actions of Max Schrems and his 'linked' NGO, None of your Business ('noyb'), in the context of its predominantly transatlantic nature. Existing literature pays insufficient attention to the narrow focus by Schrems on EU-US data transfers and the ways in which his use of EU law is mostly outside of EU court rooms and also outside of EU lobbying channels. The paper thus explores the place of EU law in the work of Schrems – often taking place outside of Court rooms and official lobbying channels when challenging EU data transfers. Fahey draws attention to the links between lobbying and litigation as to EU data transfers and beyond mirrored in the work of noyb – where little caselaw exists per se – and where broader aims and means are at stake necessitating a broader reach. The focus upon the '*locus*' adds to research highlighting the procedural limitations of the EU law system. It supports a broader framing of strategic litigation in understanding data transfers and the broader 'Brussels effects' of the work of Schrems.

Overall, the Special Issue seeks to add value to understanding emerging questions of EU law. We also draw attention to future directions of methodologies of EU law and the directions of the EU's digital transformation, and demonstrate the many factors influencing the evolution of EU law.

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

KRIS VAN DER PAS*

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

1 INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

2 SETTING THE SCENE: EU REMEDIES & OPPORTUNITIES

2.1 EU REMEDIES SYSTEM

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

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

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

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

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

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

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

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

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

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

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

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

[23] Passalacqua (n 9).

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

[25] Art. 40 Statute of the CJEU.

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

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

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

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

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

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

2.2 EU LEGAL OPPORTUNITY STRUCTURES

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

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

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

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

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

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

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

3 METHODOLOGY

3.1 CASE STUDY: DATA PROTECTION & FUNDAMENTAL RIGHTS

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

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

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

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

3.2 METHODS & APPROACH

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

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

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

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

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

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

4 ANALYSIS

4.1 FINDINGS ON LOW LEVELS OF EU LEGAL MOBILIZATION

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

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

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

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

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

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

4.2 ENGAGEMENT WITH THE EU SYSTEM

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

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

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

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

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

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

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

4.3 GENERAL REFLECTIONS ON (EU) LEGAL MOBILIZATION

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

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

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

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

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

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

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

5 DISCUSSION & CONCLUSION

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

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

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

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

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

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

Annex 1

List of NGOs interviewed

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

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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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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

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[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

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[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

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[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

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[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

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[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.

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IS THE DIGITAL SERVICES ACT HERE TO PROTECT USERS? PLATFORM REGULATION AND EUROPEAN SINGLE MARKET INTEGRATION

MATHIEU FASEL*

The regulation of social media platforms continues to be a hotly debated issue in policy and academic circles. In these discussions, the Digital Services Act (DSA) is widely seen as a major piece of an architecture under construction. However, much of the current academic discussion focuses on the content of its new rules and their implementation, with very little work examining the context in which the DSA was passed. This paper explores this context by focusing on the strategic litigation by social media platforms against the Austrian Communication Platforms Act, a member state law adopted during the transition period from the E-Commerce Directive (ECD) to the DSA. The paper's case study shows how social media platforms successfully used EU internal market principles to challenge the Austrian law, paradoxically aligning their interests with the European Commission's goal of preventing legal fragmentation within the EU. This highlights an alliance between corporate interests and the EU regulatory framework and raises questions about the objectives of the DSA. The paper argues that it is important to challenge the narrative that the DSA represents a radical shift towards user protection in the digital sphere. Indeed, the Austrian case study shows how the ECD has been constructed in a way that is very favourable to companies. It is therefore doubtful whether the new compliance-based regulatory tools of the DSA, which are supposed to ensure user protection, can be effective forms of counter-power, given that the dominant paradigm of the ECD, which favours corporate interests, has largely been retained in the DSA.

1 INTRODUCTION

In October 2022, when the European Union (EU) adopted the DSA, Thierry Breton, the then European Commissioner,[1] expressed his delight and looked back at the history of the adoption of this law, highlighting that it was a special piece of legislation that included 'unprecedented responsibilities to protect European citizens' in the face of the big social media platforms. He also highlighted how the EU stood firm in the face of pressure and lobbying from these companies and managed to avoid being pushed back.[2] The EU's press release on the adoption of the law describes how the text 'creates comprehensive new

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[1] Thierry Breton resigned from this position on 16 September 2024 when the second von der Leyen Commission was formed.

[2] Thierry Breton, *Tweet of 27 October 2022* <https://x.com/ThierryBreton/status/1585544868402794496> accessed 20 December 2024.

obligations for online platforms to reduce harm and tackle risks online, introduces strong protections for users' rights online, and places digital platforms under a unique new transparency and accountability framework'.[3] The DSA is thus presented as part of a narrative of contestation of the power of big platforms, which are said to be out of control and should be 'tamed' by regulation.[4] Accordingly, some academics describe the law as a piece of legislation aimed at protecting fundamental rights and democratic values. De Gregorio sees it as 'a paradigmatic example of European digital constitutionalism'.[5] Frosio says that the DSA 'constitutionalises private ordering practices', and represents a 'shift from intermediary liability to platform liability'.[6] Chander emphasises that the DSA offers 'to balance private technological power with democratic oversight'.[7]

This paper is part of an effort to challenge the narrative that the DSA's primary aim is user protection. To do so, the paper proposes to look more closely at the context in which the DSA was adopted. Indeed, the DSA did not emerge in a vacuum. Prior to its adoption, several Member States had attempted at their own level to adopt legislation imposing new obligations on social media companies. Among these attempts, the paper focuses on a unique case study, that of Austria. At the same time as the parliamentary discussions leading to the adoption of the DSA were taking place, i.e. in 2021 and 2022, Austria decided to adopt its own national law regulating online platforms, the Communication Platform Act (KoPl-G).[8] As soon as it came into force, this law was challenged by the companies that were subject to it. This challenge was not resolved until November 2023, when the Court of Justice of the European Union (CJEU) answered a preliminary question in favour of the companies. From the point of view of this paper, the victory of the social media companies over the Austrian state represents a significant event in the discussion on European regulation of platforms. However, to our knowledge, the academic debate has hardly discussed this issue and has quickly forgotten these developments in order to focus on the new legal framework proposed by the DSA. However, the Austrian case is particularly interesting to analyse in more detail because the companies' victory resolved the thorny issue of the interplay between the legal framework of national legislation regulating social media and the entry into force of the DSA before it had time to become a problem. By acting as they did, the companies that sued Austria paradoxically played into the hands of the European Commission. This situation

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[3] European Commission, 'Digital Services Act: EU's landmark rules for online platforms enter into force' (Press Release, 16 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6906> accessed 20 December 2024.

[4] Gerald F Davis, *Taming Corporate Power in the 21st Century* (Cambridge University Press 2022).

[5] Giovanni De Gregorio, 'The Digital Services Act: A paradigmatic example of European digital constitutionalism' (*Diritti Comparati*, 17 May 2021) <https://www.dirittocomparati.it/the-digital-services-act-a-paradigmatic-example-of-european-digital-constitutionalism/> accessed 20 December 2024; see also Francisco de Abreu Duarte, Giovanni De Gregorio, and Angelo Jr Golia, 'Perspectives on digital constitutionalism' in Bartosz Brożek, Olia Kanevskaia, and Przemysław Pałka (eds), *Research Handbook on Law and Technology* (Edward Elgar Publishing 2023).

[6] Giancarlo Frosio, 'Platform responsibility in the Digital Services Act: constitutionalising, regulating and governing private ordering' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on the EU and Internet Law* (Edward Elgard Publishing 2023); see also Giancarlo Frosio and Christophe Geiger, 'Towards a Digital Constitution – How the Digital Services Act Shapes the Future of Online Governance' in João Pedro Quintais (ed), *From the DMCA to the DSA – A Transatlantic Dialogue on Online Platform Regulation and Copyright* (Verfassungsbooks 2024).

[7] Anupam Chander, 'When the Digital Services Act Goes Global' (2023) 38(3) Berkeley Technology Law Journal 1067.

[8] In German: *Kommunikationsplattformengesetz*.

contrasts with the narrative of the European Commission and Thierry Breton, who present the DSA as a form of strong opposition to big tech companies. This discrepancy is the starting point of this paper.

In order to examine this discrepancy in more detail, the paper proposes to follow the course of the legal proceedings brought by the companies against the Austrian State before the Austrian authorities and then before the CJEU in the context of a preliminary question. The decision to focus on a single case study stems from the lack of comparable cases. Within the EU, there have only been two other national initiatives to regulate social media companies, in France and Germany. In France, the proposed legislation never materialised as its main provisions were annulled by the French Constitutional Council prior to implementation. In Germany, the law was passed, but no case was ever brought before the CJEU, making it impossible to know the position of the European institutions on the issue. Consequently, the Austrian case is the only one that can shed light on the power relations between the EU, the Member States and the companies in the context of the regulation of social media platforms. From this point of view, the paper is based on a single case study and therefore takes a more exploratory dimension.

The paper describes how, in the Austrian case, the interests of social media companies and those of the European Commission were aligned. On this basis, the paper argues that a body of evidence should lead to question the European Commission's narrative when it presents the DSA as a law aimed at reversing the balance of power between the public interest in protecting citizens and the private interests of corporations in favour of the former. Indeed, such a narrative overlooks the fact that although the DSA was adopted as a reform of its predecessor, the E-Commerce Directive (ECD), it does not change the dominant paradigm for platform regulation in the EU, as the liability exemption framework, which has been very favourable to corporate interests, remains unchanged. On this basis, the paper argues that the Austrian case is an invitation to read European developments in platform regulation from a law and political economy perspective, i.e. aimed at questioning the new power relations made possible by the DSA from the point of view of the tension between corporate interests and the protection of individual rights. This is all the more justified in the context of the current realisation of the Digital Single Market and the simultaneous revival of a strong industrial policy within the EU. These developments can be seen as part of a wider historical context in which a neoliberal view of what the law should be has prevailed, in which the law is seen above all as apolitical, with no questioning of how it privileges certain interests over others – beyond the official narratives of what it does, as the case of the European Commission's narrative on the DSA shows. Such a view is largely reflected in the (nascent but already flourishing) academic literature on the DSA, which focuses on the content of the new rules and their implementation, without addressing the broader issues of power relations between unequal public and private interests. From this point of view, the paper contributes theoretically to underlining the relevance of adopting new reading grids to interrogate the regulation of social media platforms in the EU, in particular by situating it in the broader framework of the tension between the achievement of economic and social objectives and by examining power relations. At the same time, the paper underlines the need to challenge the dominant institutional narratives. From an empirical point of view, the paper contributes to a better understanding of the context in which the DSA was adopted by providing in-depth knowledge of a specific case, that of the

KoPl-G, and the way in which companies have skilfully mobilised European law to litigate against Austria.

To do this, the paper begins with a brief history of the regulation of social media platforms, i.e. companies that provide services that enable the sharing and exchange of content among third parties. This brief history highlights the adoption of liability exemption frameworks for these companies at the turn of the millennium in the United States and then in the EU. The history continues by focusing on how Germany, France and Austria, dissatisfied with how companies were dealing with harmful and illegal content on their platforms, enacted legislation imposing new obligations on these companies. The paper then places the adoption of the DSA in the context of the EU's Digital Single Market strategy, recalling that the history of the Single Market has been marked by a tension between economic rationality and more socially oriented conceptions. The paper also briefly introduces law and political economy studies that form the analytical framework of the paper. Then, in the context of the case study, it provides a detailed description of the legal proceedings that pitted the Austrian state against three large social media companies. The paper then discusses the results of the analysis, notably by contrasting the case study results with the preparatory work for the DSA, showing how the interests of the European Commission and the social media companies converged. The paper concludes with an invitation to conduct future research on platform regulation considering issues of justice, power, and the conflict between public and private interests.

2 A BRIEF HISTORY OF SOCIAL MEDIA REGULATION IN EUROPE

In 2000, the European Union adopted the ECD, inspired by the United States and their model of liability exemption. The Internet, in its broadest sense, was developed slowly throughout the 1970s and 1980s, funded primarily by the United States Department of Defence, then under the stewardship of the National Science Foundation.[9] It wasn't until just before the turn of the century, in the mid-1990s, that the infrastructures that make up the Internet were put into private hands.[10] This created a new market whose rules had to be defined. In this context, the United States adopted the Communications Decency Act, including Section 230, as part of the Telecommunications Act of 1996. Section 230 introduces a principle of immunity from liability for third party content. This means that companies that operate services that enable the exchange of information between third parties cannot be held liable for illegal content posted or published by those third parties on their platforms.[11] The choice of such a light regulatory framework, which does not impose binding obligations on companies, is in line with the prevailing attitude towards the Internet and new technologies in general at the time. In particular, this attitude was characterized by a profoundly positive view of the Internet, which was seen as promising greater freedom

[9] Shane Greenstein, *How the Internet Became Commercial – Innovation, Privatization and the Birth of a New Network* (Princeton University Press, 2015) 22-30.
[10] ibid Chapters 4, 5 & 6.
[11] ibid.

from government control, which was denounced as censorship.[12] Section 230 is thus a concrete manifestation of the libertarian spirit of the time, where government legislation was seen as an obstacle to online freedom and the economic development of emerging companies in the Internet space.[13] In the EU, the logic behind the ECD was similar to that of Section 230. Under the ECD, 'Internet service providers' operating in the EU are also immune from liability when third parties use their services to publish illegal content.[14] However, this immunity is less flexible than in the US, as the ECD introduces a 'notice and takedown' system. In other words, Internet service providers are not liable for illegal content as long as they are unaware of its presence. However, once a company has been notified of such content, it is obliged to take steps to make it inaccessible.[15] Failure to do so may expose the company to liability.[16] The adoption of the ECD was intended to achieve two objectives. First, similar to the US approach, it aimed to create a regulatory regime that would be conducive to innovation and the economic development of companies in the emerging Internet sector. At the same time, the ECD was a step towards a single European market for information society services, removing barriers to cross-border service provision.[17]

Companies involved in services that enable communication between third parties have grown rapidly within the liability exemption framework, and with this growth has come a host of issues that extend beyond the digital space. The creation of a regulatory framework that encouraged innovation and economic growth in the nascent internet market was a success, as new companies emerged, particularly in the US. These companies, now commonly referred to as social media platforms, are an integral part of our societies and an essential element of citizen information and communication.[18] For some scholars, they constitute the new online public sphere, where ideas are debated and democratic life and culture take place.[19] The services of companies like Meta have the ability to bring together billions of citizens: almost half of the world's population has a Facebook or an Instagram account. This success has been reflected in the growing power of these companies,[20] leading to a public realization that they hold in their hands the ability to influence how information

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[12] John Perry Barlow, 'A declaration of the Independence of Cyberspace' (*Electronic Frontier Foundation*) <https://www.eff.org/fr/cyberspace-independence> accessed 20 December 2024.

[13] Julie E Cohen, *Between Truth and Power – The Legal Constructions of Informational Capitalism* (Oxford University Press 2019) 97-101.

[14] Rosa Julià-Barceló and Kamiel J Koelman, 'Intermediary liability in the E-Commerce Directive: so far so good, but it's not enough' (2000) 16(4) Computer Law & Security Review 231.

[15] Aleksandra Kuczerawy, 'Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative' (2015) 31(1) Computer Law & Security Review 46.

[16] Victoria McEvedy, 'The DMCA and the E-Commerce Directive' (2002) 24(2) European Intellectual Property Review 65.

[17] Alexandre de Streel, Martin Husovec, 'The e-commerce Directive as the cornerstone of the Internal Market – Assessment and options for reform' (Study Requested by the IMCO committee, 2020) 14-18. <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648797/IPOL_STU(2020)648797_EN.pdf> accessed 20 December 2024.

[18] Renate Fischer and Otfried Jarren, 'The platformization of the public sphere and its challenge to democracy' (2024) 50(1) Philosophy & Social Criticism 200.

[19] Rebecca J Hamilton, 'Governing the Global Public Square' (2021) 62(1) Harvard International Law Journal 117; Mike S Schäfer, 'Digital Public Sphere' in Gianpietro Mazzoleni (ed), *The International Encyclopaedia of Political Communication* (John Wiley & Sons 2016); Lincoln Dahlberg, 'The Internet and Democratic Discourse: Exploring the Prospects of Online Deliberative Forums Extending the Public Sphere' (2010) 4(4) Information, Communication & Society 615.

[20] Linnet Taylor, 'Public actors without public values: Legitimacy, domination and the regulation of the technology sector' (2021) 34 Philosophy & Technology 897.

is perceived around the world.[21] This has led many scholars to focus on the content moderation practices of these companies[22] and on the tools that they use, particularly artificial intelligence systems.[23] Numerous events, particularly since 2015, have contributed to the realization that the influential power of social media can have potentially harmful consequences in the real world. For example, Cambridge Analytica in 2016[24] or the lack of moderators to tame the spread of hate speech in Myanmar, which resulted in real-world harm to the Rohingya population,[25] were particularly striking. These incidents, among others, contributed to putting the regulation of social media companies at the top of many governments' agendas.

The spread of illegal content on social media platforms has prompted a reaction in the EU, where some Member States have passed laws imposing stricter obligations on social media companies. Germany, France, and Austria felt that the light regulatory framework based on exemption from liability was no longer adequate and that the lack of stronger rules had led to too many public problems related to the spread of harmful content or disinformation.[26] In response, Germany adopted the Network Enforcement Act (NetzDG)[27] in 2017. This law required social media companies operating in Germany to remove content on their platforms that violated specific provisions of the German Criminal Code. Companies were given 24 hours to remove 'manifestly unlawful' content and seven days for content that required further investigation.[28] In addition, social media companies were required to give users whose content had been removed the opportunity to submit 'counter-proposals'[29] and to set up mediation bodies for out-of-court dispute resolution.[30] In 2018, France attempted to pass a similar law, the *proposition de loi visant à lutter contre les contenus haineux en ligne*[31] (law proposal to combat online hate speech). This law also required social media companies to remove content that violates certain provisions of the French Criminal Code and the Press Act.[32] Unlike the German law, the French law did not set a

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[21] Mikkel Flyverbom, *The Digital Prism: Transparency and Managed Visibilities in a Datafied World* (Cambridge University Press 2019).
[22] Hannah Bloch-Wehba, 'Content moderation as surveillance' (2021) 36(4) Berkeley Technology Law Journal 1297; Kyle Langvardt, 'Regulating Online Content Moderation' (2018) 106 Georgetown Law Journal 1353; Tarleton Gillespie, *Custodians of the Internet: Platforms, content moderation, and the hidden decisions that shape social media* (Yale University Press 2018).
[23] Robert Gorwa, Reuben Binns, and Christian Katzenbach, 'Algorithmic content moderation: Technical and political challenges in the automation of platform governance' (2020) 7(1) Big Data & Society 1; Tarleton Gillespie, 'Content moderation, AI, and the question of scale' (2020) 7(2) Big Data & Society 1; Thiago Dias Oliva, 'Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression' (2020) 20(4) Human Rights Law Review 607.
[24] Christophe Olivier Schneble, Bernice Simone Elger, and David Shaw, 'The Cambridge Analytica affair and Internet-mediated research' (2018) 19(8) Embo reports <https://www.embopress.org/doi/full/10.15252/embr.201846579> accessed 20 December 2024.
[25] Christina Fink, 'Dangerous speech, anti-muslim violence, and Facebook in Myanmar' (2018) 71 International Affairs 43.
[26] Wolfgang Schulz, 'Regulating Intermediaries to Protect Personality Rights Online – The Case of the German NetzDG' in Marion Albers and Ingo Wolfgang Sarlet (eds), *Personality and Data Protection Rights on the Internet* (Springer, 2022).
[27] In German: *Netzwerkdurchsetzungsgesetz*.
[28] NetzDG, §3. Note: as of 2024, the law is no longer in force. The content of the law is quoted as it was when it was adopted in 2017.
[29] ibid §3b.
[30] ibid §3(6).
[31] Often referred to as the 'loi Avia' or Avia law, named after the member of parliament who proposed it.
[32] *Proposition de loi visant à lutter contre les contenus haineux en ligne*, Article 1.

deadline for the removal of content, expecting companies to remove unlawful content immediately. This lack of a deadline led the French Constitutional Council to consider the law a serious threat to the freedom of expression of French social media users, as it could have forced companies to remove more content than necessary to avoid liability. As a result, the main provisions of the law were annulled.[33] In 2021, Austria became the third EU Member State to adopt stricter obligations for social media platforms with the KoPl-G. This law was very similar to the German legislation, requiring the removal of content that is illegal under the Austrian criminal code within 24 hours or 7 days, depending on whether the content is clearly illegal or not.[34] Such content includes illegal hate speech, which is defined under Austrian law as public incitement to violence against or the intention to violate the human dignity of a person or a group of persons on the grounds of their race, skin colour, language, religion or belief, nationality, descent or national or ethnic origin, sex, disability, age or sexual orientation.[35]

3 ECONOMIC INTEGRATION, SOCIAL PROGRESS AND THE DIGITAL SINGLE MARKET STRATEGY

European integration is characterized by several major successive historical stages, from the creation of the Coal and Steel Community in 1951, to the Maastricht Treaty in 1992, which established the European Communities and introduced the single currency, to the Lisbon Treaty in 2007. This process can be examined in terms of a constant tension between economic integration (through the market) and socio-political integration (through institutions and the development of social policies and fundamental rights).[36] Before the Second World War, Friedrich Hayek, an ardent defender of market liberalism, had imagined that European integration would be political in the first place, and that only when a 'strong federal government' was established would it create a common market and centralize policy in this area – thus preventing the advocates of extensive welfare states from interfering with the operation of the market.[37] In the end, the opposite happened, as the European Union began as a customs union before gradually building itself around the single market project, leading to an acceleration of the liberal transformation of the European polity since the 1980s.[38] Integration has thus taken place pragmatically, first in limited economic sectors, then gradually, under the guidance of supranational institutions to which powers have been delegated, but in a limited way (the 'Monnet method').[39] This is not to say, of course, that the European Union has always favoured economic integration over social progress. In particular, the jurisprudence of the CJEU has played a major role in promoting individual

[33] Conseil Constitutionnel, Décision n°2020-801, 18 June 2020 <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042031998/> accessed 20 December 2024.
[34] KoPl-G Article 3.
[35] Austrian Criminal Code (*Strafgesetzbuch*, StGB) §283.
[36] Enrico Spolaore, 'What Is European Integration Really About? A Political Guide for Economists' (2013) 27(3) Journal of Economic Perspectives 125.
[37] Fritz W Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy' (2010) 8(2) Socio-Economic Review 211.
[38] ibid.
[39] Wolfgang Wessels, 'Revisiting the Monnet Method – A contribution to the periodisation of the European Union's history' in Michaela Bachem-Rehm, Claudia Hiepel, and Henning Türk (eds), *Teilungen überwinden* (De Gruyter Oldenbourg 2014).

rights,[40] and the adoption of the European Charter of Fundamental Rights in 2000 is a particularly striking demonstration of the EU's will to be more than a single market. However, economic development can sometimes come at the expense of the protection of individual rights. In this sense, some authors characterize integration through the single market as a 'Trojan horse of neoliberalism',[41] with a 'liberalizing and deregulatory' effect that undermines market economies based on stronger social dimensions[42] (Bartl speaks of a form of 'Internal market rationality').[43]

The rapid emergence of new technologies has created new challenges for the internal market. EU economic integration has been challenged as Member States have begun to regulate digital services and markets, such as the case of Member States regulation of social media well illustrates.[44] In principle, Article 26 of the Treaty on the Functioning of the European Union (TFEU) lays down the obligation to adopt measures to ensure the proper functioning of the internal market. This article is supplemented by Article 114 TFEU, which states that, with a view to completing the internal market, the European Union shall have the task of working towards the approximation of the laws of the Member States.[45] In digital matters, this obligation has led the European Commission, under the leadership of Jean-Claude Juncker, to launch in 2015 a strategy for the creation of the *Digital Single Market*, i.e. the development of the single market principle but reaffirmed in the digital age. This strategy pursues economic integration objectives in a number of sectors, including connectivity, e-health, the data economy, artificial intelligence and digital platforms. In some of these sectors, the aim is to encourage investment focused on greater digitisation of public services or better governance of the data economy.[46] In other sectors, the EU aims to promote the Digital Single Market not only through the development of public policies or improved governance, but also through stricter regulation of existing players, in particular US transnational technology companies. This is the case with the regulation of content sharing between third parties, i.e. in relation to the activity of these companies as social media platforms.[47] Faced with the emergence of legislation in different Member States and the

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[40] Olof Larsson, 'Political and constitutional overrides: the case of the Court of Justice of the European Union (2020) 28(12) Journal of European Public Policy 1932; Renaud Dehousse, *The European Court of Justice – The Politics of Judicial Integration* (Springer 1998).

[41] Sebastian Heidebrecht, 'From Market Liberalism to Public Intervention: Digital Sovereignty and Changing European Union Digital Single Market Governance' (2024) 62(1) JCMS: Journal of Common Market Studies 205; Christoph Hermann, 'Neoliberalism in the European Union' (2007) 79(1) Studies in Political Economy 61; Alan W Cafruny and Magnus Ryner (eds), *A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe* (Rowman & Littlefield Publishers 2003).

[42] Scharpf (n 37).

[43] Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21(5) European Law Journal 572.

[44] Michelle Cini and Patryk Czulno, 'Digital Single Market and the EU Competition Regime: An Explanation of Policy Change' (2022) 44(1) Journal of European Integration 41.

[45] Annegret Engel, 'Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market' in Annegret Engel, Xavier Groussot, and Gunnar Thor Petursson (eds), *New Directions in Digitalisation – Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Springer 2025).

[46] See for example Clarissa Valli Buttow and Sophie Weerts, 'Managing public sector data: National challenges in the context of the European Union's new data governance models (2024) 29(3) Information Polity 261; see also Clarissa Valli Buttow and Sophie Weerts, 'Public sector information in the European Union policy: The misbalance between economy and individuals' (2022) 9(2) Big Data & Society <https://journals.sagepub.com/doi/10.1177/20539517221124587> accessed 20 December 2024.

[47] Miikka Hiltunen, 'Social Media Platforms within Internal Market Construction: Patterns of Reproduction in EU Platform Law' (2022) 23(9) German Law Journal 1226.

problem of illegal content online, the European Commission saw an urgent need to propose a Europe-wide regulatory framework for social media companies.[48] It has done so by introducing the DSA, which aims to update the liability exemption framework of the ECD. Announced by Ursula von der Leyen in 2019 and presented to the European Parliament in December 2020, the DSA has been the subject of intense debate between early 2021 and 2022. The official aim of the DSA is to strengthen the protection of users of online social media platforms. To this end, the DSA introduces a number of due diligence measures,[49] including the obligation for companies to carry out systemic risk analyses[50] and undergo external audits.[51] Other measures are inspired by the principles of good administrative procedure, such as the obligation for companies to ensure that their terms and conditions are clear and precise[52] and the introduction of appeal procedures allowing users to challenge the removal of content directly with the platforms.[53]

From the perspective of law and political economy studies, this paper aims to interrogate current developments in European integration, particularly in relation to the realisation of a digital single market and the implementation of the DSA within it. The aim of such an approach is different from dogmatic legal analysis that seeks to interpret and explain the content of European law.[54] The aim is not to better explain or understand the rules, but rather to analyse what these rules and their application reveal about the power dynamics between states, individuals, companies and the EU. Indeed, law and political economy is a field of study that takes as its starting point the context of the polycrises that humanity and global governance are facing in the 21st century (climate disruption, crises of democracy and the rise of illiberalism, the resurgence of war, growing inequality) and that examines how 'legal discourse has helped to consolidate these problems by serving as a powerful authorising terrain for a series of 'neoliberal' political projects that have fuelled these same crises'.[55] Thus, the focus of this research perspective is on 'issues of power and

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[48] Commission, 'Digital Services Act: EU's landmark rules for online platforms enter into force' (n 3).
[49] Sebastian Felix Schwemer, 'Digital Services Act: A reform of the e-Commerce Directive and much more' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgard Publishing 2023).
[50] Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 200/31/EC (Digital Services Act) [2022] OJ L277/1, Article 34; Sara Tommasi, 'Risk-Based Approach in the Digital Services Act and in the Artificial Intelligence Act' in Sara Tommasi (ed), *The Risk of Discrimination in the Digital Single Market – From the Digital Services Act to the Future* (Springer 2023).
[51] Digital Services Act Article 37; Johann Laux, Sandra Wachter, and Brent Mittelstadt, 'Taming the few: Platform regulation, independent audits, and the risk of capture created by the DMA and DSA' (2021) 43 Computer Law & Security Review <https://www.sciencedirect.com/science/article/pii/S0267364921000868?via%3Dihub> accessed 20 December 2024.
[52] Digital Services Act Article 14; Mathieu Fasel and Sophie Weerts, 'Can Facebook's community standards keep up with legal certainty? Content moderation governance under the pressure of the Digital Services Act' (2024) 16(3) Policy & Internet 588.
[53] Digital Services Act Article 20.
[54] Mark Van Hoecke, 'La systématisation dans la dogmatique juridique' (1986) 10 Rechtstheorie Beiheft 217; see also Ulla Neergaard, Ruth Nielsen, and Lynn Roseberry, *European Legal Method: Paradoxes and Revitalisation* (Djøf Forlag, Copenhagen 2011).
[55] Neoliberalism is understood as 'a mode of governance and legitimation that enforces specific distributions and configurations of 'market discipline' that support profits and managerial power over democratically determined social guarantees – for instance, labor market 'liberalization', erosion of unions' role in the economy, and rollbacks of social provision' – Jedediah S Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K Sabeel Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis (2020) 129 The Yale law Journal 1789.

inequality, between individuals, groups, states and regions'.[56] From this perspective, the paper aims to ask how the DSA fits into the tension between economic integration and the protection of individual rights within the EU. As an object of analysis, the paper focuses on a case study, that of the legal challenge by social media platforms to the Austrian KoPl-G, a law aimed at imposing stricter obligations on these companies in Austria, which was adopted and subsequently challenged at the same time as parliamentary discussions on the DSA were taking place at EU level.

4 CASE STUDY: BIG TECH LITIGATION AGAINST AUSTRIA'S COMMUNICATION PLATFORMS ACT

The adoption of the KoPl-G triggered a legal dispute between the Austrian Communications Authority (KommAustria), which is responsible for enforcing the law, and the social media platforms subject to its provisions. The dispute centred solely on the question of who should be held responsible for the obligations laid down in the law.

The KoPl-G entered into force on 1 January 2021.[57] According to §1 of the law, it applies to 'domestic and foreign service providers who offer communication platforms for profit'. The law provides for certain exceptions, in particular if (1) 'the number of users in Austria authorized to access the communication platform via registration in the previous calendar year was less than 100,000', or (2) 'if the turnover generated by the operation of the communication platform in Austria in the previous calendar year was less than EUR 500,000'. A further exception applies to service providers whose communication platforms primarily offer non-profit services. The law assigns KommAustria the task of designating, by means of official decisions, which companies are subject to its obligations.

Between 26 March 2021 and 22 April 2021, KommAustria designated the companies subject to the law. Three companies – Google, Meta, and TikTok, all of which are registered in Ireland – challenged this designation by submitting objections directly to KommAustria.[58] The companies raised similar objections, arguing that the Austrian law could not be applied to them because it conflicted with the 'country of origin' principle set out in Article 3 of the ECD. This article states:

> […] 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.
> […]
> 4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:
> (a) the measures shall be:

[56] Michael A Wilkinson and Hjalte Lokdam, 'Law and Political Economy' (2018) LSE Law, Society and Economy Working Papers 7/2018 <https://eprints.lse.ac.uk/87544/1/Wilkinson_Law%20Political%20Economy_Author.pdf> accessed 20 December 2024.

[57] An outline of the chronology of events relating to the legal challenge to the KoPl-G can be found in Annex 1.

[58] Bundesverwaltungsgericht, Case W195 2241960-1 (2021). <https://www.bvwg.gv.at/presse/703149.html> accessed 20 December 2024.

> (i) necessary for one of the following reasons:
> - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
> - the protection of public health,
> - public security, including the safeguarding of national security and defence,
> - the protection of consumers, including investors.
> (ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
> (iii) proportionate to those objectives;
> (b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:
> - asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
> - notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.
> […]

The companies argue that Article 3 should be interpreted as meaning that only the Member State in which an information society service is established has the power to take measures that may restrict the free movement of those services. While acknowledging that Article 3 of the ECD contains exceptions allowing other Member States to take measures in respect of services established elsewhere, Google, Meta, and TikTok argue that, although they are established in Ireland and the Austrian law is based on a legitimate exception to Article 3, the broad and abstract application of the law to all services, rather than to a specific information society service, should invalidate it. They argue that such a law constitutes an unjustified restriction on the free movement of the services they provide. At the very least, the companies argue that if the law is not invalid, it should not apply to them.[59]

In order to clarify whether the KoPl-G is in line with the ECD, KommAustria referred the case to the Austrian Federal Administrative Court (*Bundesverwaltungsgericht*). Under the Austrian legal system, this court has jurisdiction to hear appeals against decisions made by federal administrative bodies, such as KommAustria pursuant to Art. 130, §1, N1 of the Austrian Federal Constitutional Law. In a decision issued on 28 September 2021, the court ruled that the KoPl-G was valid and not incompatible with the ECD. In its decision,[60] the Court argued that the adoption of the KoPl-G fell within the exceptions set out in paragraphs 4 and 5 of Article 3 of the ECD. These exceptions allow a Member State in which an information society service is not established to take measures against such services, contrary to the country-of-origin principle, provided that there are justifiable grounds of public policy, public health, or public security, and that the measures taken are proportionate

[59] Bundesverwaltungsgericht (n 58).
[60] ibid.

to the objective pursued. The Court found that these conditions were met in the case of the KoPl-G. By introducing measures to prevent the dissemination of hateful content, the KoPl-G seeks to protect highly valuable interests, such as the protection of minors and human dignity. Given the importance of these objectives, a restriction of the country-of-origin principle is considered justified.[61] Furthermore, the Court did not find any problems with the proportionality of the KoPl-G.

As the companies were not convinced by the Federal Administrative Court's confirmation of KommAustria's decision, they appealed to the Supreme Administrative Court (*Verwaltungsgerichtshof*). In their appeal, the companies reiterated their argument that the KoPl-G was incompatible with EU law, in particular because it contradicted the country-of-origin principle established by the ECD. On 24 May 2022, the Supreme Administrative Court ruled on the appeal.[62] The Court pointed out that Article 3, paragraph 2 of the ECD provides that the free movement of services provided by information society companies may not, in principle, be restricted by a Member State other than the one in which those services are established. This provision embodies the country-of-origin principle, which means that companies providing information society services are generally only subject to measures adopted by the Member State in which they are established. However, the Supreme Administrative Court also noted that Article 3, paragraph 4 allows other Member States to take specific and targeted measures against such companies under certain conditions. Contrary to KommAustria and the Federal Administrative Court, the Supreme Administrative Court expressed uncertainty as to whether measures of a general and abstract nature, such as those proposed by the KoPl-G, can be considered 'specific and targeted' within the meaning of Article 3, paragraph 4 of the ECD, without intermediary measures of a specific and concrete nature directed at a single information society service. This question is crucial for determining whether the exceptions set out in paragraph 4 apply and, consequently, whether the KoPl-G is valid. As this question directly concerns coordinated EU law, the Supreme Administrative Court declined to rule itself and referred a preliminary question to the CJEU.

The CJEU answered to the preliminary question on 9 November 2023. In its answer, the CJEU emphasized that the primary objective of the ECD is to ensure the free movement of information society services between Member States. In order to achieve this, the Directive seeks to remove the obstacles created by 'the different national regimes applicable to those services through the principle of control in the Member State of origin'.[63] The CJEU recognised that, in certain circumstances, Member States other than the Member State of origin of the service may take measures 'in order to safeguard public policy, the protection of public health or public security, or the protection of consumers'. However, in response to the request submitted by the Supreme Administrative Court for a preliminary ruling, the CJEU clarified that such measures must not, under any circumstances, consist of 'general and abstract measures that apply indiscriminately to any provider of a category of information society services'. This means that measures contrary to the principle of control

[61] Bundesverwaltungsgericht (n 58) §3.5.1.
[62] Verwaltungsgerichtshof. CASE EU 2022/0003-005-1. <https://www.vwgh.gv.at/rechtsprechung/vorabentscheidungsantraege_an_den_eugh/Ro_2021030032.pdf> accessed 20 December 2024.
[63] Case C-376/22 *Google Ireland and Others v Kommunikationsbehörde Austria* EU:C:2023:835.

in the country of origin can only be covered by the exception provided for in paragraph 4 if they apply to a single, clearly defined information society service. Such measures cannot apply to an indeterminate number of services, whose identity cannot be determined a priori. The CJEU justified this interpretation by stating that allowing Member States to impose general and abstract obligations would 'call into question the principle of control in the Member State of origin' as established by the ECD. It would also 'undermine mutual trust between Member States and contravene the principle of mutual recognition'. Furthermore, the free movement of services would be jeopardized if companies subject to the KoPl-G 'would find themselves subject to different legislation', which would have a direct impact on the proper functioning of the internal market.

In answering to the question referred for a preliminary ruling, the CJEU confirmed the concerns of the Supreme Administrative Court. At the same time, it vindicated Google, Meta, and TikTok by confirming that the KoPl-G could not be applied to them on the grounds that this law was incompatible with the ECD. In a decision issued on 20 December 2023, the Supreme Administrative Court acknowledged the CJEU's ruling, concluding that the companies had been unlawfully subjected to the law.[64] As a result of this ruling and the simultaneous adoption of the DSA by the European Union in October 2022, the KoPl-G was repealed by the Austrian government in February 2024.

5 A NEW PERSPECTIVE ON THE ADOPTION AND OBJECTIVES OF THE DSA

The most striking element to emerge from the analysis of the case is the perfect alignment between the arguments initially put forward by the big tech companies as part of their litigation strategy and the final reasoning of the CJEU. This case demonstrates how European rules are, in this case, aligned with the interests of the companies, in opposition to those of the Austrian State. The latter, dissatisfied with the leeway given to social media companies by the liability exemption introduced in the ECD in the early 2000s, is attempting to formulate a stricter legal framework for these companies based on the exceptions allowed by the ECD for the protection of public safety and public security. The Austrian government's aim is to ensure the correct application of its national law. In other words, it wants to ensure that, despite the exemption framework provided by the ECD, content that is considered illegal under Austrian law cannot be disseminated on the companies' platforms. Social media companies, on the other hand, are strongly opposed to these new obligations, which they see as synonymous with additional workload and, consequently, increased costs. The companies' argument in this case is primarily based on the principle of control in the state of origin, as defined in Article 3 of the ECD. This principle directly embodies the idea of integration through the internal market for companies providing cross-border services and is seen as serving as a crucial cornerstone in the completion of the digital single market.[65] From a litigation strategy point of view, companies have simply used European law provisions on the completion of the internal market to undermine the efforts of the Austrian

[64] Verwaltungsgerichtshof. Document Ro 2021/03/0032-8,0033-7, 0034-6 (2023) <https://ris.bka.gv.at/Dokumente/Vwgh/JWT_2021030032_20231220J00/JWT_2021030032_20231220J00.pdf> accessed 20 December 2024.

[65] De Streel and Husovec (n 17).

state to ensure better compliance with its national law. In this way, companies skilfully mobilized principles of European law and used them against a Member State in order to emerge victorious.

By winning the case, the social media companies have litigated in a way that contributes to the realisation of the Digital Single Market. The companies' main concern, of course, is not European integration, but the avoidance of a regulatory burden that they see as potentially damaging to their business. In this sense, the litigation against the KoPl-G is in line with their systematic opposition in the courts to any European or national legislation that affects them.[66] However, by preventing the KoPl-G from taking full effect, the companies are litigating in a way that serves European integration. In the case studied, there was thus a reciprocal interaction between the legal framework of the ECD and the strategy of the companies. On the one hand, the general EU regulatory framework facilitated the companies' opposition to the national law; on the other hand, the companies' strategy and their successful litigation accelerated the process of strengthening the internal market for digital communication services. These two observations provide a basis for discussion. While these findings are based on a single case study and thus have limited generalisability, the perfect alignment between the companies' arguments and the ECD legal framework highlights the power dynamics between companies, the European Union, and Member States in relation to the different objectives that each of these parties seeks to achieve in the context of regulating social media companies. In this context, the Austrian case study sheds light on how the EU's institutional and policy framework can inherently favour business interests and provides insight into the EU's underlying rationale when regulating to achieve digital single market integration.

Indeed, the outcome of the legal challenge to the KoPl-G is particularly interesting when juxtaposed with the process of adopting the DSA, as it provides a new perspective on this process. The legal challenge in front of the CJEU takes place at the same time as the parliamentary phase of the DSA. In this respect, a reading of the preparatory documents for the law reveals some interesting elements. In these documents, the European Commission discusses the need to better protect users of social media platform services across the EU. However, the main focus of the impact assessment is elsewhere, as one of the Commission's main concerns is said to be the fragmentation of the internal market that countries such as Germany and Austria are creating through their national laws regulating social media companies.[67] In the preparatory documents, the Commission stresses several times that these national initiatives, although well-intentioned in the fight against illegal content, pose a risk to the economic environment of Internet companies in the EU because of the legal uncertainty they create. In this sense, one of the main objectives of the DSA is the need to update the liability exemption framework for social media companies, which dates back to the adoption of the ECD in 2000,[68] and to reaffirm its value for the Digital Single Market.[69]

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[66] See notably 'The EU Is Taking on Big Tech. It May be Outmatched' (*Wired*, 9 June 2024). <https://www.wired.com/story/european-commission-big-tech-regulation-outlook/> accessed 20 December 2024.

[67] European Commission, 'Impact assessment accompanying the proposal for a regulation of the European parliament and of the council' SWD/2020/348 final23-25. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0348 > accessed 27 March 2024

[68] De Streel and Husovec (n 17).

[69] Commission, 'Impact assessment' (n 67).

These elements underline the extent to which, beyond the official narrative of user protection and the good administrative practice and due diligence provisions it contains, the DSA is also here to counter Member States' attempts to adopt national laws to better protect users and to enforce their criminal law online, as these attempts could be detrimental to legal certainty and, thus, to economic growth. From this perspective, the Austrian proceedings can be seen in a different light, because the companies' triumph over the Austrian state comes at just the right time: by overturning Austrian law, the companies are helping to achieve the objective of combating legal fragmentation within the EU. In this sense, the companies have performed a crucial service for the Commission by opposing the Austrian law, as the annulment of the KoPl-G has pre-emptively resolved the complex issue that would have arisen from the coexistence of this law and the DSA. In this configuration, social media companies have found themselves to be allies of the European Commission. Their particular interests differ (the former want to avoid a regulatory burden, the latter wants to promote economic integration), but their general interest is the same: Member State regulation aimed solely at protecting users is seen as detrimental to economic interests. Such an insight into the EU's underlying rationale paves the way for adopting a more critical perspective on the issue of social media regulation in general. Such a perspective, based on a deeper analysis of power relations, could be used to interrogate current developments at the EU level, especially with the entry into force of the DSA. Indeed, the DSA is generating a lot of discussion, especially in academic circles. However, the work that deals with the DSA seems to support the Commission's narrative,[70] which presents the law as a legislation to protect 'consumers and their fundamental rights online by setting clear and proportionate rules',[71] aiming to rebalance 'the roles of users, platforms and public authorities according to European values, putting citizens at the centre'.

Such narrative overlooks the fact that the liability exemption framework for social media companies remains unchanged – despite the fact that it was this framework that was criticised by Member States for contributing to companies' failure to fight illegal and harmful content online, thereby endangering both users and the good functioning of democratic societies. Indeed, the general framework of exemption from liability for social media companies in relation to third-party content on their platforms has been very favourable to these companies since its inception. The economic success of such companies since the beginning of the 21st century can largely be attributed to this lack of liability.[72] Cohen has shown how, at its inception, this framework was rooted in the libertarian vision of the internet as a space free from government control, where laws should have minimal impact. This ideology is most evident in Section 230 of the CDA, but it also influenced the ECD. Over time, this general exemption has frustrated some EU Member States. They felt that the lack of liability meant that companies were not taking enough proactive measures to remove illegal content from their platforms. This led countries such as Germany, France, and Austria to adopt stricter laws, imposing additional obligations that challenged the existing liability exemption framework. As the case study shows, Austria's attempt was fiercely opposed by

[70] See De Gregorio (n 5); Frosio (n 6); Chander (n 7).
[71] European Commission, 'The Digital Services Act – Ensuring a safe and accountable environment' (2024) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en> accessed 20 December 2024.
[72] Cohen (n 13).

the companies, who ultimately prevailed. At the same time, the European Union viewed national initiatives such as Austria's unfavourably, as they fragmented the internal market. With the adoption of the DSA and the success of companies against Austria's KoPl-G, national efforts were abandoned,[73] and concerns about legal fragmentation have dissipated. The legal situation is now much clearer. For companies providing communication services such as social media, the DSA applies uniformly across Europe, without competing with any national law. This avoids the complex issue of how national laws would have interacted with the European framework. Legally, the DSA maintains the existing liability exemption framework of the ECD, while introducing new regulatory tools inspired by the field of compliance. The DSA seeks to demonstrate that these additions will better protect users and meet the demands of Member States. However, the DSA does not radically change to the way social media companies are regulated in the EU, as the libertarian-inspired liability exemption framework remains intact.[74] Contrary to some claims,[75] the DSA does not appear to be an aggressive regulation targeting companies. This is supported by reports showing that, like other EU digital legislation, the DSA was subject to intense lobbying throughout its legislative process, some of which was successful.[76] For example, companies successfully lobbied to exclude a ban on surveillance advertising, which was part of the original draft and would have radically changed the way social media companies make money by harvesting users' personal data.[77] The various elements presented above form a cluster of clues that leads us to question the European Commission's narrative, which claims that the primary role of the DSA is to ensure a secure Internet for users within the European Union. Furthermore, it seems wise to question the purpose of the DSA from a larger perspective, particularly by placing this legislation in the context of the resurgence of industrial policy in the European Union.[78] The current digital context reflects a growing awareness of the need to achieve strategic autonomy from the United States, with increasing calls for digital sovereignty.[79] From this perspective, the DSA should be seen as part of the EU's efforts to promote European companies whose business models are more in line with European values and are less dependent on American tech giants. However, the question is whether this can be achieved without radical changes to the regulatory framework that also applies to US companies. This requires a reading of the law that adopts a political economy perspective, in contrast to the focus of the dominant legal literature – which typically concentrates on

[73] The other law in force alongside the KoPl-G, the NetzDG, was abandoned by Germany when the DSA came into force. The fact that the CJEU had ruled in the Austrian case that national laws regulating social media ran counter to the principle of control in the country of origin probably played a part in this decision.
[74] Hiltunen (n 47).
[75] Algorithm Watch, 'A guide to the Digital Services Act, the EU's new law to rein in Big Tech' (21 September 2022) <https://algorithmwatch.org/en/dsa-explained/> accessed 20 December 2024.
[76] Emilia Korkea-aho, 'Legal Lobbying: The Evolving (But Hidden) Role of Lawyers and Law Firms in the EU Public Affairs Market' (2021) 22(1) German Law Journal 65; Robert Gorwa, Grzegorz Lechowski, and Daniel Schneiß, 'Platform lobbying: Policy influence strategies and the EU's Digital Services Act' (2024) 13(2) Internet Policy Review 1.
[77] Corporate Europe Observatory, 'How corporate lobbying undermined the EU's push to ban surveillance ads' (18 January 2022) <https://corporateeurope.org/en/2022/01/how-corporate-lobbying-undermined-eus-push-ban-surveillance-ads> accessed 20 December 2024.
[78] Kathleen R McNamara, 'Transforming Europe? The EU's industrial policy and geopolitical turn' (2024) 31(9) Journal of European Public Policy 2371.
[79] Luciano Floridi, 'The Fight for Digital Sovereignty: What It is, and Why It Matters, Especially for the EU' (2020) 33 Philosophy & Technology 369.

discussing the DSA's new obligations and their implementation.[80] Such a perspective would question the deeper reasons for this law and the new power relations it introduces or maintains, beyond the official narrative of its purpose. The case study of Austria is a first step to show how the regulatory framework for social media platforms might inherently favour corporate interests. Yet, it is not sufficient to fully map out interests or power dynamics, merely adding to the body of evidence that suggests the need to move in this direction. This evidence is supported by the literature on single market rationality[81] and the asymmetry of European integration,[82] which discusses how, in the process of European economic integration, a neoliberal vision – primarily favourable to business interests – has often prevailed over more socially oriented approaches. Furthermore, in the current context of democratic crisis and the rise of illiberalism, it is important to consider the potential for the DSA to be misused in ways that could serve anti-democratic agendas.[83] In all of these respects, future research on regulatory developments in social media governance, both within the European Union and beyond, would benefit from adopting analytical frameworks rooted in political economy studies to interpret the law through these lenses.

6 CONCLUSION

This paper has analysed the case of the KoPl-G and the subsequent legal battle with major social media companies. It has then placed the findings of the case in the context of the adoption of the DSA, a period that remains underexplored in the literature on social media regulation.

The case study has shown that the strategic use of EU law by social media companies has demonstrated how internal market principles can be very favourable to corporate interests. On the basis of the Austrian case study, this paper shows how social media platforms successfully used the ECD and internal market principles to challenge a national legislation aimed at combating illegal online content. By overturning Austria's KoPl-G, these companies ensured the dominance of an EU-wide framework over national regulatory efforts, thus contributing to safeguard the coherence of the Digital Single Market. From this perspective, the case reveals an alignment between corporate interests and the EU regulatory framework for social media companies.

This alignment is particularly interesting when considering the context of the adoption of the DSA, which was debated at the same time as the KoPl-G was being challenged in court. Officially, the DSA is presented as user protection legislation aimed at greater corporate accountability and transparency. However, the alignment between corporate interests and the EU regulatory framework in the Austrian case contributes to challenge this

[80] For example: Caroline Cauffmanand and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) 12(4) European Journal of Risk Regulation 758 https://doi.org/10.1017/err.2021.8; João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?' (2022) 13(2) European Journal of Risk Regulation 191. https://doi.org/10.1017/err.2022.1

[81] Bartl (n 43).

[82] Scharpf (n 37).

[83] For this discussion, see in particular the work of Rachel Griffin (notably: 'EU Platform Regulation in the Age of Neo-Illiberalism – Working Paper' (*SSRN*, 29 March 2024) <https://ssrn.com/abstract=4777875> accessed 20 December 2024).

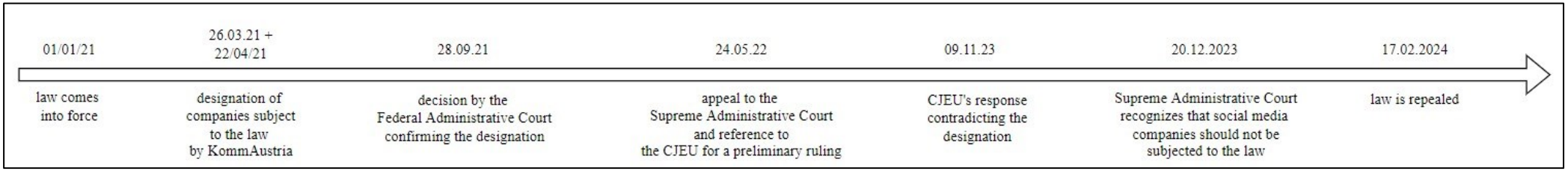
image of the DSA as a counterbalance to the power of Big Tech. Indeed, the preparatory works for this legislation show that the adoption of the DSA was not really motivated by a desire to better protect users, but mainly by fears of legal fragmentation in the digital single market. Moreover, by maintaining the liability exemption framework of the ECD, which has also proven to be very favourable to corporate interests, the DSA does not appear to represent a major change in the approach taken to social media regulation in the EU.

These elements cast doubt on the DSA's ability to act as a counterweight to the big tech companies. Next to new regulatory tools based on compliance mechanisms, the DSA overall retains a regulatory approach that has historically favoured corporate interests over public and user protection. This continuity casts doubt on the DSA's ability to bring about a paradigm shift in European social media regulation. On the contrary, the Austrian case study shows how social media platforms have been able to skilfully mobilise the EU regulatory framework to resist the obligations imposed on them. In the face of such a situation, compliance-based regulatory instruments, which express a similar form of 'corporate rationality', seem unable to sufficiently compensate for an unchanged dominant paradigm favouring corporate interests.

On this basis, the findings of the paper call for a reassessment of the underlying motives and potential consequences of the DSA. Future research should go beyond the mere discussion of the content of new rules and their implementation, and more critically examine the power relations between the EU, Member States, citizens and companies that this law enables. Critical lenses are needed to explore how social media regulation shapes not only market efficiency, but also issues of social justice, democratic accountability and the balance between public and private interests in the digital age.

Annex 1

Figure 1: Timeline of the KoPl-G and relevant events in the litigation process



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MAPPING DATA PROTECTION LEGAL MOBILIZATION BEFORE THE CJEU: THE NEED TO RETHINK A SUCCESS STORY?

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The article explores data protection legal mobilisation before the Court of Justice of the EU ('DPLM'). It provides a theoretical framework to study DPLM before the CJEU and undertakes, for the first time, a comprehensive mapping of this area. It does so by studying, all the data protection-related judgments delivered by the Court between 2014-2023. The mapping is crucial to shed light on the characteristics and mechanisms of DPLM; it is also needed in order to unveil any potential blind spots of such mobilisation. The article asks: How can data protection legal mobilisation before the CJEU be understood through general mobilisation debates and theoretical frameworks? What are its main actors, objectives, topics and outcomes? What are its potential neglected aspects and omissions? The article argues that while DPLM as it emerges from our empirical study can be considered a successful story overall, it, nevertheless, appears elitist in its objectives, problems and actors. In this regard, we call for a critical rethinking of DPLM in order to transfer the data protection collective struggles of more marginalised social movements to the CJEU juridical field.

1 INTRODUCTION

This article explores legal mobilisation before the Court of Justice of the EU (CJEU) in the area of data protection law. The term legal mobilisation broadly refers to the 'use of legal action through a judicial mechanism in order to produce change beyond the individual case or individual interest'.[1] Judicial mobilisation is seen as a sub-category of mobilisation, a broader concept, which encompasses 'any type of process by which individual or collective actors invoke legal norms, discourse, or symbols to influence policy or behaviour'.[2]

There is evidence of growing use of legal mobilisation in the field of data protection recently,[3] followed by an emerging debate in the area. This has focused so far on a discussion of the relevant possibilities regarding the transnational enforcement of the GDPR,[4] and on

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[1] Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45(1) Law & Social Inquiry 166; Kris van der Pas, 'All That Glitters Is Not Gold? Civil Society Organisations and the (non-)Mobilisation of European Union Law' (2024) 64(2) Journal of Common Market Studies 525.

[2] These might include lobbying, information campaigns, etc.

[3] 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.

[4] 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 (GDPR) [2016] OJ L119/1. Benjamin Greze, 'The Extra-Territorial Enforcement of the GDPR: A Genuine Issue and the Quest for Alternatives' (2019) 9(2)

how different types of organisations, such as consumer organisations,[5] civil society actors, Non-Governmental Organisations (NGOs) and other transnational collectives can contribute to the promotion of data privacy interests across Europe,[6] including their engagement with Data Protection Authorities (DPAs) and national courts.[7] A strand of this literature has also started to examine the CJEU as a venue for civil society legal mobilisation,[8] in particular highlighting the procedural challenges Civil Society Organisations (CSOs) face in this regard.[9] However, there is currently no systematic understanding of data protection legal mobilisation (hereinafter, DPLM) before the CJEU which assesses its main actors, goals and problems.

The present article aims to address this gap by offering a theoretical framework to understand DPLM before the CJEU and by undertaking, for the first time, a comprehensive mapping of this area. It does so by studying, all the data protection-related judgments delivered by the Court between 2014-2023. The mapping is crucial to shed light on the characteristics and mechanisms of DPLM; it is also needed in order to unveil any potential blind spots of such mobilisation. The article asks: How can data protection legal mobilisation before the CJEU be understood through general mobilisation debates and theoretical frameworks? What are its main actors, objectives, topics and outcomes? What are its potential neglected aspects and omissions?

The article argues that while DPLM as it emerges from our empirical study can be considered a successful story overall; it, nevertheless, appears elitist in its objectives, problems and actors. In this regard, we call for a critical rethinking of DPLM in order to transfer the data protection collective struggles of more marginalised social movements to the CJEU juridical field.

The article makes a number of important contributions. For those interested in legal mobilisation debates, this paper joins a growing body of research, by focusing on a less studied area of mobilisation:[10] data protection. Building upon general legal mobilisation theories, the article develops its own theorisation of DPLM before the CJEU as a useful framework to study this area. The empirical mapping findings offer insights on this

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International Data Privacy Law 109; Brian Daigle and Mahnaz Khan, 'The EU General Data Protection Regulation: An Analysis of Enforcement Trends by EU Data Protection Authorities' (2020) Journal of International Commerce & Economics 1; Giulia Gentile and Orla Lynskey, 'Deficient by Design? The Transnational Enforcement of the GDPR' (2022) 71(4) International and Comparative Law Quarterly 799.

[5] Peter Rott, 'Data Protection Law as Consumer Law – How Consumer Organisations Can Contribute to the Enforcement of Data Protection Law' (2017) 6(3) Journal of European Consumer and Market Law 113.

[6] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3); Emilio Lehoucq and Sidney Tarrow, 'The Rise of a Transnational Movement to Protect Privacy' (2020) 25(2) Mobilization: An International Quarterly 161; 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; Federica Casarosa, 'Transnational Collective Actions for Cross-Border Data Protection Violations' (2020) 9(3) Internet Policy Review 1.

[7] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3).

[8] See in general, beyond data protection Jos Hoevenaars, *A People's Court? A Bottom-up Approach to Litigation before the European Court of Justice* (Eleven International Publishing 2018); Virginia Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights From the Case of Migrant Rights' (2021) 58(3) Common Market Law Review 751.

[9] 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.

[10] As compared to environmental, non-discrimination and migration law.

mobilisation's main features, goals, actors and outcomes and help make sense of how general theoretical frameworks apply to the data protection case study. At the same time, the empirical study suggests that there might be neglected aspects to this mobilisation which matter if EU data protection law is to be interpreted by the Court to address social justice problems. The critique the article advances on the basis of socio-legal theories aims not only to initiate an academic debate in the field; more importantly, its goal is to inspire mobilising actors and ultimately the CJEU's juridical outcomes.

The paper is structured as follows: The next Section explores the general theoretical debates and factors of legal mobilisation before the CJEU (2.1) and analyses the particularities of the data protection case (2.2). Section 3 discusses the empirical mapping of DPLM by focusing on the methodological approach adopted (3.1) and its main findings (3.2). Section 4 advances three critiques of data protection mobilisation before the Court. Section 5 concludes.

2 LEGAL MOBILISATION, THE CJEU AND DATA PROTECTION

2.1 THEORETICAL BACKGROUND: THE FACTORS OF LEGAL MOBILISATION BEFORE THE CJEU

The scholarship on legal mobilisation offers a useful theoretical framework for understanding the mobilisation of European law on the basis of three level factors: 1) macro-level systemic factors (legal opportunities at the EU level); 2) meso-level factors (legal opportunities at the national level); and, 3) micro-level factors (focusing on the actors involved).[11]

At the macro-level, the literature considers 'the shifting legal norms and institutional arrangements of the EU' that shape 'the rules of the game for potential litigants' and encourage or discourage litigation.[12] The CJEU is considered an important forum for legal mobilisation opportunities. This is because it is one of 'the most influential supranational courts' serving as the apex judicial body of the European Union, a 450 million-person association[13] and it has played a considerable role in shaping the EU's ever deeper 'integration through law',[14] sometimes referred to as 'judicial integration'.[15] Indeed, the influence of the CJEU on the Community's market integration is considered as the *constitutionalization* of the Community legal order.[16] By establishing the principles of direct effect[17] and primacy of EU law over national law,[18] the Court interpreted the European Community Treaties and

[11] Lisa Conant et al, 'Mobilizing European Law' (2018) 25(9) Journal of European Public Policy 1376.
[12] ibid 1378.
[13] Ran Hirschl, 'The Global Expansion of Judicial Power' in Lee Epstein et al (eds), *Oxford Handbook of Comparative Judicial Behaviour* (Oxford University Press 2023).
[14] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75(1) American Journal of International Law 1. See also Sabine Saurugger and Fabien Terpan, *The Court of Justice of the European Union and the Politics of Law* (Palgrave Macmillan 2017).
[15] Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organization 41.
[16] Stein (n 14).
[17] Case 26/62 *Van Gend en Loos* EU:C:1963:1.
[18] Case 6/64 *Flaminio Costa v E.N.E.L.* EU:C:1964:66.

legislation in a 'constitutional mode',[19] ascribing to them effects typical of constitutional law, while at the same time systematically advancing the legal interpretation and institutional evolution of the Community -EU-[20] in a way that was 'more or less detached from the will of Member States'.[21] In this way, the Court has been seen as exerting its judicial control 'to address major public policy issues and political disputes'.[22]

This constitutionalization of the EU into 'an unprecedented supranational polity' was achieved by granting EU citizens substantive rights and procedural guarantees through the preliminary reference procedure. Indeed, this mechanism has played a central role in the constitutionalization of the EU legal system.[23] It has ensured the uniform interpretation of EU law and the judicial review of its validity. More importantly, and relevant to this article, the preliminary reference procedure has been used in combination with the doctrines of supremacy and direct effect as a 'citizens' infringement procedure',[24] opening up possibilities for individuals to challenge the compatibility of national law in the light of EU law.[25] This function of the preliminary reference procedure has been reinforced by the Lisbon Treaty which made the EU Charter of Fundamental Rights binding.[26] In this context, a strand of the literature views the preliminary reference procedure as 'a unique opportunity for legal mobilisation, as it can be used by individuals and groups to challenge national norms and to set a precedent in 27 Member States'.[27]

By contrast, other scholars have criticised the CJEU for its 'general lack of openness' towards civil society[28] and its hostility to collective action.[29] This criticism relates primarily to the strict interpretation of the standing requirements under Article 263 TFEU for direct action for annulment. Furthermore, individuals are also excluded from infringement proceedings as they cannot bring a Member State to the CJEU for EU law violations; only

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[19] Stein (n 14).
[20] Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003); Dieter Grimm, 'The Democratic Costs of Constitutionalization: The European Case' (2015) 21(4) European Law Journal 460; Joseph H H Weiler, 'The Transformation of Europe' (1991) 100(8) The Yale Law Journal 2403.
[21] Grimm (n 20); Ninke Mussche and Dries Lens, 'The ECJ's Construction of an EU Mobility Regime-Judicialization and the Posting of Third-country Nationals' (2019) 57(6) Journal of Common Market Studies 1247; Alec Stone Sweet and Thomas L Brunell, 'Trustee Courts and the Judicialization of International Regimes' (2013) 1(1) Journal of Law and Courts 61.
[22] R Daniel Kelemen, 'Judicialisation, Democracy and European Integration' (2013) 49(3) Representations 259.
[23] Juan A Mayoral, 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe' (2017) 55(3) Journal of Common Market Studies 551.
[24] Bruno De Witte, 'The impact of Van Gend en Loos on judicial protection at European and national level: Three types of preliminary questions' in Antonio Tizzano, Julianne Kokott, and Sacha Prechal (eds), *50th Anniversary of the Judgment in Van Gend en Loos, 1963–2013* (Office des Publications de l'Union Européenne 2013) 93, 95.
[25] ibid.
[26] Maria Tzanou, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance* (Hart Publishing 2017).
[27] Passalacqua (n 8) 752; Hoevenaars (n 8).
[28] Effie Fokas, 'Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion' (2016) 5(3) Oxford Journal of Law and Religion 541, 553.
[29] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Taylor and Francis 1992) 525. See also Sergio Carrera and Bilyana Petkova, 'The Potential of Civil Society and Human Rights Organizations through Third-Party Interventions before the European Courts: The EU's Area of Freedom, Security and Justice' in Mark Dawson et al (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 262–263; Mariolina Eliantonio, 'The Role of NGOs in Environmental Implementation Conflicts: "Stuck in the Middle" between Infringement Proceedings and Preliminary Rulings?' (2018) 40(6) Journal of European Integration 753, 763.

the Commission and the Member States can initiate such action.[30] Moreover, it has been questioned whether the CJEU could be considered 'a full-blown fundamental rights adjudicator' – in particular when compared with the European Court of Human Rights (ECtHR)[31] even after the EUCFR became legally binding.[32] If volume of judgments is used, an EU Fundamental Rights Agency (FRA) empirical study found that there is a 'relatively low number of preliminary rulings where the Charter is of relevance'.[33]

At the meso-level the scholarship has focused on factors at the national level that affect opportunities for mobilisation.[34] These 'legal opportunities structures' (LOS) reflect the way EU law is implemented and enforced at the Member States[35] and how it impacts national policies.[36] Factors at the meso-level are, therefore, inter-linked and interrelated with factors at the macro-level;[37] in fact, in the context of EU law, legal opportunities structures have been labelled by scholars as 'EU LOS' (as they refer to the specificities of the EU legal system and of the preliminary reference procedure).[38]

The preliminary reference procedure depends to an extent on national rules on standing – subject to the principles of equivalence and effectiveness – as a case must be first brought before a national court who then needs to send a preliminary reference question to the CJEU under Article 267 TFEU. The role of national judges is central here; indeed, it has been argued that by referring 'sensitive questions of interpretation', national courts are 'indirectly responsible for the boldest judgments the Court has made'.[39] However, national courts might decide to refer or not to refer for a variety of factors,[40] and it can be difficult to litigants to influence these decisions – although not impossible.[41] Furthermore, the possibility for third-party interventions in preliminary reference (and in direct actions) is limited as it depends on divergent national rules requiring that 'only parties involved in the national

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[30] Arts. 258-260 TFEU; Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Oxford University Press 2014) 145.
[31] Conant et al (n 11); Maria Tzanou, 'European Union Regulation of Transatlantic Data Transfers and Online Surveillance' (2017) 17(3) Human Rights Law Review 545.
[32] Van der Pas, 'All That Glitters Is Not Gold?' (n 1); Arthur Dyevre, Monika Glavina, and Michal Ovádek, 'The Voices of European Law: Legislators, Judges and Law Professors' (2021) 22(6) German Law Journal 956.
[33] Van der Pas, 'All That Glitters Is Not Gold?' (n 1) 528; Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20(2) Maastricht Journal of European and Comparative Law 168.
[34] Passalacqua (n 8) 758; Conant et al (n 11) 1379; Rhonda Evans Case and Terri Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48(2) Journal of Common Market Studies 221, 224.
[35] Van der Pas, 'All That Glitters Is Not Gold?' (n 1) 525.
[36] Conant et al (n 11) 1379
[37] Van der Pas, 'All That Glitters Is Not Gold?' (n 1).
[38] Passalacqua (n 8) 770. There are also the political opportunities structures 'POS' which refer to are relevant to the political environment and the incentives or disincentives this provides for legal mobilisation.
[39] Federico Mancini, 'The Making of A Constitution For Europe (1989) 26(4) Common Market Law Review 595, 597.
[40] Both structural explanations (national legal culture, judicial organization) and subjective reasons (policy preferences, education) may influence judges' decisions. Passalacqua (n 8) 755; Harm Schepel and Erhard Blankenburg, 'Mobilizing the European Court of Justice' in Gráinne De Búrca and Joseph H H Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 9.
[41] Van der Pas, 'All That Glitters Is Not Gold?' (n 1).

proceedings of the preliminary question can participate before the CJEU'.[42] This has prompted some scholars to conclude that 'the preliminary reference procedure cannot be seen as a fully adequate means of bottom-up GDPR enforcement'.[43]

Micro-level factors pay attention to 'the agent-level characteristics that influence whether individuals, groups or companies will turn to the courts'.[44] Even if opportunities for rights enforcement exist, it would be wrong to automatically assume that individuals and CSOs will be able to bring their case before the CJEU.[45] Micro-level factors include EU legal awareness ('euro-expertise')[46] 'know-how', financial costs and resources, networks, etc.[47] All these matter when examining the extent to which the CJEU is mobilised or not.[48]

2.2 DATA PROTECTION LEGAL MOBILISATION BEFORE THE CJEU

The above taxonomy provides a useful analytical framework to study data protection legal mobilisation. At the macro level, EU law and in particular the recognition of data protection as a fundamental right on its own alongside the right to privacy in the Charter,[49] as well as the adoption of secondary legal provisions, such as the General Data Protection Regulation (GDPR) which is considered 'the gold standard' for data protection laws worldwide[50] have established a new opportunity structure for legal mobilisation. In this regard, the academic scholarship has seen the CJEU as a driving force for the development of EU data protection law.[51] The CJEU has framed the scope of this law, by explaining the meaning of concepts such as 'personal' and 'sensitive' data, 'processing' and 'adequacy' of protection for international data transfers and has consistently interpreted internal market harmonisation instruments (such as the DPD and the GDPR) in a *constitutional mode* that fosters the protection of fundamental rights by distancing them from economic objectives.[52] In fact, it has been argued that the CJEU's interpretation of data protection has manipulated legal texts often exceeding its interpretative limits to create a 'super' fundamental right to data protection[53] that could 'effectively make the entire Internet subject to EU data protection law'.[54] The CJEU's data protection case law has distinguished it even from human rights specialised courts such as the ECtHR, with a current ECtHR judge remarking that 'the

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[42] Jasper Krommendijk and Kris van der Pas, 'To Intervene or not to Intervene: Intervention Before the Court of Justice of the European Union in Environmental and Migration Law' (2022) 26(8) The International Journal of Human Rights 1394.
[43] Golunova and Eliantonio (n 9).
[44] Conant et al (n 11); Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge University Press 2010).
[45] Passalacqua (n 8) 756.
[46] ibid 766.
[47] ibid 756; Van der Pas, 'All That Glitters Is Not Gold?' (n 1).
[48] Van der Pas, 'All That Glitters Is Not Gold?' (n 1); Rachel A Cichowski, *The European Court and Civil Society* (Cambridge University Press 2007); Tommaso Pavone, *The Ghostwriters* (Cambridge University Press 2022).
[49] Article 8 EUCFR; Tzanou, *The Fundamental Right to Data Protection* (n 26).
[50] See, inter alia, Giovani Buttarelli, 'The EU GDPR as a Clarion Call for a New Global Digital Gold Standard' (2016) 6(2) International Data Privacy Law 77.
[51] Maria Tzanou, 'The Future of EU Data Privacy Law: Towards a More Egalitarian Data Privacy' (2020) 7(2) Journal of International and Comparative Law 449.
[52] Maria Tzanou, 'The judicialization of EU data retention law: Epistemic injustice and the construction of an unequal surveillance regime' in Eleni Kosta and Irene Kamara (eds), *Data Retention in Europe and beyond: Law and Policy in the aftermath of an invalidated directive* (Oxford University Press 2024, *forthcoming*).
[53] ibid.
[54] ibid.

Strasbourg Court lags behind the Luxembourg Court, which remains the lighthouse for privacy rights in Europe'.[55]

The role of the CJEU in constitutionalizing EU data protection has had an influence on legal opportunities structures at the meso-level. While, the general access to Court limitations that individuals and CSOs face under Articles 263 and 267 TFEU are applicable to data protection as well,[56] it is significant to note that the CJEU has interpreted standing requirements generously in the context of data protection. In *Österreichischer Rundfunk*, a case decided before the adoption of the EUCFR, the Court stated that the provisions of the Data Protection Directive (DPD) must be interpreted in light of fundamental rights,[57] and held that 'to establish the existence of an interference with the fundamental right to respect for private life, it does not matter whether the information in question relating to private life is *sensitive* or whether the persons concerned *have suffered any adverse consequences* on account of that interference'.[58]

This pronouncement is important because it signifies that essentially there are *no standing requirements* for individuals to bring cases under EU data protection law alleging an interference with their right to data privacy, including in the (sensitive for Member States) context of national security. The absence of standing requirements for privacy complaints has been crucial for the admissibility of secret surveillance claims before the CJEU.[59] In *Schrems I*, the (Irish) Data Protection Commissioner, rejected Max Schrems' complaint about Facebook transferring his personal data to the USA where they could be accessed by US intelligence services, as 'frivolous or vexatious'. However, the CJEU did not raise any similar concern when a preliminary reference was made; the complaint was deemed acceptable because EU data protection law applies irrespective of whether an individual has suffered actual damage or harm.[60] This approach is different from the one adopted by the ECtHR regarding admissibility of complaints in secret surveillance cases, where the Court has held that the European Convention on Human Rights ('the 'ECHR') does not provide for an *actio popularis*,[61] and, therefore, an individual is required to show that they were 'directly affected' by the measure complained of in order to be able to lodge an application under the Convention.[62]

Furthermore, the possibility of representative or collective actions are significant legal mobilisation factors at the meso-level in particular for CSOs. Article 80(1) GDPR grants data

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[55] Opinion of Judge Pinto De Albuquerque in ECtHR (Grand Chamber), *Big Brother Watch and others v UK*, Apps nos. 58170/13, 62322/14 and 24960/15, 25 May 2021, para 59.
[56] Golunova and Eliantonio (n 9).
[57] C-465/00 *Österreichischer Rundfunk* EU:C:2003:294 para 68.
[58] ibid para 75. Emphasis added.
[59] Tzanou, 'European Union Regulation of Transatlantic Data Transfers' (n 31) 550.
[60] ibid.
[61] The Roman *actio popularis* granted any citizen the right to bring an action in the public interest. See Farid Turab Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (Brill 2018) 13; Beate Gsell, 'The new European Directive on representative actions for the protection of the collective interests of consumers – A huge, but blurry step forward' (2021) 58(5) Common Market Law Review 1365, 1379.
[62] See *N.C. v Italy* App no 24952/94 (ECtHR, 18 December 2002) para 56; *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* App no 47848/08 (ECtHR, 14 July 2014) para 101. Interestingly, the US Supreme Court held that neither individuals nor organizations have standing to bring a lawsuit under Section 702 of the Foreign Intelligence Surveillance (FISA) Amendments Act (FAA) because they cannot know whether they have been subject to surveillance or not. See *Clapper v Amnesty International USA*, 568 U.S.— (2013). For further discussion, see Tzanou 'European Union Regulation of Transatlantic Data Transfers' (n 31).

subjects the right to mandate a not-for-profit body, organisation or association active in the field of the protection to lodge a complaint on their behalf to exercise their rights. Member States are also allowed to authorise such representative bodies to file complaints 'independently of a data subject's mandate', if they consider that the rights of a data subject have been infringed as a result of the processing.[63]

In *Meta Platforms Ireland v. Bundesverband der Verbraucherzentralen* (Federal Union of Consumer Organisations and Associations), the CJEU interpreted this provision in a way that favours open LOS for CSOs. The case concerned a referral from the German Federal Court enquiring if qualified entities under Article 80(2) GDPR, including consumer associations could lodge proceedings for breaches independently of the infringement, and without being mandated to do so by a data subject.[64] The CJEU held that the GDPR allows a consumer protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects.[65]

More importantly for this article, the Court clarified that, in order to recognise that an entity has standing to bring representative proceedings, it is sufficient to claim that the data processing concerned 'is *liable to affect the rights*' of data subjects '*without it being necessary to prove actual harm suffered*'.[66] It noted that authorising consumer protection associations (such as the Federal Union) to bring, by means of a representative action data protection-related claims 'undoubtedly contributes to strengthening the rights of data subjects and ensuring that they enjoy a high level of protection',[67] and 'makes it possible to prevent a large number of infringements', thus proving 'more effective than the action that a single person individually and specifically affected' by a breach may bring.[68] The CJEU, thus, concluded that Article 80 GDPR 'may be used to protect the collective interests of consumers'.[69]

A further important structural factor of DPLarises from the data subjects' right to lodge a complaint with a supervisory authority where they consider that the processing of their personal data infringes EU data protection law.[70] Complaints before national Data Protection Authorities (DPAs) offer an avenue of legal mobilisation that is relatively speedier and less costly than judicial mobilisation. At the same time, they might constitute the start of a process that will reach the national courts and eventually the CJEU. Article 78 GDPR grants data subjects the right to an effective judicial remedy against a legally binding decision

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[63] Article 80(2) GDPR. See also Recital 142 GDPR. Marina Federico, 'European Collective Redress and Data Protection Challenges and Opportunities' (2023) 1 Media Laws 86, 94.
[64] Case C-319/20 *Meta Platforms Ireland v Bundesverband der Verbraucherzentralen* EU:C:2022:322.
[65] ibid.
[66] ibid para 72. Emphasis added. See also Case C-40/17 *Fashion ID* EU:C:2019:629 which was decided before the GDPR.
[67] Case C-319/20 *Meta Platforms Ireland* (n 64) para 74.
[68] ibid para 75.
[69] ibid para 82. In the subsequent case of Case C-757/22 *Meta Platforms Ireland Ltd, Verbraucherzentrale Bundesverband* EU:C:2024:598 the Court clarified that the right of the subject of a personal data processing operation to obtain from the controller, in a concise, transparent, intelligible and easily accessible form, using clear and plain language, information relating to the purpose of such processing and to the recipients of such data, constitutes a right whose infringement allows recourse to the representative action mechanism provided for in Article 80(2) GDPR. See also Karl Wörle and Oskar Josef Gstrein, 'Collective Data Protection Litigation: A Comparative Analysis of EU Representative Actions and US Class Actions Enforcing Data Protection Rights' (2024) 11(2) European Journal of Comparative Law and Governance 275.
[70] Article 77 GDPR.

of a DPA concerning them,[71] thus introducing an additional layer of redress.[72]

At the micro level, it was found (in the context of environmental law) that decentralized EU law enforcement mechanisms increase opportunities for NGOs' participation if they possess domestic court access and sufficient resources to use it.[73] This appears relevant in the data protection context, with its decentralized enforcement through DPAs and national courts. What is interesting to note here is data protection's complex interaction with other areas of law, which makes it a subject matter of legal mobilisation from different perspectives. Data protection is seen as a human rights issue (thus allowing rights' mobilisation), a consumer law issue (where consumers could be represented collectively for harms), a potential competition law issue (to be addressed by competition authorities and interested parties),[74] and increasingly a standalone area of law itself which has initiated mobilisation to address what are understood as privacy problems in particularly against big tech.[75]

Overall, a number of legal opportunity factors have been identified in the context of EU DPLM at the macro, meso and micro-levels; we term these factors, unique in the data protection context: *EU data protection LOS*. These *EU data protection LOS* include the recognition of data protection as a fundamental right on its own; its interpretation by the CJEU in a constitutional mode; the fact that data protection claims can be brought without applicants having to satisfy any standing requirements, such as showing particular damage or harm; the broad interpretation of collective action under Article 80 GDPR to include consumer organisations in potential entities that might raise data protection complaints; and, the existence of a decentralized enforcement system comprising both specialised independent authorities such as DPAs and national courts.

Yet, while *EU data protection LOS* offer a useful initial framework to understand the factors that might affect legal mobilisation in this area, a number of questions still remain: How does legal mobilisation before the CJEU in the field of data protection actually look like? How many cases adjudicated before the CJEU could be considered DPLM and what are their main characteristics? What are the players involved in CJEU DPLM? What are the goals and outcomes of such mobilisation? The next Section aims to address these questions by providing for the first time, an empirically-informed systematic mapping of DPLM before the CJEU.

3 MAPPING DATA PROTECTION MOBILISATION BEFORE THE CJEU

3.1 CASE SELECTION AND METHODOLOGICAL APPROACH

Despite an increasing recognition of the significant role that private parties and NGOs are

[71] Article 78 GDPR.
[72] For an empirical assessment of this, see Section 3.
[73] Tanja A Börzel, 'Participation through law enforcement: the case of the European Union' (2006) 39(1) Comparative Political Studies 128; Conant et al (n 11) 1382.
[74] Case C-252/21 *Meta Platforms and Others v Bundeskartellamt (Conditions générales d'utilisation d'un réseau social)* (Grand Chamber) EU:C:2023:537.
[75] See Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3).

playing in data protection enforcement,[76] relatively little systematic work has examined the characteristics of DPLM. In order to better understand this, we selected the CJEU as the focus of our analysis, because as the highest court of the EU legal order it is a crucial 'site of competition for the monopoly of the right to determine the law'.[77] Moreover, as the theorisation above has demonstrated, the CJEU has held a central role in the development of the distinct area which could be described as 'EU data protection law', with many of its judgments in the field being characterised by scholars as 'judicial activism', namely, the Court going beyond what was asked by national courts or interpreting data protection law in an expanding manner.[78] This article, however, does not aim to add yet another commentary on the CJEU's judicial activism in the field of data protection. It instead, aims to shed light on the main attributes and features of legal mobilisation in this area which have reached the Court. There is an additional advantage to our case selection. This is to fill a gap in the field of EU legal mobilisation studies, which has focused predominantly on anti-discrimination, environmental protection and migration law, leaving data protection rather underexplored.

The underlying research proceeded as follows: we used the search form on curia.europa.eu and specifically the a) the 'subject-matter' and b) period or date: 'date of delivery' functionalities. As subject-matter, we chose 'data protection' and performed the search ten times, from 1 January to 31 December of each year for the ten-year period between 01.01.2014–31.12.2023.[79] The built database included judgments rendered by the Court of Justice (C-judgments) but excluded Opinions, Orders and General Court judgments (Opinions, P and T cases). The C- judgments cover different secondary law legal instruments, such as the DPD, the GDPR, the Law Enforcement Directive (LED), and the ePrivacy Directive or indeed primary law, such as Articles 7 and 8 EUCFR. The following information was collected on each judgment and included in the database: year of publication; case name & number; procedure; actors; preliminary questions (if relevant); topic/ objectives; and, outcome.

A two-stage process was then used to assess legal mobilisation. At the first stage, we employed a number of evaluative criteria that appear prominently in the academic literature on legal mobilisation, strategic litigation and movement lawyering.[80] The key criteria included at this stage of the research to identify legal mobilisation were: 'whether the case had as its intended course of action to achieve a (collective) aim/ interest'; 'whether it created change beyond the individual applicant/ case'; 'whether it had an underlying societal ideal'; 'whether its aim was to bring forward legal/policy/societal change'; and, 'whether its importance was

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[76] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3).

[77] Pierre Bourdieu, 'The force of law: toward a sociology of the juridical field' (1987) 38 The Hastings Law Journal 805, 817.

[78] Tzanou, 'The judicialization of EU data retention law' (n 52).

[79] In other words, our first search was from 01.01.2014 to 31.12.2014, and our tenth search was from 01.01.2023 to 21.12.2023. Of course, this method, too, was met with certain limitations. Most notably, we observed that for the year 2020, searching through the subject-matter of data protection did not yield two of the most important data protection cases of that year, that is, *Privacy International and La Quadrature du Net*. Therefore, a supplementary search, using the 'Reference to case-law or legislation' to look for judgments referring to the DPD, was conducted.

[80] Kris van der Pas, 'Conceptualising Strategic Litigation' (2021) 11 Oñati Socio-Legal Series 116; Christine Cimini and Doug Smith, 'An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study' (2021) 35 Georgetown Immigration Law Journal 431; 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.

supported by the historical context/background work surrounding the particular case'. Not all of the above criteria had to be satisfied for a case to be included in our empirical mapping. At the first stage of the assessment, our goal was to avoid missing cases.

At the second stage, we undertook a further evaluative review to ensure that our approach was not overinclusive. To do so, we used as an evaluative criterion 'the impact of the case'. Under this, cases initiated by individuals were classified as 'legal mobilisation' only where 'the judgment had an impact which opens up a discussion beyond the individual outcome'. As a result, cases which appeared to serve the individuals' immediate interests and where there was no further evidence of legal mobilisation present (such as, for instance NGOs acting as interveners) were excluded from the judgments identified as legal mobilisation. The data are analysed below by making use of the theorisations from Section 2.

There are certain limitations to the approach taken in the present study.[81] First, we acknowledge that legal mobilisation before the CJEU is not the only form of legal mobilisation in the field of data protection. Indeed, pursuant to the theoretical analysis above, data protection legal mobilisation may employ different routes before DPAs, national courts, etc. While it is worth studying all these forums empirically and comparatively in future research, our current focus remains with the CJEU. This is because the *scope* of legal mobilisation before the CJEU can be seen as 'pan-European' and 'transnational' influencing policy direction – through legally binding judgments – across the 27 Member States.[82] Therefore, even if legal mobilisation was initiated at the local or national level before other venues and national courts, the fact that it reached the CJEU as the last stage of a broader process means that its subject matter has become a transnational 'strategic' issue. As van der Pas has noted 'high-profile cases decided by the [CJEU], do not coincidentally end up there but were the product of considerable strategic planning'.[83] A second limitation concerns the involvement of surrounding legal mobilisation factors and actors, such as CSOs in the Court's case law that is not always visible from the judgments themselves.[84] To mitigate this limitation, we have triangulated our database with data from other sources, including academic and media publications, reports and other relevant historical information. Finally, there is another limitation: our case selection focuses on positive cases, i.e. cases that reached the CJEU; further research needs to be conducted in relation to DPLM cases which never reached the Court.

3.2 DATA PROTECTION LEGAL MOBILISATION BEFORE THE CJEU: AN EMPIRICAL ANALYSIS

3.2[a] Overview

The study identified an overall of 25 cases of legal mobilisation among the judgments

[81] For the advantages and limitations of empirical (legal) studies, especially qualitative research in general, see, inter alia, Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13(3) Utrecht Law Review 95; Pierre Dewitte, 'The Many Shades of Impact Assessments: An Analysis of Data Protection by Design in the Case Law of National Supervisory Authorities' [2024] Technology and Regulation 209.
[82] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3) 677.
[83] Van der Pas, 'All That Glitters Is Not Gold?' (n 1).
[84] ibid; Passalacqua (n 8) noted: 'collective actors' activity is often non-manifest, as from the official documents of a case I cannot understand whether an individual claimant was supported by an NGO'.

rendered by the CJEU in the ten-year period between 2013-2024. This amounts to 32 per cent of the total C-judgments included in our database.[85] While the Grand Chamber appeared to be seized in several of these cases (overall 15 judgments), not all legal mobilisation cases were Grand Chamber judgments. Legal mobilisation seems to have peaked in 2019 (5 cases) and in 2023 (6 cases). These peaks appear to follow the entry into force of the GDPR (in 2018) and to demonstrate a recent increase in high importance transnational cases decided by the CJEU.

The percentage of identified legal mobilisation cases appears relatively high, but it may be explained by two main reasons: first, as mentioned above, the CJEU is considered a 'pan-European', 'strategic' and 'transnational' legal mobilisation forum, thus, confirming that mobilisation actors want to bring cases before the Court. Secondly, the Court's own judicial receptivity (and indeed judicial activism) to adjudicate important and often controversial data protection law cases from the point of view of both the EU's own institutions and Member States has played an important role in being asked to deal with such matters.

In terms of procedure, all the cases identified as legal mobilisation concerned requests for a preliminary ruling, thus, confirming academic debates that preliminary references are the main avenue for legal mobilisation also in the field of data protection. Furthermore, this finding confirms that other procedures before the Court (such as annulment proceedings and infringement proceedings) besides their general limitations, are also closed to DPLM actors.

Table 1: Overview of CJEU data protection legal mobilisation cases

Year	Overall data protection CJEU judgments	Identified as legal mobilization
2014	5	3
2015	4	1
2016	4	2
2017	6	0
2018	6	2
2019	7	5
2020	9	3
2021	2	1
2022	12	2
2023	23	6
Total	**78**	**25**

[85] On what was excluded from the database, see the methodology section.

3.2[b] Actors, aims and topics of DPLM

The empirical study identified several different types of actors involved in data protection legal mobilisation. These include individuals, CSOs or NGOs, DPAs and other national bodies. It should be noted that certain cases involve multiple types of actors at different roles (applicant, respondent, intervener).

Table 2: Data protection legal mobilisation actors and cases

Legal mobilization actors	**Parties & Cases**
Individuals	11,130 applicants in the C-59/12 cases that joined *Digital Rights Ireland*; Max Schrems in *Schrems I, Schrems v Facebook Ireland Limited,* and *Schrems II*; Patrick Breyer in *Breyer*; Mario Costeja González in *Google Spain;* Tom Watson in Joined cases *Tele2 Sverige*; Sergejs Buivids in *Buivids*; and pseudonymised individuals in *Y.S.*; *GC and Others*; *Latvijas Republikas Saeima*; *VB v Natsionalna agentsia za prihodite*; *OQ v Land Hessen, SCHUFA Holding AG; V.S.*
CSOs and NGOs	Digital Rights Ireland (Irish digital rights advocacy and lobbying group) in *Digital Rights Ireland*; Privacy International (UK digital rights charity) in *Privacy International*; La Quadrature du Net (French digital freedoms association) in *La Quadrature du Net*; and Ligue des droits humains (Belgian human rights association) in *Ligue des droits humains* and *Ligue des droits humains, BA v Organe de contrôle de l'information policière.*
DPAs	- Cases against DPA: Spanish DPA in *Google Spain and Google*; Latvian DPA in *Buivids*; French DPA in *GC and Others*, and *Google*; German DPA in *OQ v Land Hessen, SCHUFA Holding AG.* - Cases initiated by DPA: German DPA in *Wirtschaftsakademie Schleswig-Holstein*; Irish DPA in Schrems II. - Cases with DPA as intervener: German DPA in *Fashion ID.*
Other national bodies	- Consumer or competition law authorities: Verbraucherzentrale NRW (German consumer protection association) in *Fashion ID* and in *Meta Platforms Ireland*; Bundeskartellamt (German Federal Cartel Office) in *Meta Platforms and Others.* - Other national bodies: Hauptpersonalrat der Lehrerinnen und Lehrer beim Hessischen Kultusministerium (German Principal Staff Committee for Teachers Land Hessen) in *Hauptpersonalrat der Lehrerinnen und Lehrer.*

The general mobilisation literature identifies CSOs and NGOs as the main actors of legal mobilisation. These figure prominently also in DPLM before the CJEU with CSOs from different Member States[86] (including Ireland, the UK, France and Belgium) having initiated or acted as interveners in several seminal judgments. This mobilisation intended to bring a broader policy change through litigation by challenging i) EU and ii) national surveillance measures.

Regarding challenging EU laws, an Irish digital rights advocacy and lobbying group, Digital Rights Ireland brought a challenge against the Data Retention Directive (DRD),[87] which was adopted by the EU institutions in the aftermath of the terrorist attacks in Madrid (2004) and London (2005) with the aim to harmonise rules on the retention of communications metadata by Electronic Communication Service Providers in order to ensure that these were available to law enforcement authorities.[88] In *Digital Rights Ireland*,[89] the CJEU invalidated the DRD, ruling that indiscriminate bulk metadata retention was incompatible with EU fundamental rights.[90] A Belgian human rights organisation, Ligue des droits humains, questioned the validity of the EU PNR Directive,[91] a measure which concerned air travel passengers surveillance. While the CJEU did not eventually invalidate the EU PNR Directive, it restricted significantly its scope and provisions on the basis of the Charter rights.[92] In *BA v Organe de contrôle de l'information policière*, Ligue des droits humains joined an individual's complaint regarding the data subject's rights under the LED and specifically requested the national court to make a preliminary reference to the CJEU.[93] The outcome of the case was a partial win for the applicants: the Court held that data subjects must have an effective judicial remedy under Article 17 LED,[94] but did not invalidate this provision in the light of Article 8 EUCFR although it performed extensive judicial interpretation on the basis of fundamental rights and primary law.

Legal mobilisation initiated by CSOs has also focused on challenging national measures in the light of EU law. Privacy International,[95] a UK digital rights charity and La Quadrature du Net,[96] a French digital freedoms association, brought forward cases concerning the applicability of EU law to domestic data retention legislation adopted to safeguard national

[86] This includes also former MS, such as the UK.
[87] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54 (DRD).
[88] Art 1(1) DRD.
[89] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others* (C-293/12) and *Kärntner Landesregierung and Others* (C-594/12) EU:C:2014:238.
[90] ibid para 57.
[91] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132.
[92] Case C-817/19 *Ligue des droits humains* EU:C:2022:491.
[93] This is explicitly documented in the judgment.
[94] Case C-333/22 *Ligue des droits humains, BA v Organe de contrôle de l'information policière* EU:C:2023:874.
[95] Case C-623/17 *Privacy International v. Secretary of State for Foreign and CommonIalth Affairs and Others* EU:C:2020:790.
[96] Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier Ministre and Others* EU:C:2020:791.

security.[97]

While SCOs' mobilisation is important, nevertheless, individuals were identified as the most prominent actors of DPLM before the CJEU for the period of the study (48% of the total cases identified as legal mobilisation were brought by individuals). This is a significant finding because most of the scholarship has focused so far on interest groups, while less research focuses on individuals as litigants.[98] Max Schrems, an Austrian (law student and later) lawyer is the main 'strategic litigant' in the area of data protection. Max Schrems was behind three cases of data protection mobilisation in the period between 2013 to 2024 (12% of CJEU judgments identified as legal mobilisation in our database).[99] Two of the legal mobilisation cases initiated by Max Schrems produced outcomes which had an extraterritorial scope, in the sense of affecting private or public entities outside the EU, namely in the United States[100] and indeed impacting transatlantic relations more broadly. Further strategic litigants in the field of data protection are political figures such as Patrick Breyer (German digital rights activist and MEP)[101] and Tom Watson (British politician).[102]

The rest of individuals involved in cases identified as legal mobilisation in our study seemed to be 'one-shotter' litigants. Following Galanter's relevant typology, 'one-shotters' have recourse to the law/ courts only on occasion,[103] 'are relatively inexperienced in legal venues'[104] and 'once their individual case has exited the court system, they have no need to litigate for the foreseeable future'.[105] Unlike one-shotters, 'repeat players' normally engage in litigation repeatedly, including 'to pursue more strategic and ongoing litigation campaigns'.[106]

They are able to 'develop expertise' and 'their bargaining reputation is more convincing than that of the one-shotter, giving them potentially 'greater power when liaising with and combatting litigation opponents'.[107] Finally, 'while one-shotters are mainly concerned with the immediate tangible outcome in the present case, repeat players may be more interested in the case's "rule component" and in favourably influencing the outcomes of future cases in the field'.[108]

A number of one-shotter litigants were identified in our database. These include, among others, Mario Costeja González whose case against Google established a broad

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[97] For a detailed analysis, see Maria Tzanou and Spyridoula Karyda, 'Privacy International and Quadrature Du Net: One Step Forward Two Steps Back in the Data Retention Saga?' (2022) 28(1) European Public Law 123; Valsamis Mitsilegas et al, 'Data Retention and the Future of Large-Scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2022) 29(1-2) European Law Journal 176.
[98] Van der Pas, 'All That Glitters Is Not Gold?' (n 1).
[99] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* EU:C:2015:650; Case C-498/16 *Schrems v Facebook Ireland Limited* EU:C:2018:37; Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* EU:C:2020:559.
[100] Maria Tzanou, '*Schrems I* and *Schrems II*: Assessing the Case for the Extraterritoriality of EU Fundamental Rights' in Federico Fabbrini, Edoardo Celeste, and John Quinn (eds), *Data Protection Beyond Borders Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing 2021).
[101] Case C-582/14 *Patrick Breyer v Bundesrepublik Deutschland* EU:C:2016:779.
[102] Case C-203/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* EU:C:2016:970.
[103] Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) Law & Society Review 95.
[104] Sam Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2023) 86(2) The Modern Law Review 331, 346.
[105] ibid 346.
[106] ibid 346.
[107] ibid.
[108] ibid.

judicial interpretation of the right to be forgotten in Europe.[109] On the other hand, Max Schrems is a repeat player currently continuing his mobilisation work through 'noyb', a European Centre for Digital Rights, which he founded in 2017.[110] Mr Schrems is clear that noyb's mission is to 'enforce privacy' in a pan-European context.[111] This confirms that the CJEU is considered a crucial forum of mobilisation focusing on transnational legal compliance. Nevertheless, mobilisation brought forward by one-shotters has also produced significant effects which go beyond the individual's immediate interests in areas of public interest, such as journalistic freedom,[112] and automated decision-making in the public sector;[113] the interpretation of core data protection rules such as the concept of personal data,[114] the right to be forgotten,[115] the notion of controllership,[116] and the processing of biometric data.[117]

We argued above that EU data protection is characterised by its own *LOS*. Among these *EU data protection LOS*, we identified the existence of a decentralized enforcement system encompassing specialised independent authorities such as DPAs. This is corroborated by our empirical study. In fact, while the general mobilisation scholarship does not normally identify public authorities as actors of mobilisation,[118] the role of DPAs in this area cannot be underestimated. DPAs have supported in different ways (by initiating or intervening) in DPLM cases brought forward by both individuals and CSOs. Passalacqua, writing on migration mobilisation, identified what she termed 'Euro-expertise' (i.e. EU legal expertise) as 'the single most important, albeit scarce, resource' of EU migration mobilisation.[119] Within the present case study, this article argues that DPAs offer besides 'Euro-expertise', also subject-matter/ 'data privacy- expertise', providing an additional layer of EU data protection LOS. Indeed, DPAs are to be considered repeat players of mobilisation who support individuals' action by playing the crucial role of 'translators'[120] of both EU law and data protection. Our empirical study shows instances where powerful alliances between one-shotters (individuals) and repeat players (DPAs) have taken place in the EU data protection context. For instance, Mr Costeja González case against Google was

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[109] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* EU:C:2014:317.
[110] noyb (homepage) <https://noyb.eu/en> accessed 20 December 2024. Research has found that noyb 'is addressing GDPR problems of potentially a high magnitude' dealing with 'suspected GDPR violations that impact hundreds of millions of EU citizens'. Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3) 690.
[111] Noyb's motto is 'We enforce your right to privacy'. Schrems has noted: 'We need clear pan-European rules. Right now, a German company feels that the French authorities' interpretation of the GDPR only applies to France, even though they operate under the same law within the same European market'. Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3) 693.
[112] Case C-345/17 *Sergejs Buivids* EU:C:2019:122.
[113] Case C-634/21 *OQ v Land Hessen, SCHUFA Holding AG* EU:C:2023:957.
[114] Case C-582/14 *Breyer* (n 101).
[115] Case C-131/12 *Google Spain* (n 109); Case C-136/17 *GC and others v CNIL* EU:C:2019:773; Case C-507/17 *Google v CNIL* EU:C:2019:772.
[116] Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* EU:C:2018:388; Case C-40/17 *Fashion ID* (n 66).
[117] Case C -205/21 *Ministerstvo na vatreshnite raboti* EU:C:2023:49.
[118] But see Van der Pas who recognises that 'litigation by public authorities also contributes to changes in Europe.' Van der Pas, 'All That Glitters Is Not Gold?' (n 1).
[119] Passalacqua (n 8).
[120] ibid; Sally Engle Merry, *Human Rights and Gender Violence Translating International Law into Local Justice* (The University of Chicago Press 2005) 193.

first brought before the Spanish DPA ('Agencia Española de Protección de Datos', 'AEPD') before it reached the CJEU.

A further finding from our empirical mapping provided evidence to support the point put forward above that data protection interacts with other areas of law and often implicates different types of litigants and not just digital rights / privacy related organisations and individuals. For instance, we found that consumer[121] and competition law authorities[122] as well as trade unions[123] initiated or intervened in 16 per cent of the cases identified as legal mobilisation in our study. An interesting question that arises in this context is whether consumer law (or a combination of data protection with consumer law) could offer more effective judicial redress than a fundamental right (data protection). The comparison is perhaps more obvious in the US context where data protection is not recognised as a fundamental right but is protected through consumer law and compensation for data breaches is much higher compared to the EU (for instance, the Meta – Cambridge Analytica lawsuit produced a compensation of 725 million USD).[124] Our research shows that given the broad interpretation of Article 80 GDPR by the CJEU, the interaction between data protection and other areas of law, such as competition and consumer law opens up an interesting path for mobilisation with the involvement of a broader range of actors. For example, competition law authorities are able to assess the legality of personal data processing and are required to collaborate with data protection authorities to ensure the effectiveness of data protection laws.[125] With the adoption of the Artificial Intelligence (AI) Act, national market surveillance authorities, as well as all national human rights bodies, will play a significant role in scrutinising the ever-increasing use of AI systems, which rely on personal data processing, across all sectors.[126]

Finally, it is also worth considering the parties targeted by DPLM. These include primarily: i) EU law-making institutions; ii) national legislators; and, iii) tech companies. The first two concerned mainly cases of surveillance at the supra-national, national and transnational levels often implicating the latter. 36 per cent of the cases identified as legal mobilisation in our mapping targeted big tech platforms, such as Google[127] and Facebook, now Meta.[128] This reveals the complex entanglements between public laws and private actors in the area. It also shows that a central overall aim of DPLM before the CJEU is to 'generate high impact cases'[129] often targeting big tech.

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[121] Case C-40/17 *Fashion ID* (n 66) and in Case C-319/20 *Meta Platforms Ireland* (n 64).
[122] Case C-252/21 *Meta Platforms and Others* (n 74).
[123] Case C-34/21 *Hauptpersonalrat der Lehrerinnen und Lehrer* EU:C:2023:270.
[124] Wörle and Gstrein (n 69).
[125] Case C-252/21 *Meta Platforms and Others* (n 74).
[126] Plixavra Vogiatzoglou and Laura Drechsler, 'Article 77. Powers of Authorities Protecting Fundamental Rights' in Ceyhun Necati Pehlivan, Nikolaus Forgó, and Peggy Valcke (eds), *The EU Artificial Intelligence (AI) Act: A Commentary* (Kluwer Law International 2024) 1170-1180.
[127] Case C-131/12 *Google Spain* (n 109); Case C-136/17 *GC and others v CNIL* (n 115); Case C-507/17 *Google v CNIL* (n 115).
[128] Case C-362/14 *Schrems I* (n 99); Case C-498/16 *Schrems v Facebook Ireland Limited* (n 99); Case C-311/18 *Schrems II* (n 99); Case C-210/16 *Wirtschaftsakademie Schleswig-Holstein* (n 116); Case C-40/17 *Fashion ID* (n 66); Case C-319/20 *Meta Platforms Ireland* (n 64); Case C-252/21 *Meta Platforms and Others* (n 74).
[129] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3) 693.

4 A CRITIQUE OF DATA PROTECTION LEGAL MOBILISATION

The above empirical study reveals a complex picture of legal mobilisation in the area of data protection with a multiplicity of different players, procedures and structures referred to in this article as *EU data protection LOS*. Beyond this descriptive understanding of the main features of legal mobilisation, we argue that our empirical mapping is crucial at a more normative level as well; to advance our understanding of the 'emancipatory potential'[130] or the 'legal empowerment' of EU data protection law. 'Critical legal empowerment' as coined by Margaret Satterthwaite could be used 'as a practice, an approach, and a lens' to 'broaden our understanding of how communities and movements are engaging with the law and legal systems to advance their human rights and to resist exclusion and oppression'.[131] Here, we are interested to understand what possibilities can be created by data protection related struggles carried out through litigation that aims to 'increase disadvantaged populations' control over their lives'[132] by 'capacitating communities to make claims of – and to change – the systems impacting their quest for justice and equality'.[133]

In this regard, the theorizations of legal mobilisation presented in Section 2 must engage with (and be enriched by) socio-legal perspectives focusing around broader social concerns. We have seen that scholarship on legal mobilisation conceptualises the strategy of relevant litigation actors as the promotion of an interest that goes beyond the individual case. The question, therefore, that arises, is: What is the emancipatory potential of DPLM before the CJEU in addressing underlying social issues? What can our empirical mapping tell us about this socio-legal dimension of legal mobilisation in the data protection context (or the absence thereof)?

Our study has identified three main issues that we consider as currently 'missing' from data protection legal mobilisation before the CJEU. We advance three critiques in this respect.[134]

4.1 THE PREVAILING LEGAL PROBLEM

The first critique we advance concerns the 'prevailing legal opinion' problem found in socio-legal debates and relevant to the present analysis. This acknowledges that legal discursive contention, entails disputes over the 'prevailing legal opinion' which 'define and even crystalize socially mobilised and collectively articulated interpretations of the law'.[135]

We argue that a 'prevailing legal opinion' or rather *a prevailing legal problem* seems to be discerned in the DPLM case study. This concerns primarily defending the 'rights of the

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[130] Buckel et al (n 80); Gráinne de Búrca, 'Legal Mobilization for Human Rights – An Introduction' in Gráinne de Búrca (ed), *Legal Mobilization for Human Rights* (Oxford University Press 2022) 1.
[131] Margaret Satterthwaite, 'Critical Legal Emporwerment for Human Rights' in Gráinne de Búrca (ed), *Legal Mobilization for Human Rights* (Oxford University Press 2022) 89.
[132] Rachel M Gisselquist, 'Legal Empowerment and Group- Based Inequality' (2019) 55(3) Journal of Development Studies 333, 336.
[133] Satterthwaite (n 131) 96.
[134] The critiques are closely interlinked but are discussed separately for the sake of clarity and in order to present a more in-depth analysis.
[135] Buckel et al (n 80).

majority'.[136] For example, our mapping shows that all the surveillance-related mobilisation cases successfully brought before the CJEU by both CSOs and individuals (32 per cent of the cases identified in our database) concern 'mass surveillance' affecting the majority .[137] To address the problem of 'mass surveillance', the CJEU has constructed a distinction between 'bulk data retention' of metadata which is prohibited[138] and 'targeted data retention' which is permitted.[139] This legal distinction between mass and targeted data retention and the concomitant conceptualization of mass retention as *impermissible* is based on the – widely shared – perception that mass surveillance affects 'everyone' as it sweeps up communications data of the entire population, including those of 'innocent people'.[140] In the words of the Court, the problem with mass data retention is that it is 'comprehensive in that it affects *all persons* using electronic communication services, even though those persons are not, even indirectly, in a situation that is liable to give rise to criminal proceedings'.[141]

By contrast, targeted retention is framed as *permissible* because it is 'portrayed as the collection of the data and communications of those who are considered to be the *legitimate targets* of government investigation and repression'.[142] As the CJEU has explained, targeted retention is allowed because it is based on a *relationship* between the data which must be retained and a threat to public security.[143] This *link* or *relationship* may be established according to the Court, among others, on the basis of 'data pertaining to a *particular geographical area'*.[144] As Tzanou has argued elsewhere, the geographic criterion 'may appear neutral' at first glance, but its symbolic and normative implications cannot be ignored.[145] At a symbolic level, the judicial construction of targeted geographical retention as hierarchically less invasive compared to mass surveillance – and hence permissible – demonstrates cognitive ignorance of spatial concentrations of privilege and disadvantage, of their consequences and of how these interlink with systemic social ills such as poverty, discrimination, gendered, racial and socioeconomic subordination.[146] This judicial distinction might lead to differentiation (and breed further indifference) between the majority (most of us/ 'innocent'/ affected by

136 Tzanou, 'The judicialization of EU data retention law' (n 52).
137 ibid.
138 The CJEU has held that the 'general and indiscriminate retention of all traffic and location data', covering 'in a *generalised manner*, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception' is prohibited as it presents a disproportionate interference with the fundamental rights to privacy (Article 7 Charter), data protection (Article 8 Charter), and, since *Tele2 Sverige*, freedom of expression (Article 11 Charter). Case C-203/15 *Tele2 Sverige* (n 102) paras 97 and 107.
139 The 'targeted retention' of metadata, is permitted as 'a preventive measure' for the purpose of fighting serious crime and safeguarding national security, provided that it is compliant with certain conditions. Case C-203/15 *Tele2 Sverige* (n 102) para. 108.
140 Seda Gürses, Arun Kundnani, and Joris Van Hoboken, 'Crypto and empire: the contradictions of counter-surveillance advocacy' (2016) 38(4) Media, Culture & Society 576.
141 Case C-203/15 *Tele2 Sverige* (n 102) para 105. Emphasis added.
142 Gürses et al (n 140).
143 Case C-203/15 *Tele2 Sverige* (n 102) para 106.
144 The 'links' for targeted surveillance recognised by the Court are: '(i) data pertaining to a *particular time* period and/or *geographical area* and/or a *group of persons* likely to be involved, in one way or another, in a serious crime, or (ii) persons who could, for other reasons, contribute, through their data being retained, to fighting crime'.
145 Tzanou, 'The judicialization of EU data retention law' (n 52).
146 ibid.

surveillance) and the 'others'[147] (identified as legitimate targets of surveillance due to the geographic area they reside).[148]

The distinction between prohibited 'mass surveillance' and permitted 'targeted surveillance' offers valuable insights on DPLM. By identifying as its prevailing legal problem the surveillance of the 'innocent' majority and focusing its energies on this, it shows *how* DPLM shapes legibility of fundamental rights' protection, and *how* it excludes. This approach involves assumptions about *whose* experiences of data retention 'are to be addressed and whose ignored' and has resulted – perhaps beyond the intentions of DPLM's actors – in a judicial construction of a hierarchy of EU data protection problems: those that concern the experiences of the majority are deemed more important than those of powerless minorities (who have the misfortune to reside in geographical spaces of 'disadvantage' and are considered 'suspects by default' and therefore legitimate targets of surveillance).[149]

As a scholar observed, 'legal mobilisation begins when an individual's experience of injustice intersects with a group's political goal'.[150] Our study demonstrates that DPLM is primarily concerned with an injustice faced by the privileged majority. This – somewhat selective – mobilisation[151] has inevitably fed into judicialization (the case law of the Court), thus creating unequal distributional outcomes and epistemic injustice consequences.[152]

4.2 THE LACK OF COLLECTIVE ACTION

The second critique that we advance concerns a lack of *collective litigation* or *collective action*. Collective action is crucial, in our view, because DPLM should aim to address *collective* and *societal* data harms (which go beyond individual harms). Similar to many human rights, data protection has focused so far on an individualistic approach to harm 'by granting natural persons subjective rights to defend their individual interests'.[153] However, new technologies, such as big data[154] and AI 'often affect large groups or society as a whole'.[155]

Collective or *group* harms occur 'when a group – either aligning with a traditional category or an *ad hoc* group – experiences a harm in their capacity as a member of that group e.g., a

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[147] As Fredman remarked regarding racism: 'Racism is […] not about objective characteristics, but about relationships of domination and subordination, about hatred of the "Other" in defence of "Self" perpetuated and apparently legitimated through images of the "Other" as inferior, abhorrent, even subhuman'. Sandra Fredman, 'Equality: A New Generation?' (2001) 30(2) Industrial Law Journal 145, 148.
[148] Tzanou, 'The judicialization of EU data retention law' (n 52).
[149] ibid.
[150] Passalaqua (n 8).
[151] A similar argument has been made by de Búrca in the context of litigation in the field of anti-discrimination law: '[…] the uneven patterns of litigation before the ECJ in the field of anti-discrimination law may be the presence or absence of institutional litigants, NGOs or Equality bodies and commissions supporting or bringing claims in particular fields. The intended beneficiaries of anti-discrimination law are often (though certainly not always) individuals, groups or communities who are marginalized and under-resourced, and who may not have the knowledge or capacity to resort to law and litigation to defend their interests and rights'. Gráinne de Búrca, 'The Decline of the EU Anti-Discrimination Law?' (2016) Note for the Colloquium on Comparative and Global Public Law <https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Decline%20of%20the%20EU%20Anti-Discrimination%20Law.pdf> accessed 20 December 2024.
[152] Tzanou, 'The judicialization of EU data retention law' (n 52).
[153] Bart van der Sloot and Sascha van Schendel, 'Procedural law for the data-driven society' (2021) 30(3) Information & Communications Technology Law 304, 305.
[154] Bart van der Sloot, *Privacy as Virtue: Moving Beyond the Individual in the Age of Big Data* (Intersentia 2017).
[155] Van der Sloot and van Schendel (n 153) 306.

group of workers, local or indigenous community'.[156] *Societal* harms refer to 'harms affecting larger-scale human groups bounded by persistent interaction, normally sharing the same spatial territory, typically subject to the same political authority and dominant cultural expectations, interests, and norms'.[157] Societal harms may be experienced at an individual level, but their effects might have a systemic and cumulative impact on the lived experiences of certain societal groups in general. The distinction between collective and societal harms is not one of scale merely; societal harms relate to affected interests 'held by society at large, going over and above the sum of individual interests'.[158]

Societal (and collective) harms could arise from personal data processing and are therefore particularly relevant to data protection law.[159] These harms might be *tangible* (physical and material as well as non-material/emotional damage arising from the misuse or abuse of users' personal data) or *intangible* (relating to the power asymmetries between data subjects and controllers and the opaque, inhibitive, discriminatory and controlling effects of modern surveillance).[160] *Intangible harms* can be more indirect,[161] abstract and, therefore, more difficult to determine[162] often lacking an individualistic focus and requiring attention to scope and scale.[163] For example, the Facebook/Cambridge Analytica case showed how data processing for the purposes of voter profiling and targeting could influence election outcomes.[164] The Grindr case, which concerns the world's biggest dating app for the LGBT community allegedly sharing sensitive personal information such as people's HIV status with third parties (including advertisers),[165] demonstrates how data processing could produce collective harms affecting marginalised communities. These examples demonstrate the importance of collective action to deal with such societal data harms.

Yet, our empirical mapping has shown that DPLM has been successful so far by focusing on individualistic approaches to data harm.[166] Admittedly, this is to be expected

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[156] Chris Thomas et al, 'The Case For a Broader Approach to AI Assurance: Addressing "Hidden" Harms in the Development of Artificial Intelligence' (*SSRN*, 8 January 2024) 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4660737> accessed 20 December 2024; Linnet Taylor, Luciano Floridi, and Bart van der Sloot (eds), *Group Privacy: New Challenges of Data Technologies* (Springer 2017).

[157] Thomas et al (n 156) 5; Luciano Floridi, 'Global Information Ethics: The Importance of Being Environmentally Earnest' (2007) 3(3) International Journal of Technology and Human Interaction 1; Nathalie A Smuha, 'Beyond the Individual: Governing AI's Societal Harm' (2021) 10(3) Internet Policy Review <https://policyreview.info/articles/analysis/beyond-individual-governing-ais-societal-harm> accessed 20 December 2024.

[158] Smuha (n 157) 5.

[159] See Anastasia Siapka, Maria Tzanou, and Anna Nelson, 'Re-imagining data protection: Femtech and gendered risks in the GDPR' in Róisín Á Costello and Mark Leiser (eds), *Critical Reflections on the EU's Data Protection Regime: GDPR in the Machine* (Hart Publishing 2024); Tzanou, 'The Future of EU Data Privacy Law' (n 51).

[160] ibid.

[161] Maria Tzanou, 'Addressing Big Data and AI Challenges' in Maria Tzanou (ed), *Health Data Privacy under the GDPR* (Routledge 2021) 106–132.

[162] Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015).

[163] Danielle Keats Citron and Daniel J Solove, 'Privacy Harms' (2021) 102 Boston University Law Review 793.

[164] Shiona McCallum, 'Meta settles Cambridge Analytica scandal case for $725m' (*BBC*, 23 December 2022) <https://www.bbc.co.uk/news/technology-64075067> accessed 20 December 2024.

[165] Tom Singleton and Imran Rahman-Jones, 'Grindr sued for allegedly revealing users' HIV status' (*BBC*, 22 April 2024) <https://www.bbc.com/news/articles/cj7mxnvz42no> accessed 20 December 2024.

[166] For instance, the alleged data harm in *Schems I* and *II* was that Mr Schrems' Facebook data were transferred to the US where they could be potentially accessed by US intelligence authorities.

given the subjective nature of the fundamental right to data protection. However, we argue that a shift in the focus of DPLM from individual to collective and societal data harms is needed. This is crucial because as Karen Yeung observed, societal harms might lead to the destabilisation 'of the social and moral foundations for flourishing democratic societies' which enable the protection of human rights (such as data protection) in the first place.[167] Furthermore, 'a legal regime that addresses incidental data harms only on an individual level runs the risk of leaving unaddressed the underlying causes, allowing structural problems to persist'.[168]

DPLM should not solely focus its energies on pursuing private interests (even if they go beyond the immediately case); it should develop '"societal" means of intervention[169] to safeguard the underlying societal infrastructure' enabling the rule of law and human rights. Collective action is a form of such societal intervention, crucial to address both *tangible* and *intangible* data harms by demanding a focus to structural rather than individual problems arising from data processing.

However, collective litigation seems to be currently missing from DPLM before the CJEU. The closest we could identify in our study to what could be considered as displaying elements of 'collective' action is case *VB v Natsionalna agentsia za prihodite*.[170] The judgment concerned the unauthorised access to the Bulgarian National Revenue Agency's ('the NAP') IT system, following a cyberattack resulting in the personal data contained in that system been published on the internet. More than 6 million natural persons, of Bulgarian and foreign nationality, were affected by those events. Several hundreds of them brought actions against the NAP for compensation for non-material damage allegedly resulting from the disclosure of their personal data. An individual, VB, whose case was referred to the CJEU, asked for a relatively small amount of damages (Euros 510) for non-material damage because data were hacked by a third party. This case could have tested the waters for potential collective litigation by the individuals affected by the hacking. It could have also offered an initial judicial recognition and interpretation of 'collective' harms, given that such harms are not explicitly recognised in the GDPR.[171] However, the CJEU did not award non-material damages to the applicant itself. It just established the relevant principles and left it to the national (Bulgarian) court to decide if the relevant conditions were satisfied.

More importantly and beyond this particular case, we would like to see data protection litigation (and relevant CJEU case law) recognise that 'collective experiences are an essential part of and one important precondition for social mobilisation working towards transformation'.[172]

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[167] Karen Yeung, 'Responsibility and AI - A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework (Study DGI(2019)05, Council of Europe <https://rm.coe.int/responsability-and-ai-en/168097d9c5> accessed 20 December 2024.
[168] Van der Sloot and van Schendel (n 153) 305.
[169] Smuha (n 157) 12.
[170] Case C- 340/21 *VB v Natsionalna agentsia za prihodite* EU:C:2023:986.
[171] Siapka et al (n 159).
[172] Buckel et al (n 80).

4.3 THE ABSENCE OF CLAIMS BY MARGINALISED COMMUNITIES

Our empirical study has unveiled a further fundamental aspect currently lacking from data protection mobilisation: marginalised actors and movements, such as migrants and the poor are currently almost entirely missing from such mobilisation before the CJEU.[173] Critical socio-legal theory has argued that 'marginalised actors are often rendered invisible in legal struggles as their voices are only brought into the juridical field by juridical actors, i.e., indirectly and without their own protagonism'.[174] While this might be true in legal mobilisation debates in the field of migration,[175] in the context of data protection it seems that the problem is that the struggles of less privileged actors have so far rarely – if ever – materialised before the EU's highest Court. In fact, going back to our empirical analysis, the only case identified in our database which concerned marginalised data subjects was *Y.S.* where a number of third-country nationals seeking asylum in the Netherlands asked to obtain the minutes explaining the reasons for refusing or granting the asylum residence permit and thus sought an interpretation by the CJEU of 'personal data' and the data subject's 'right of access'.[176]

We observe, thus, a paradox in the case of DPLM before the CJEU. On the one hand, this mobilisation can be considered as quite successful overall: it has produced significant data protection victories vis-à-vis modern electronic surveillance techniques;[177] it has established the extraterritorial application of EU data privacy rights;[178] it has created red lines regarding the permissibility of national surveillance / data retention measures even in the sensitive area of national security (which falls in principle outside the scope of EU law);[179] and, it has shown big tech companies, such as Google and Meta, that they cannot operate in a human-rights free zone in the EU.[180]

However, despite these undeniable victories, DPLM before the Court appears elitist in its *objectives, problems and actors*.[181] It seems that at least for the moment before the highest EU Court, we do not see any cases that address systemic injustices and social harms whose effect is accelerated by increasingly digitalisation and public and private surveillance[182] and is felt on a scale previously unimaginable, especially by marginalised groups.[183]

As we attempt to rethink how DPLM could transform legal systems that perpetuate inequality and injustice, it is crucial to consider socio-legal debates, and more specifically, the

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[173] See Tzanou, 'The Future of EU Data Privacy Law' (n 51).
[174] Buckel et al (n 80).
[175] For a slightly opposite view, see Passalacqua (n 8).
[176] Cases C-141/12 and C-372/12 *Y.S.* EU:C:2014:2081.
[177] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* (n 89).
[178] Case C-362/14 *Schrems I* (n 99); Case C-311/18 *Schrems II* (n 99).
[179] See Maria Tzanou and Plixavra Vogiatzoglou, 'National Security and New Forms of Surveillance: From the Data Retention Saga to a Data Subject Centred Approach' (2024) European Papers (*forthcoming*).
[180] Case C-131/12 *Google Spain* (n 109).
[181] A similar argument has been made regarding human rights litigation. See Jack Snyder, 'Empowering Rights through Mass Movements, Religion and Reform Parties', in Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri (eds), *Human Rights Futures* (Cambridge University Press 2017) 89; Satterthwaite (n 131).
[182] See Tzanou, 'The Future of EU Data Privacy Law' (n 51).
[183] For instance, we have not seen so far before the CJEU a collective data protection action similar to the Grindr case filed at the High Court in London (Reuters, 2024 <https://www.reuters.com/technology/grindr-facing-uk-lawsuit-over-alleged-data-protection-breaches-2024-04-22/> accessed 20 December 2024).

concept of 'litigation collective'.[184] 'Litigation collective' draws from feminist sociology of law scholarship[185] and debates on law and social movements[186] and refers to a research approach which calls for 'an examination of the role of collective actors in the initiation and conduct of leading cases', including investigating 'ways in which such actors transfer their interests, ideas, and concrete tactics to the juridical field'.[187] This lens is crucial in the context of data protection legal mobilisation, which needs a rethinking about *whom* it is for and *whom* it excludes.[188] All these elements demonstrate the significant institutional role that both mobilisation actors and the CJEU play in this area and why studying (both theoretically and empirically) legal mobilisation problems and its neglected aspects matters.

DPLM requires a critical rethinking to ensure legal empowerment through the inclusion of marginalized communities and the claims of the less advantaged to the outcomes of EU data protection law. It demands a reconceptualization of *what* DPLM can do, and *who* it can do it for. It also requires 'an embrace of movement direction and ownership' that challenges 'power' from an intersectional perspective.[189] In this regard, it could draw inspiration by the so-called 'movement lawyering' in the US, understood as 'the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define'.[190] The *EU data protection specific LOS* that we identified in this article could play a role in bringing these marginalised claims at the forefront. DPAs could be pivotal in providing *Euro* and *data-protection* expertise to less advantaged parties, and CSOs, as well as consumer organisations and trade unions could ensure that collective redress mechanisms are used to advance such claims.

5 CONCLUSION

This article provides new theoretical and empirical insights on data protection mobilisation before the CJEU. Legal mobilisation has been increasingly used in the field of EU data protection law, but there has been no systematic study so far of its main features, actors and subject-matters. This is crucial not only to understand its patterns and trends, but also to shed light in potentially neglected aspects of such mobilisation.

In order to address this gap, the article provided first a theorisation of data protection legal mobilisation before the CJEU. Drawing from general mobilisation debates, we identified several legal opportunity factors unique to data protection mobilisation; we termed these *EU data protection LOS*. EU data protection LOS include the recognition of data protection as a fundamental right in the Charter (alongside the right to privacy); its interpretation by the CJEU in a constitutional mode; the fact that data protection claims can be brought without applicants having to satisfy any standing requirements, such as showing particular damage or harm; the broad interpretation of collective action under

[184] Buckel et al (n 80).
[185] See Buckel et al (n 80) and references therein.
[186] ibid.
[187] Buckel et al (n 80).
[188] Tzanou, 'The judicialization of EU data retention law' (n 52).
[189] Satterthwaite (n 131) 97.
[190] Scott L Cummings, 'Movement Lawyering' (2017) University Illinois Law Review 1645, 1660.

Article 80 GDPR to include consumer organisations in potential entities that might raise data protection complaints; and, the existence of a decentralized enforcement system of data protection comprising both specialised independent authorities such as DPAs and national courts.

Building upon these theoretical foundations, the article offered the first in the literature analytical map of data protection legal mobilisation before the CJEU. Our study identified 25 cases of legal mobilisation among the judgments rendered by the CJEU in the ten-year period between 2014-2023 and discussed their main actors, objectives and topics. While it found that several actors are involved in DPLM, including CSOs, DPAs and other national bodies, it concluded that individuals were the most prominent actors of DPLM before the CJEU. These included both repeat players, such as Max Schrems and one-shotters often supported by DPAs, which provide both Euro and data privacy expertise to litigants.

In terms of the topics of data protection legal mobilisation, these included issues of surveillance and the invalidation of several measures by the Court with effects at the national, transnational and international levels; and questions of interpretation of EU data protection law in core areas such as the right to be forgotten and its effects, journalistic freedom, and automated decision-making; the concept of personal data, the right to be forgotten, the notion of controllership, and the processing of biometric data.

Our research demonstrated that the main targets of data protection legal mobilisation were EU and national institutions (and in particular legislators) and big tech companies, such as Google and Meta, thus showing that a central overall aim of DPLM before the CJEU is to generate high impact cases.

Beyond the useful insights that our empirical research provided, we used this to critically reflect on the 'emancipatory potential' of EU data protection law to address broader socio-legal questions of subjugation. Reading the findings of our study against critical socio-legal theories, we advanced three main critiques concerning data protection legal mobilisation before the CJEU.

First, the prevailing legal problem in DPLM focuses primarily on the data protection rights of the (more privileged) majority as opposed to minoritized data subjects. As a result, certain individuals and groups linked to specific geographical spaces are subject – through permissible targeted surveillance – to greater suspicion and more exclusionary, differential treatment. This distinction involves assumptions about whose experiences of surveillance 'are to be addressed and whose ignored' and demonstrates how litigation in the public interest can shape (and limit) the beneficiaries of the right to data protection.

Second, a lack of collective action reveals that DPLM is mainly focused in addressing individualistic rather collective and societal data harms. We argued that collective action is crucial because DPLM should not solely aim to pursue subjective, private interests; it should use collective litigation to address societal data harms by demanding a focus to structural injustices arising from data processing.

Third, the absence of less advantaged actors and movements from this area of mobilisation, reveals that the problems of DPLM before the CJEU and the change this has effectuated are elitist and ignorant of more marginalised social struggles.[191] This shows that

[191] On why these matter in the context of data protection, see Tzanou, 'The Future of EU Data Privacy Law' (n 51).

while data protection legal mobilisation before the CJEU can be seen as a successful juridical struggle against public institutions and big tech, its emancipatory potential to pursue broader social struggles as it arises from our empirical study is limited.

In this regard, the critiques we voiced in this article could be also viewed as a call for the development of this field in the future. DPLM requires a critical rethinking of its goals and beneficiaries in order to transfer the data protection collective struggles of social movements and of the more marginalised to the CJEU juridical field. Legal mobilisation actors and players (including DPAs) need to urgently interrogate the role they and the Court play in claiming, defining and distributing legal outcomes. DPLM should be willing to 'bridge frames' with the less advantaged and reorient its strategies to 'transform legal understandings and key concepts'[192] in EU data protection law. Only in this way can DPLM realise the emancipatory potential of data protection law and advance legal empowerment.

[192] De Búrca, 'Legal Mobilization for Human Rights' (n 130).

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STRATEGIC LITIGATION AND EU LAW ON CROSS-BORDER DATA TRANSFERS: ON THE PLACE OF EU LAW IN THE WORK OF SCHREMS AND NOYB

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This article examines the place of EU law in the actions of Schrems and his 'linked' NGO, None of your Business, 'NOYB', in the context of its predominantly transatlantic nature. Existing literature pays insufficient attention to the narrow focus on Schrems on EU-US data transfers and the ways in which his use of EU law is mostly outside of EU court rooms and also outside of EU lobbying channels. The article thus focuses upon the place of EU law in the work of Schrems – often take outside of Court rooms and official lobbying channels when challenging EU data transfers – and beyond. The paper draws attention to the links between lobbying and litigation as to EU data transfers and beyond mirrored in the work of NOYB – where little caselaw exists per se – and where broader aims and means are at stake necessitating a broader reach. Civil society similar to Big Tech use a variety of methods to engage with EU law, but not limited to a courtroom per se, amply demonstrated in the work of Schrems and NOYB. The article also highlights how much scholarship focuses upon the work of Schrems and NOYB as examples of the 'transnational' enforcement of EU law. It argues that existing literature easily overlooks the exclusively transatlantic focus of Schrems and the relatively modest number of cases taken by him, less again by NOYB before the CJEU, concentrated elsewhere. The focus upon the 'locus' adds to research highlighting the procedural limitations of the EU law system. It supports a broader framing of strategic litigation in understanding data transfers and the broader 'Brussels effects' of the work of Schrems.

1 OVERVIEW

Privacy advocacy organisation NOYB – short for 'None of Your Business'[1] is led by one of the EU's leading privacy activist, Austrian Max Schrems, as a student initially, whose focus has been on Big Tech and the enforcement of EU law. Despite a perceived implosion of caselaw on data in EU law, there are a limited number of cases on international data transfers at EU level, with a heavy concentration on EU-US relations.[2] As this paper will outline, they notably involve one individual prominently, data activist or campaigner, Max Schrems rather

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[1] See NOYB (homepage) <https://noyb.eu/en> accessed 1 October 2024.

[2] See CJEU, 'Annual Report 2023 Statistics concerning the judicial activity of the Court of Justice 2019-2023' 18 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/en_ra_2023_cour_stats_web_bat_22042024.pdf> accessed 1 October 2024, outlining approx. 1000 cases per year – data privacy or protection is not listed as a subject matter of cases; Eurlex lists data protection cases at 83 over a 10 year period from 2014- 2024; Search contains: Subject-matter = "Data protection" Court = "Court of Justice"; Period or date = "Date of delivery"; period= "from 01/01/2014 to 01/01/2024"; Cf Karen Yeung and Lee A Bygrave, 'Demystifying the Modernized European Data Protection Regime: Cross-disciplinary Insights from Legal and Regulatory Governance Scholarship' (2022) 16(1) Regulation & Governance 137.

than NOYB or 'NOYB' hereafter. Despite the changing geopolitics of data transfers, the work of Schrems inside and outside of courtrooms continues to dominate EU law on such transfers, focussing mainly on EU-US relations.[3] As this article will demonstrate, inside the courtroom – of the Court of Justice of the European Union (CJEU) –, NOYB is not to be found in this litigation and Schrems himself has relatively few cases numerically to his name.

The current EU internal legal framework concerning data transfers, i.e. flows of personal data to third countries which is provided for in Regulation (EU) 2016/679 (GDPR), occurs predominantly through adequacy decisions, is implemented by the EU Commission and interpreted by the CJEU. According to the GDPR and case law of the Court, an adequacy decision requires an extremely high level of protection and the European has recognised only 15 non-EU States as 'adequate'.[4] The Court famously found that the fundamental rights of Austrian Law student turned campaigner, Max Schrems, were impaired by US laws on surveillance for national security in respect of data transfers by Meta. The further consequence was the invalidation of the two adequacy decisions known as 'Safe Harbour' (2000)[5] and 'Privacy Shield' (2016),[6] respectively by *Schrems I* ruling (2015) and *Schrems II* rulings (2020). The CJEU notably invalidated Safe Harbour without direction as to its temporary effects. *Schrems v European Data Protection Commissioner (EDPS)* after the NSA, Snowdon and PRISM revelations[7] spurred the development of the Privacy Shield in its wake and significant developments as to other instruments and enforcement regimes, such as an EU-US Umbrella Agreement and the General Data Protection Regulation (GDPR).[8]

In the wake of the invalidation of the 'Safe Harbour' and of the 'Privacy Shield' Agreements, the European Commission adopted a third measure, the 'EU-US Data Privacy Framework (DPF)', in 2023 and an adequacy decision followed thereafter.[9] Litigation of the

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[3] Kenneth Propp, 'Who's a national security risk? The changing transatlantic geopolitics of data transfers' (*Atlantic Council*, 29 May 2024) <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/whos-a-national-security-risk-geopolitics-of-data-transfers/?mkt_tok=NjU5LVdaWC0wNzUAAAGTy5lE7n4mcFkmhbN9R9ygb2b_fO292-_mLQ8YPm2B2y439tnLATh6NieQ46Kxiu-yS1JLqjSOEB1GmGVFCrZ2MV4bEzKi32p9g8rvtPU1fQVW> accessed 1 October 2024.

[4] The European Commission has so far recognised: Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom, United States and Uruguay as providing adequate protection; See European Commission, 'Adequacy Decisions' (nd) <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 1 October 2024.

[5] Commission Decision 2000/520/EC 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 [2000] OJ L215/7.

[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 [2016] OJ L207/1.

[7] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 (n 7); Case C-362/14 *Maximillian Schrems v Data Protection Commissioner (Schrems I)* EU:C:2015:650.

[8] See Council Decision (EU) 2016/920 of 20 May 2016 on the signing, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences [2016] OJ L154/1; 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 (GDPR) [2016] OJ L119/1.

[9] 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 [2023] OJ L231/118; See European Parliament,

DPF is underfoot and was expected -explicitly- by former Commissioner Breton on the part of Schrems with plausible success rates.[10] Schrems is himself in his own right a well-known legal 'activist' in the field, confirmed by a CJEU decision on this issue prior to the introduction of the GDPR on his 'right' to take cases on behalf of thousands of consumers qua activist pursuant to the Brussels I Regulation.[11] The Schrems judgments are thus part of a genre of case law where data privacy dominates and leads to significant transatlantic change e.g. DPF.[12] In the first periodic review of the EU-US Data Adequacy Decision – that was broadly positive of its operation and effects – the Commission nonetheless acknowledged that much work was needed as to its operation.[13] Many such reviews have previously been conducted with very 'light touch' reviews of such hybrid governance and the conclusions reached may prove to be controversial and costly if proven wrong yet again by the CJEU – via Schrems.[14]

The caselaw of Schrems – and DPF resulting therefrom – may also be said to show unprecedented convergence between EU and US law, possibly demonstrating a form of Bradford's 'Brussels Effect', i.e. the influence of the EU over third countries rules and regulations.[15] This underscores the importance of the litigation work of Schrems in the complex field of what are understood here to be data transfers, consequences for the place of Big Tech in EU law therein, however numerically limited the number of cases. A strategic use of law and institutional mechanisms to advance a particular cause is a well-used definition of strategic litigation that is relied upon here, to depict some of the work of Schrems, in line with this Special Issue.[16] Some claim that scrutiny of the role of civil society actors in EU law before the CJEU remains rare.[17] However, it can also be said that strategic litigation looks likely to be increasingly common in areas of EU law relating to global challenges, from

'European Parliament resolution of 11 May 2023 on the adequacy of the protection afforded by the EU-US Data Privacy Framework (2023/2501(RSP))' (2023).

[10] 'The Invalidation of the EU-U.S. Privacy Shield and the Future of Transatlantic Data Flows' US Senate Hearing (9 December 2020) <https://www.govinfo.gov/content/pkg/CHRG-116shrg52856/html/CHRG-116shrg52856.htm> accessed 1 October 2024; 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 1 October 2024.

[11] Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* EU:C:2018:37.

[12] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others and Kärntner Landesregierung and others* EU:C:2014:238; Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* EU:C:2014:317; Joined Cases C-203/15 & C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis* EU:C:2016:970; *Opinion 1/15* EU:C:2017:592; Case C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)* EU:C:2019:772.

[13] European Commission, 'Report from the Commission to the European Parliament and the Council on the First periodic review of the functioning of the adequacy decision on the EU-US Data Privacy Framework COM(2024) 451 final.

[14] The effects of the new adequacy decision remain to be seen. It had garnered much negative attention already at its advent. Mikolaj Barczentewicz, 'Schrems III: Gauging the Validity of the GDPR Adequacy Decision for the United States' (*International Center for Law and Economics*, 25 September 2023) <https://laweconcenter.org/resources/schrems-iii-gauging-the-validity-of-the-gdpr-adequacy-decision-for-the-united-states/> accessed 1 October 2024; NOYB, 'European Commission gives EU-US Data Transfers Third Round at CJEU' (n 10).

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

[16] See Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45(1) Law & Social Inquiry 166, 168.

[17] See 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.

climate to data and migration, areas that legislators grapple with, where most actionable causes may be possible.[18] Also, in EU law, strategic decisions have been taken by the European Commission to devote considerably fewer resources to the enforcement and implementation of EU law – perhaps consequentially leaving others such as Schrems to 'pick up the pieces'.[19] This can be said to explain the need to understand any shifts in the actions of civil society *towards* the court room.

However, while this article begins from the premise that the work of Schrems has been impactful and important, focussing upon this caselaw may not capture the full effects of the work of such 'activists', not least Schrems, on EU law. There is, accordingly, as will be argued here, flexibility as to the use of EU procedures by individuals such as Schrems, where they can communicate to a range of audiences in other channels better, with litigation as a last-chance saloon. These new modes or sites of engagement include activities outside of courtrooms, but linked to EU law. These include activities such as lobbying using official structures, indirect lobbying or informal lobbying on social media, academic lectures, conferences, training, and interviews on mainstream media. As this paper will outline, Schrems has sought to focus almost exclusively upon transatlantic relations and transatlantic data transfers for their salience, whereas NOYB, the civil society NGO body that he leads, has as an organisation taken a slightly broader stance on the jurisdictions that it lobbies on.

Law, practice, procedure and jurisdiction are complex issues in EU data transfer law to isolate because to some they transgress perceived boundaries. Actors such as Schrems and NOYB are thus important sites of study for their work as to the GDPR both inside and outside of courtrooms and for the attention of the former to transatlantic data transfers. The number of cases pending at the time of writing in data privacy issues in EU law at the CJEU is 43.[20] It is also worth remarking that a vast array of key EU caselaw begins before national regulators, DPCs, and does not reach the CJEU.[21] The figure in reality is significantly smaller at EU law level than at national level. It reflects only a very small dimension of the litigation taken at a lower level[22] and covers a vast array of areas.

This brings us to the broader question of the place of courts and framing of litigation. EU legal scholarship has long tended to adopt a highly 'court-centric' approach of EU law where CJEU caselaw is its dominant metric.[23] However, arguably non-court-centric views need to be considered in any realistic view of contemporary and future EU law, as this account will outline. Big Tech increasingly engages with EU law beyond the court room

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[18] See Pola Cebulak (ed), 'Special Issue on Strategic Litigation in EU law' German Law Journal, forthcoming.
[19] R Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75(4) World Politics 779; Lisa Conant, 'The European Court of Justice and the policy process: The shadow of case law' (2018) 96(3) Public Administration 628.
[20] Search made using official form at CJEU, 'InfoCuria Case-law' <https://curia.europa.eu/juris/recherche.jsf?language=en#> accessed 1 October 2024, with terms: Subject-matter = 'Data protection'; Case status = 'Cases pending'.
[21] Key data used here is the CJEU website <https://curia.europa.eu/jcms/jcms/j_6/en/> accessed 1 October 2024 and NOYB website <https://NOYB.eu/en> accessed 1 October 2024.
[22] Search made using official form at CJEU, 'InfoCuria Case-law' (n 20).
[23] E.g. Arthur Dyevre, Wessel Wijtvliet, and Nicholas Lampach, 'The Future of European Legal Scholarship: Empirical Jurisprudence' (2019) 26 Maastricht Journal of European and Comparative Law 348; See Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20(3) European Law Journal 292, 313-316.

through e.g. lobbying, as do civil society bodies.[24] The Transatlantic focus of Schrems is arguably well captured also *other than* in the courtroom, taking an even broader perspective on the work of Schrems – and beyond. Still, Schrems also has limited official lobbying engagement which further demonstrates the need to look even more broadly at EU law usage.

The travel of EU law across the Atlantic is one of the most significant shifts in global privacy developments.[25] It is an empirical study of much complexity and surprise, as to shifting legal instruments. Litigation is also part of this transatlantic matrix to a degree – but not exclusively. Long in advance of the litigation of Schrems and other NGOs, lobbyists have found that the supranational level of government in the EU is not a barrier to opportunity and that the CJEU has proved to be a highly successful venue in which to seek policy change.[26] This paper considers the litigation and lobbying of Schrems and NOYB from this perspective, but also not limited to this, where more avenues are used to seek policy change, including through social and other media.

The paper thus relies upon desk-based doctrinal research on CJEU caselaw and EU data privacy and EU lobbying law related books and articles in particular, as well as press releases and social media posts on X and LinkedIn of NOYB and Schrems between 2014 and 2024. This time-period is selected because it relates to the period of time shortly before and after initial implementation of the GDPR and its enforcement in EU law. It focuses upon the NOYB website and LinkedIn and X accounts of Schrems.[27] It also considers the EU Transparency Register and lobbying activities of NOYB as well as litigation taken by Schrems himself. It thus also draws from desk-based secondary literature research, to identify problems that data transfer provisions may generate in EU law. Insights are additionally drawn from the literature on intermediary liability in the digital economy and from parallels with past research on data governance.

The article thus focuses upon the place of EU law in the work of Schrems – often taken outside of Court rooms and official lobbying channels when challenging EU data transfers. The paper draws attention to the links between lobbying and litigation as to EU data transfers and beyond mirrored in the work of NOYB – where little caselaw exists per se – and where broader aims and means are at stake necessitating a broader reach. Civil society like Big Tech use a variety of methods to engage with EU law, but not limited to a courtroom per se, amply demonstrated in the work of Schrems and NOYB. The article also highlights how much scholarship focuses upon the work of Schrems and NOYB as examples of the 'transnational' enforcement of EU law. It argues that existing literature easily overlooks the exclusively *transatlantic* focus of Schrems and the relatively modest number of cases taken

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[24] Emilia Korkea-aho, 'No Longer Marginal? Finding a Place for Lobbyists and Lobbying in EU Law Research' (2022) 18(4) European Constitutional Law Review 682.
[25] Florencia Marotta-Wurgler and Kevin E Davis, 'Filling the Void: How E.U. Privacy Law Spills Over to the U.S.' (2024) 1 Journal of Law and Empirical Analysis 1.
[26] Margaret McCown, 'Interest Groups and the European Court of Justice' in David Coen and Jeremy Richardson (eds), *Lobbying The European Union: Institutions, Actors, And Issues* (Oxford University Press 2009); Pieter Bouwen and Margaret McCown, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' (2007) 14(3) Journal of European Public Policy 422; Korkea-aho, 'No Longer Marginal?' (n 24).
[27] Accordingly, NOYB Website, <https://NOYB.eu/en> accessed 1 October 2024; Max Schrems Profile on Linkedin, <https://www.linkedin.com/in/max-schrems/?originalSubdomain=at> accessed 1 October 2024; and X, <https://x.com/maxschrems> accessed 1 October 2024.

by him, less again by NOYB before the CJEU, concentrated elsewhere. The focus upon the '*locus*' adds to research highlighting the procedural limitations of the EU law system. It supports a broader framing of strategic litigation in understanding data transfers and the broader 'Brussels effects' of the work of Schrems.

It explores these issues as a question of framing, where the EU has many subjects and objects to regulate as to Big Tech generally. EU law is thus argued here to be highly facilitating of global endeavours and there are strong transatlantic dimensions thereto, both bottom-up and top-down. The traditionally top-down focus in human rights scholarship on laws, institutions, and courts has begun to turn towards a bottom-up focus on activists, advocacy groups, affected communities, and social movements.[28] It is arguably the case that many of these characteristics apply to strategic litigation as EU data transfer law, broadly conceived.

Section 2 outlines Schrems' litigation: considering his building of an exclusively transatlantic focus, Section 3 assesses the Transatlantic focus, reflecting upon whether it is explained by procedural limitations of EU law; while Section 4 considers a lobbying focus – looking outside of the courtroom, examining the concept of direct and indirect lobbying on social media of Schrems and NOYB, followed by Conclusion.

2 THE SCHREMS LITIGATION: BUILDING AN EXCLUSIVELY TRANSATLANTIC FOCUS

This Section explores the focus of the work of Schrems and NOYB.

The work of Schrems and his NGO, NOYB, expose the challenge of the *framing* relationship of strategic and ordinary litigation and broader strategic activities, where literature generally focusses upon lawyering and lobbying of civil society. Notably, for all of the opposition of the European Parliament e.g. in its Civil Liberties, Justice and Home Affairs 'LIBE' committee, to international data transfers, the European Parliament has rarely engaged in salient litigation – allowing others to step in.[29] It has been argued that patterns of law and regulation in the European Union have been shifting toward a distinctive European variant of American adversarial legalism, 'Eurolegalism' generating a culture with an emphasis on transparent, judicially enforceable legal norms adversarial enforcement by public authorities, and empowerment of private actors to enforce legal norms albeit 'tamer' than that found in the US.[30] Eurolegalism is useful as a prism for exploring the work of Schrems. Yet it further provokes the nuanced question as to the place of EU law inside *and* outside of the Court room.

Schrems is far from the only NGO or civil liberties entity engaging in this type of litigation in the field of data privacy; others include Digital Rights Ireland.[31] Such others have taken important caselaw in the field. While it is far from a household name in the EU as an

[28] See Gráinne de Búrca (ed), *Legal Mobilization for Human Rights* (Oxford University Press 2022).
[29] Elaine Fahey, 'Of "One Shotters" and "Repeat Hitters": A Retrospective on the Role of the European Parliament in the EU-US PNR Litigation' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).
[30] R Daniel Keleman, 'The Rise of Eurolegalism' (*The Regulatory Review,* 7 November 2021) <https://www.theregreview.org/2011/11/07/the-rise-of-eurolegalism/> accessed 1 October 2024.
[31] See Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* (n 12); Digital Rights Ireland has also joined as party in Case C-362/14 *Schrems I* (n 7).

NGO in the same way as possibly other European counterparts e.g. Dutch NGO 'Urgenda' on climate, NOYB has a high-profile within data privacy circles largely for its links to Schrems. Schrems is a well-known legal 'activist' in his own right, confirmed by a CJEU decision on this issue prior to the introduction of the GDPR on his 'right' to take cases on behalf of thousands of consumers qua activist pursuant to the Brussels I Regulation.[32] Schrems is arguably well known on account of the focus of his litigation upon EU-US relations and US Big Tech, considered below.

The NOYB association describes itself as being initiated by Schrems to bring together a large group of experts and institutions from the privacy, tech and consumer rights sectors from all over Europe and beyond.[33] Schrems is depicted as chairman and founder of NOYB as a 'privacy enforcement platform' that brings data protection cases to the courts under the EU General Data Protection Regulation.[34] In reality, however, Schrems is the key focal point given that it is mainly he that litigates and Schrems alone than has instigated the caselaw bearing his name, rather than the NGO. Schrems is nonetheless an extraordinary character in the EU legal order, himself litigating in Austria and Ireland initially as a law student, using his technology IT knowledge, studies in the US and in-depth knowledge of EU law in practice to take some of arguably the most important litigation of EU law of all time. The starting point of his individual litigation is a diverse portfolio of litigation taken focussed in Ireland mainly at first instance on account of the 'One Stop Shop' procedure under the GDPR and jurisdiction of Ireland as 'home' or European headquarters of all leading Big Tech.[35] This caselaw was derided initially in Ireland for Schrems taking litigation to the CJEU about the interest of the US Government in his Facebook accounts. Yet he ended up successfully overturning the much-maligned Safe Harbour Agreement, and even putting data protection to the top of the CJEU and EU law agenda for a whole generation of lawyers.[36]

As this account will demonstrate, the concept of 'civil society' is increasingly significant in a world of digitalisation and Schrems and NOYB in particular have done important groundwork in this field to justify focus upon it. The impact of digital transformation on different social groups to assess the emergence of new digital inequalities in Europe is increasingly pervasive and challenging. As Van der Pas states, NOYB is said to deploy employees from the different EU Member States in order to engage in forum shopping and select the jurisdiction to make the most impact – but it faces challenges as to staffing.[37] Additionally, NOYB has tech experts in-house, as these are needed for building a litigation

[32] Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* (n 11); Claes Granmar, 'A reality check of the Schrems saga' (2021) 4(2) Nordic Journal of European Law 49; Jeffrey Atik and Xavier Groussot, 'A Weaponized Court of Justice in Schrems II' (2021) (2021) 4(2) Nordic Journal of European Law 1; Tamara Ehs, 'Democratisation Through Participation in Juristocracy: Strategic Litigation Before the ECJ' in Markus Pausch (ed), *Perspectives for Europe: Historical Concepts and Future Challenges* (Nomos 2020) 119.

[33] See e.g. NOYB, 'Making Privacy a Reality' (2020) <https://NOYB.eu/sites/default/files/2020-03/concept_NOYB_public.pdf> accessed 1 October 2024.

[34] Recently NOYB has announced it has filed a complaint against the ChatGPT creator OpenAI on the basis that OpenAI openly admits that it is unable to correct false information about people on ChatGPT as the company cannot say where the data comes from.

[35] See Christopher Kuner et al (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2020).

[36] See Elaine Fahey, 'The Supreme Court Preliminary Reference in *DPA v Facebook And Schrems:* Putting National and European Judicial Independence At Risk?' (2019) 1 Irish Supreme Court Review 408.

[37] Kris van der Pas, '"The Police Car Just Isn't Fast Enough': Mobilizing the EU Remedies System in the Field of Data Protection', in this issue.

strategy. Nonetheless, there is a particularly ad hoc nature to the operation of NOYB and the work of Schrems, often highly responsive, patchy and litigating at its limits, that merits attention for its considerable success as to its global effects.

This issue as to the focus of this litigation – and quantity thereof matters. Political scientists as much as lawyers focus upon the evolution of the 'transnational' character of EU data privacy regimes- mainly on account of the GDPR *and* the actions of Schrems.[38] Some advocate how EU civic engagement has served to mitigate cross-border policy implementation disparities, while preserving considerable regulatory discretion nationally. Integrating NGOs into privacy policy implementation is argued to have helped in highlighting issues.[39] It is, however, arguably difficult as this paper will contend, to characterise Schrems and his litigation as being transnational in any sense on account of his *sole* focus upon *transatlantic or EU-US* relations data transfers. NOYB by contrast rarely takes cognisance of developments outside the borders of the EU and rarely again expresses any interest in lobbying on those issues. Indeed, the only non-EU data transfer regime of interest to NOYB / Schrems relates to the *US*. In fact, much attention is unduly focused upon disparities at national level rather than the locus of NGO activity. This is despite many significant examples existing as to other third countries and regions with which the EU has e.g. adequacy decisions.[40] In fact, it draws attention to the esoteric place of the transatlantic to a degree, which is alluded to here throughout.

As noted above, the CJEU has opined three times on the key legal standards that must be met for data transfers under the GDPR and Schrems is involved in most of them: *Schrems I* (Case C-362/14), its second Schrems decision dealing with international data transfers (*Schrems II*, Case C-311/18), and Opinion 1/15.[41] In the two *Schrems* judgments, a Commission adequacy decision was invalidated, and in Opinion 1/15 it was held that a proposed international agreement could not be entered into.[42] The political and legal salience of data transfers has rocketed on account of Schrems and continues to, with a new adequacy decision emerging, as outlined above. However, statistically this may not be entirely 'logical'. In 2020, NOYB claimed to have filed 101 complaints on EU-US data transfers but all before national authorities.[43] NOYB claims to have over 800 cases at the time of writing in 2024 pending before national authorities, including in its calculations two before the European Data Protection Supervisor (EDPS) – albeit none on EU-US transfers.[44] A search of curia.eu

[38] 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; Giulia Gentile and Orla Lynskey, 'Deficient by Design? The Transnational Enforcement of the GDPR' (2022) 71(4) International and Comparative Law Quarterly 799.
[39] 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.
[40] I.e. Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom, United States and Uruguay.
[41] Case C-362/14 *Schrems I* (n 7); Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* (*Schrems II*) EU:C:2020:559; Opinion 1/15 (n 12).
[42] Fahey, 'The Supreme Court Preliminary Reference in *DPA v Facebook and Schrems*' (n 36).
[43] NOYB stated that: 'Some complaints were filed with the (likely) relevant Lead Supervisory Authority (LSA) at the establishment of the controller directly. Others with the Austrian DPA, at the residence of the data subjects. These complaints will likely be forwarded to the relevant LSA under the "One Stop Shop" (OSS)'; See NOYB, '101 Complaints on EU-US transfers filed' (*NOYB,* 17 August 2020) <https://NOYB.eu/en/101-complaints-eu-us-transfers-filed> accessed 1 October 2024.
[44] See 'Overview of NOYB's GDPR complaints by DPA': <https://NOYB.eu/en/project/dpa> accessed 1 October 2024.

reveals zero cases for NOYB and one for Schrems between 2014 and 2024, showing relatively little litigation in this time period of the rollout of the GDPR, i.e. before and after.[45] At the same time, there were over 80 cases on the GDPR brought by other actors.[46] In short, the statistics suggest limited courtroom activity by Schrems and NOYB, and a heavy transatlantic focus.

This draws attention, firstly, to the esoteric place of the '*transatlantic*' in this context.[47] For many in EU law, the transatlantic relationship is key in understanding the present and future of fundamental rights, given the many pressures and opportunities that the digital era has presented for some of the West's most advanced cultures and disciplines.[48] The use of EU law by Big Tech through its lobbying, litigating and lawyering constitutes a significant example of private order of the transatlantic space by global governance actors. The absence of a concept of civil society in transatlantic relations has long been lamented by scholars of comparative law, political science and public administration.[49] The drive towards a digitised society across the Atlantic has seen an unprecedented development of the transatlantic consumer.[50] It is both a practical and conceptual development. Transatlantic understandings of digital rights have in no small part possibly emanated from the vast infrastructure of institutionalisation that the GDPR has put in place, at least at the outset. The litigation of Schrems has generated many curiosities of transnational governance and promoted shifts in public and private synergies and the subject and object of analysis as to Big Tech is frequently a moving target. The term transnational is normally used to describe companies or business activities that exist or take place in more than one country.[51] Big Tech has in general availed of the EU's 'One Stop Shop' OOS and thus contributes to this context significantly where the EU is a first-mover regulator. Even in the EU, scholars across disciplines question the depth of how seriously fundamental rights are being taken in the realm of digital governance; and how and where to change this.[52] The place of the transatlantic in this movement towards rights and regulation is thus a curious one, generated by Schrems.[53] If we look beyond political science understandings of power and actors in law-making processes to the diverse ways in which EU law is engaged across the Atlantic, a broader array of engagement is possible, beyond *formal* law-making processes. Secondly, the character of the evolution of EU law here is important, enabling, centralising and being open to participation, *inside and outside* of the Court, where the focus of Schrems and NOYB alike has largely taken effect.

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[45] Search made using official form at CJEU, 'InfoCuria Case-law' (n 20) with terms: Court = 'Court of Justice'; Period or date = 'Date of delivery'; Period = 'from 01/01/2019 to 01/09/2024'; Name of the parties = schrems and repeating the search with 'NOYB' and NOYB.

[46] Search made using official form at CJEU, 'InfoCuria Case-law' (n 20).

[47] See Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press 2014).

[48] E.g. Oreste Pollicino, 'The Transatlantic Dimension of the Judicial Protection of Fundamental Rights Online' (2022) 1(2) The Italian Review of International and Comparative Law 277.

[49] Francesca Bignami and Steve Charnovitz, 'Transnational civil society dialogues' in Mark A Polack and Gregory C Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowman and Littlefield 2001).

[50] Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023).

[51] See Cambridge English Dictionary, <https://dictionary.cambridge.org/dictionary/english/transnational> accessed 1 October 2024.

[52] Giancarlo Frosio and Christophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime' (2023) 29(1-2) European Law Journal 31.

[53] See Mark Pollack and Gregory Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowman and Littlefield 2001).

The next Section considers why this is the case, examining the procedural place of EU law, starting with the 'Court room' and litigation at EU level.

3 A TRANSATLANTIC FOCUS EXPLAINED… BY THE MANY PROCEDURAL AND OTHER LIMITATIONS OF EU LAW?

Both instruments struck down through the litigation of Schrems at the CJEU were enshrined in EU law in an 'adequacy decision' adopted by the European Commission on the basis of the EU legislation on data protection, a form of complex hybrid governance.[54] There are 8 data transfer agreements, not all international agreements, some hybrid regimes, comprising an array of legal bases.[55] NOYB itself claims that there are a wide range of procedural avenues in the GDPR for it to pursue its cases.[56] This Section then considers the legal issues relating procedural and other limitations of EU law as to data transfers. As regards procedural areas of focus, NOYB states that with the many enforcement possibilities under the GDPR, it is able to submit data protection complaints with local authorities and file procedures in national courts.[57] It expressly states that it thus follows the idea of 'targeted' and 'strategic litigation' to strengthen privacy.[58] Yet practical issues are not inconsequential when discussing strategic litigation as to data transfers when focussed exclusively upon the US where complex hybrid governance mechanisms are applicable. There are arguably a limited number of legal procedural avenues in reality despite the general openness of the EU legal order. The right to the protection of personal data is enshrined in Article 6 TFEU and is underpinned by a significant enforcement regime under EU law; but one that has been developed by key cases with a transatlantic focus, i.e. by Schrems.[59] It is arguably difficult to legally define EU law data rights, which may be said to fall within am umbrella of rights flowing from Article 16 TEU, introduced since the Treaty of Lisbon, given effect to in legislation in the form of the GDPR, a number of years later.[60] This fountain of rights relates to a vast range of areas, from consumer to privacy to competition law *and* international data transfers. It is difficult to pinpoint one specific case but standard leading texts on data privacy point to a wave of post-GDPR litigation, from *Google Spain* 'Right to be forgotten' caselaw to the *Schrems* litigation. Schrems mostly has generated key litigation of EU law using the

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[54] Elaine Fahey and Fabien Terpan, 'The Future of the EU-US Privacy Shield' in Elaine Fahey (ed) *Routledge Research Handbook on Transatlantic Relations* (Routledge 2023) 221.
[55] Theodore Christakis and Fabien Terpan, 'EU–US negotiations on law enforcement access to data: divergences, challenges and EU law procedures and options' (2021) 11(2) International Data Privacy Law 81.
[56] See 'NOYB Projects', <https://NOYB.eu/en/projects> accessed 1 October 2024: 'With the many enforcement possibilities under the European data protection regulation (GDPR)'.
[57] ibid.
[58] ibid.
[59] Eleni Kosta, Ronald Leenes, and Irene Kamara (eds), *Research Handbook on EU Data Protection Law* (Edward Elgar Publishing 2022); Chris Jay Hoofnagle, Bart van der Sloot, and Frederik Zuiderveen Borgesius, 'The European Union general data protection regulation: what it is and what it means' (2019) 28(1) Information & Communications Technology Law 65; Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action' in Serge Gutwirth et al (eds), *Reinventing Data Protection?* (Springer 2009); Anastasia Iliopoulou-Penot, 'The construction of a European digital citizenship in the case law of the Court of Justice of the EU' (2022) 59(4) Common Market Law Review 969; Thomas Streinz, 'The Evolution of European Data Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021) 902.
[60] Iliopoulou-Penot (n 59).

Article 267 TFEU preliminary reference procedure, a key part of the system of EU remedies, alleging infringements of fundamental rights.

This Section thus briefly breaks down this 'success' and next considers two sub-themes as to this transatlantic focus, it examines avenues of the system of remedies in EU law for litigating data transfers and legal bases, powers and values. It reflects briefly upon the array of legal avenues that are possible and their challenges:the GDPR, Article 218 TFEU on international agreements, Article 258 TFEU infringement actions, Article 267 TFEU preliminary references, and the Charter of Fundamental rights. The aim overall is to explain the limited number of cases taken by Schrems and the other avenues pursued as a result.

3.1 GDPR

The GDPR is a highly sophisticated 'legalisation' of the operation of data protection law, implemented since May 2018 and provides a vast array of procedural bases, beyond that previously existing.[61] Of salience to the question of data transfers and civil society, any not-for-profit body, organisation or association whose statutory objectives are in the public interest and which is active in the field of the protection of data subjects' rights and freedoms may lodge a complaint to a DPA on behalf of a data subject or exercise the right to judicial remedy and the right to seek compensation on behalf of data subjects on account of Article 80 GDPR. This is a new development in the GDPR, with profound possible effects at transnational level.[62] It progresses the law significantly beyond previous case law. Prior to this, the CJEU had permitted Schrems to take class actions despite their data activist role having regard to an interpretation of the Brussels Regulation.[63] Article 80 also enables a more transnational legal culture to emerge as noted above, not per se limited to the territory of the EU. Thus, the Court in *Meta Platforms Ireland* (on Article 80(2) GDPR) held that EU law did not preclude national legislation allowing consumer protection association to bring legal proceedings absent a mandate and independently of breach of data subject rights on consumer protection grounds.[64]

However, arguably, Schrems and his litigation affords a more complex 'take' on this from a legal perspective, where his focus is individual and transatlantic rather than via NOYB in Court. NGOs are considered to be playing a 'bottom-up' role in transforming policy implementation e.g. through so-called new governance tools such as transnational fire alarms.[65] Groups like noyb are said to have adopted a 'mission', which seeks to take advantage of Article 80 and the transnational level, to put pressure on national and EU regulators. Yet

[61] See Elaine Fahey, *EU as a Global Digital Actor* (Hart Publishing 2022).
[62] See extensively: Florence D'ath, 'Meta v. BVV: The CJEU Clarifies The Scope of the Representative Action Mechanism of Article 80(2) GDPR Whereby Not-for-Profit Associations Can Bring Judicial Proceedings Against a Controller or Processor' (2022) 8(2) European Data Protection Law Review 320; Mizarhi-Borohovich, Newman, Sivan-Sevilla (n 39); Emilio Lehoucq and Sidney Tarrow, 'The Rise of a Transnational Movement to Protect Privacy' (2020) 25(2) Mobilization: An International Quarterly 161; Jang and Newman (n 38); Noah Page et al, 'Culture-Minded GDPR Recommendations for an NGO' (2022) <https://digital.wpi.edu/downloads/05741v89c> accessed 1 October 2024.
[63] See Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* (n 11).
[64] Case C-319/20 *Meta Platforms Ireland* EU:C:2022:322.
[65] Jang and Newman (n 38).

their lack of litigation must be said to be notable on key areas such as data transfers.[66]

3.2 CHARTER OF FUNDAMENTAL RIGHTS

Procedure aside, Schrems has successfully relied upon the EU's Charter of Fundamental Rights substantively in various cases taken as to data transfers as part of his preliminary reference proceedings.[67] The EU's Charter of Fundamental Rights encompasses a broad range of civil, political, social and economic rights, together with rights peculiar to EU citizens, such as free movement within the EU or the right to privacy and the right to data protection.[68] Yet the gradual hybridization of Internet governance blurs the lines between the limits of power and makes it more difficult to uphold the public interest and necessary safeguards for the digital society. It has challenged the context of understanding rights in the digital age.[69] The Charter has featured in much key litigation overall as to the EU-Privacy Shield Agreement as much as the EU-Passenger Name Records (PNR) litigation and has thus been of much significance.[70] The CJEU, in the Case of *Schrems II*, in particular held that the Commission's finding that US law was of an adequate level of protection essentially equivalent to EU law under the GDPR read in light of the Charter, was called into question by US law because they authorised surveillance programmes without limitations on powers or conferring enforceable rights on EU citizens against the US authorities.[71] This violated the principle of proportionality because surveillance programmes could not be regarded as limited to what was strictly necessary. Moreover, the Ombudsman could not remedy deficiencies which the Commission had found (e.g. lack of a redress mechanism) as to the transfers impugning findings as to adequacy with respect to essential equivalence as guaranteed by Article 47 of the Charter.

3.3 ARTICLE 258 TFEU

Any individual or organisation may also lodge a complaint with the Commission if a measure or an administrative practice in a Member State appears to violate EU rules. However, it is only the Commission that may initiate the procedure under Articles 258 and 260 TFEU. Non-governmental organizations are excluded from participation in Article 258 TFEU, a key remedy in the Treaties where complaints can be made to the Commission as to the

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[66] See n 62; See also 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); Laima Jančiūtė, 'Data protection and the construction of collective redress in Europe: Exploring challenges and opportunities' (2019) 9(1) International Data Privacy Law 2; René Mahieu and Jef Ausloos, 'Recognising and Enabling the Collective Dimension of the GDPR and the Right of Access' (2020) Submission as feedback to the European Commission's two-year evaluation of the implementation of the GDPR, 13 et seq <https://osf.io/preprints/lawarchive/b5dwm> accessed 1 October 2024.

[67] E.g. Case C-362/14 *Schrems I* (n 7) and Case C-311/18 *Schrems II* (n 41).

[68] Giulia Gentile and Daria Sartori, 'Interim Measures as "Weapons of Democracy" in the European Legal Space' (2023) 1 European Human Rights Law Review 18; Giulia Gentile, 'Effective judicial protection: enforcement, judicial federalism and the politics of EU law' (2023) 2(1) European Law Open 128; Gentile and Lynskey (n 38).

[69] Giovanni De Gregorio and Roxana Radu, 'Digital constitutionalism in the new era of Internet governance' (2022) 30(1) International Journal of Law and Information Technology 68.

[70] Fahey, *EU as a Global Digital Actor* (n 61).

[71] Fahey and Terpan (n 54).

enforcement of EU law. NGOs are excluded thus from infringement proceedings against Member States for failing to fulfil their obligations under the GDPR, which can be launched by the Commission under Article 258 TFEU.[72] This additional exclusion arguably 'feeds' more actors towards the preliminary reference process, itself without added value to interest groups and actors subject to complex national locus standi rules, discussed next.[73]

3.4 ARTICLE 267 TFEU

Schrems has mainly gained access to the CJEU through Article 267 TFEU, the main way in which individual litigants can access the CJEU albeit not by 'right'. National courts which consider a decision on the question necessary to enable them to give judgment, may, or in the case provided for in Article 267 TFEU, must, request the Court of Justice to give a preliminary ruling on the interpretation of Union law, as one of the common and key elements of the system of remedies in the EU Treaties.[74] Most key litigation in the first and second wave of litigation notably derives from private parties or NGOs as first plaintiff. Big Tech while usually involved tends to be the defendant or opponent. Indeed, Tech organisations outside of EU Member States having OOS jurisdiction have been able make amicus curiae submissions in some key EU law litigation. Moreover, as Van der Pas and Krommedijk have shown, the legal possibilities for interested natural or legal persons, including NGOs, to intervene in EU law proceedings, particularly in the context of the preliminary ruling procedure (Article 267 TFEU) are rather limited.[75]

3.5 ARTICLE 218 TFEU

Article 218 TFEU, which details the procedural requirements for Treaty-making at the EU level, lays down a single procedure of general application for the negotiation, conclusion and implementation of international agreements by the EU. It deals with the different stages of the life of an international agreement, from negotiations, signature, termination, execution and suspension of contractual commitments as a form of constitutional code of the EU.[76] International data transfer issues have exposed for some the constitutional fragility of international relations given the complexity of Article 218 TFEU and its highly separate existence to the EU's system of adequacy decisions under the GDPR involving a different institutional set up, character and legal sources.[77] In general, individuals have hardly any rights or entitlements as to the Article 218 TFEU process where their interests instead are conveyed (rarely) through the EU institutions i.e. the European Parliament, and the Member States to

[72] See Golunova and Eliantonio (n 17).
[73] Marta Morvillo and Maria Weimer, 'Who shapes the CJEU regulatory jurisprudence? On the epistemic power of economic actors and ways to counter it' (2022) 1(2) European Law Open 510.
[74] Case C-645/19 *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit* EU:C:2021:483.
[75] See in the context of migration: Jasper Krommendijk and Kris van der Pas, 'Third-party interventions before the Court of Justice in migration law cases' (*EU Migration Law Blog,* 29 February 2022) <https://eumigrationlawblog.eu/third-party-interventions-before-the-court-of-justice-in-migration-law-cases/#more-8551> accessed 1 October 2024.
[76] Panos Koutrakos, 'Institutional balance and sincere cooperation in treaty-making under EU law' (2018) 68(1) International and Comparative Law Quarterly 1.
[77] Christakis and Terpan (n 55).

a lesser extent. The CJEU can hear opinions on the legal character of an agreement.[78] Overall, however, international data transfer issues have not taken effect using Article 218 TFEU agreements.[79] However, it is often mooted as a likely collective legal base for future agreements and needs further reflection for its consequences.

While in theory there are a variety of ways for litigation to take effect here and challenge data transfers, the paucity of such caselaw warrants further attention. Arguably, the actions and successes of Schrems highlight the technical expertise needed to challenge an adequacy decision as well as the resources to do so, and interest in achieving outcomes of salience.

This leads to the final discussion here, on the actual practice of Schrems and how they engage in actions in EU law generating global convergence or causing the global reach of EU law, looking outside the court room.

4 A LOBBYING FOCUS? LOOKING OUTSIDE OF THE COURT TO CAPTURE THE EU LAW 'WORK' OF SCHREMS / NOYB?

Much of the work of Schrems is argued here to be conducted *outside* of the Court room – if the small number of cases he has taken is considered from a broader perspective of EU law. To discern where Schrems is in fact engaging more regularly and actively with EU law, this article reflects next upon his official *lobbying* of the EU institutions. It considers this work through his think tank, NOYB and then individually in other channels, arguing that it appears to take place in the form of informal lobbying as to EU law issues, still with global effects.

The EU has a Transparency Register, which is a publicly accessible data, with over 12 000 entries in the form of registrations at the time of writing.[80] The Register is understood to have highly up-to-date information about those actively engaged in activities aimed at influencing EU policies. Public reports indicate that of the approx. 12 000 entries, roughly half are in-house lobbyists – those who work for companies and groups – or people representing trade or professional associations including trade unions. About one third represent non-governmental organisations.[81] This leaves a vast genre of 'other entities'. The vastness of this data register is itself a challenge and as a result there is a considerable literature from EU administrative law to EU public law and governance on these complex parameters. There are actually many actors *outside* of the scope of lobbying legislation in the EU – law firms and consultancies, trade unions and employers' organisations, third countries' governments, and regional public authorities, leading to accusations of selective transparency to the neglect of basic democratic values.[82]

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[78] Marise Cremona, 'The Opinion procedure under Article 218(11) TFEU: Reflections in the light of Opinion 1/17' (2020) 4(1) Europe and the World: A Law Review.

[79] Another way to see this is how much hybridity and complex legal constructions as to the predecessor to the GDPR have governed international data transfers because of the complexity of Article 218 TFEU. See Fahey and Terpan (n 54).

[80] European Commission, 'Transparency Register' <https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/transparency-register_en> accessed 1 October 2024.

[81] See Emilia Korkea-aho, '"Mr Smith Goes To Brussels": Third Country Lobbying and the Making of EU Law and Policy' (2016) 18 Cambridge Yearbook of European Legal Studies 45.

[82] Odile Ammann and Audrey Boussat, 'The Participation of Civil Society in EU Environmental Law-Making Processes: A Critical Assessment of the European Commission's Consultations in Relation to the European Climate Law' (2023) 14(2) European Journal of Risk Regulation 235.

Despite most major Big Tech companies having US origins, Big Tech does not equate easily with the US Government. Big Tech has stopped lobbying in the EU though the US government in Brussels a long time ago.[83] Research on transparency in the EU and at the European Parliament, has extensively examined the adoption and implementation of transparency initiatives as well as the conditions under which interest groups have access to and influence on EU policy-making. However, others suggest that the question of whether even Members of the European Parliament (MEPs) are transparent regarding their interactions with interest group representatives has also been overlooked by the literature.[84] Indeed as Ammann states, the current narrow focus of EU lobbying law is unduly centred upon transparency which appears misguided where it neglects other fundamental democratic values such as equality, generally at the expense of duties of integrity.[85]

Although lobbying is about influencing law-making and legislation, the interpretation of lobbying is not traditionally seen as the work of lawyers.[86] As a result, lobbying is not a priority as a research topic in EU law scholarship.[87] One feature of the study of Big Tech that emerges through the prism of lobbying and EU law is the phenomenon of 'lobbying non-lobbying.'[88] This entails that Big Tech operates officially at the margins of existing transparency and lobbying laws. It exists 'on the margins' precisely because not all aspects of lobbying are regulated, the concept of lobbying is not universally agreed or defined and the EU's efforts at lobbying registration are error prone.[89] The extent to which NGOs and activists linked to them such as Schrems falls into this category of lobbying non-lobbying remains to be seen but appears certainly to be a possibility for the following reasons.

The transatlantic evolution of lobbying in the EU is a relatively recent and increasingly professionalised affair and Schrems is arguably a part of this curious landscape. There is a well-documented surge in professional US lobbyists in Brussels, often US qualified lawyers working at Brussels-based law firms, with sizeable departments dedicated to following sectoral EU law and policy developments.[90] Some even describe a Brussels ecosystem with its own properties and informal rules.[91] In fact, political scientists argue now that even if the so-called 'GAFAM' (i.e. Google, Amazon, Facebook, Apple, Meta etc) negotiate 'Brussels in pitch perfect fashion', it is highly unlikely they can escape intervention from the EU. However, these developments on lobbying are not limited to EU law, where the complexity

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[83] See Anthony Luzzatto Gardner, *Stars with Stripes: The Essential Partnership between the European Union and the United States* (Palgrave 2020).
[84] Nuria Font and Ixchel Pérez-Durán, 'Legislative Transparency in the European Parliament: Disclosing Legislators' Meetings with Interest Groups' (2023) 61(2) Journal of Common Market Studies 379.
[85] Odile Ammann, 'Transparency at the Expense of Equality and Integrity: Present and Future Directions of Lobby Regulation in the European Parliament' (2021) 4 European Papers 239, 243; Alberto Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) European Law Review 72, 81.
[86] Korkea-aho, 'No Longer Marginal?' (n 24).
[87] ibid.
[88] Adam Satariano and Matina Stevis-Gridneff, 'Big Tech Turns Its Lobbyists Loose on Europe, Alarming Regulators' (*New York Times*, 14 December 2020) <https://www.nytimes.com/2020/12/14/technology/big-tech-lobbying-europe.html> accessed 1 October 2024.
[89] Nikolaj Nielsen, 'EU lobby register still riddled with errors' (*EUObserver,* 31 January 2023) <https://euobserver.com/eu-political/156664> accessed 1 October 2024.
[90] Satariano and Stevis-Gridneff (n 88).
[91] David Coen, Alexander Katsaitis, and Matia Vannoni, *Business Lobbying in the European Union* (Oxford University Press 2021). See also Andy Tarrant and Tim Cowen, 'Big tech lobbying in the EU' (2022) 93(2) The Political Quarterly 218.

of the role of non-state actors in rule-making systems and their participation is equally challenging, with the risk from profit-seeking business capturing the public interest. This transatlantic dimension thus becomes more difficult to unpick / unpack but features prominently, with US companies 'Europeanising' their practices.

These challenges are readily 'transposeable' to Schrems and NOYB. NOYB has been legally registered since 2021 as an NGO for the purposes of the EU's Transparency Register.[92] NOYB states its aims are to use best practices from consumer rights groups, privacy activists, hackers, and legal tech initiatives and merge them into a stable European enforcement platform.[93] NOYB is mainly focussed upon international data transfers in the areas of its work but has a limited official lobbying record to date, focussing on only two areas of law, reflecting its scale perhaps and the strength of Schrems in other forums, where the 'threat' of Schrems litigation against EU instruments has been outlined by EU Commissioners in public forums.[94] This arguably shows the salience of Schrems and his work however 'niche' its study might appear. Schrems in fact rarely lobbies 'officially' using EU law lobbying procedures, nor thus does NOYB statistically at least. Schrems has also established an NGO with a view to enabling lobbying and litigating against Big Tech in favour of the enforcement of EU law, arguably defining the conditions for good lobbying as per Alemanno.[95] Schrems has also used a wide variety of social media posts, conference presentations, responses in press releases to CJEU decisions and public discussions of non-lobbyists, Governments and the European Commission to direct a series of communications on the appropriate and correct direction of EU law. Schrems thus uses newer modes of communication extensively, in particular Schrems uses social media e.g. Twitter/X, LinkedIn, NOYB press releases, and conference panels.[96] Searches for press

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[92] See as of 11 May 2021 (date of registration) the stated by NOYB in the EU's Transparency Register: 'The Association has a non-profit aim and promotes public awareness in the areas of freedom, democracy and consumer protection in the digital sphere with a focus on consumer rights, the fundamental rights to privacy and self-determination, data protection, freedom of expression, freedom of information, human rights and the fundamental right to an effective remedy. The Association also aims to promote relevant adult education (popular education), research and science'; See Transparency Register, <https://transparency-register.europa.eu/searchregister-or-update/organisation-detail_en?id=488900342587-15> accessed 1 October 2024.

[93] See NOYB Projects (n 56).

[94] 'NOYB's Comments on the proposed Standard Contractual Clauses for the Transfer of Personal Data to Third Countries pursuant to Regulation (EU) 2016/67' (*NOYB,* December 2020) <https://NOYB.eu/sites/default/files/2020-12/Feedback_SCCs_nonEU.pdf> accessed 1 October 2024; See also 'NOYB's Comments on EDPB Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' (*EDPB*) <https://edpb.europa.eu/sites/default/files/webform/public_consultation_reply/noybs_comments_on_edpb_guidance_on_additional_measures_final_.pdf> accessed 1 October 2024.

[95] Per Alemanno: 'Big tech companies are responding in an equally remarkable manner, with a type of lobbying that is characterised by 1) overspending; 2) aggressivity; 3) levering expertise and brand recognition, and 4) opacity in terms of their funding'; See Alberto Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* (ICON Books 2017). See also The Good Lobby Organisation's strategies and projects: 'Big-Tech Lobbying: How tech giants lobby and why it is concerning' (*The Good Lobby,* nd) <https://www.thegoodlobby.eu/hi-tech-lobbying-how-tech-giants-lobby-and-why-it-is-concerning/#> accessed 1 October 2024.

[96] Schrems LinkedIn profile expressly states: 'Hardly using LinkedIn, send an email instead. // (Luckily not only) Law, Privacy and Politics'. His LinkedIn Profile has nearly 25,000 followers, although with intermittent postings and interventions every few months in 2024. Most of their activity is on X social media, with over 800 hundred of posts and over 56k followers; NOYB is a most 'active' platform on X mainly. In early September, Schrems addressed in a LinkedIn post the Irish DPAs light-touch enforcement of EU data protection law as a topic. See respectively, Max Schrems profiles on LinkedIn (n 27) and on X (n 27); NOYB

releases by NOYB and Schrems' social media accounts reveal a regular and active set of perspectives on the direction of GDPR enforcement and the future of EU-US data transfers over a decade at least.[97] Thus statistically, Schrems is not to be found much on the EU Lobbying Register and officially is hard to be identified in EU lobbying law as a lobbyist or engaged in direct lobbying, although engaging in such lobbying through NOYB in only a very small number of instances. He also takes relatively few cases, albeit more than NOYB and still of significance despite the quantity. Yet Schrems has been engaging actively and successfully *elsewhere*.

This paucity of official data, on lobbying, but also in litigation perhaps, reflects the depth and breadth of Schrems and NOYB activities in *other* forums and warrants its attention as a future research agenda as to the effects and usage of EU law as to civil society and strategic litigation. It reinforces the importance of considering the limits of the term '*lobbying*' from an EU law perspective and where *other* engagement with EU law takes place, such as in the case of *indirect lobbying*. Schrems appears to mainly use social media e.g. Twitter/X, less so LinkedIn and more indirectly NOYB press releases to leverage much success. To similar effect, his own NGO is far from easily being deemed to be highly active or present with the EU Transparency Register but still has prominence. While NOYB regularly publishes press releases on a vast array of issues, with Schrems' personal enforcement or support, Schrems also independently pursues such activities. NOYB appears less regularly to engage with transatlantic issues on any platform or in any medium. The span of this other successful albeit indirect forms of lobbying are nonetheless highly significant for EU law and engage with EU law. It shows the esoteric but still important place of EU law in the development of key data transfer law generated through the actions of Schrems

5 CONCLUSION

Data transfers form part of the development of the global reach of EU law and this article has considered the place of the transatlantic therein. The article has outlined the many procedural challenges of EU law as to data rights where they relate to data transfers and the limitations of avenues for Schrems and NOYB – yet where he surmounts them in a limited number of key cases before and after the GDPR. Schrems – rather than NOYB – does notably more than litigation – but both are relatively absent from official data on lobbying. The outcome of litigation with a transatlantic dimension – or not – is of significance for the political and legal influence that it leveraged upon policy-makers. The effects of Schrems' litigation initiatives are thus not inconsiderable. They have arguably widened the global effects of EU law by having high-profile and high-impact, e.g. in the case of the EU and US establishing a Transatlantic Data Privacy Court under the DPF in order to implement the Schrems rulings. The article has also considered the locus of the energy and attention of Schrems, mainly focussing upon data transfers outside of the EU, i.e. to the US. This article has demonstrated that court-centric understandings of EU integration as a modus operandi of EU law or place the Court as the ultimate subject and object of the data analysis may not be the only means of framing important developments in data transfers, with Schrems

Profile in X, <https://x.com/NOYBeu> accessed 1 October 2024. See also Max Schrems' profile on Mastodon, <https://mastodon.social/@maxschrems> accessed 1 October 2024.

[97] See ibid.

litigating only a tiny handful of salient cases. This paper shows how broader views of EU law which would advocate a non-court centric perspective in framing international data transfers would capture better the work of Schrems in particular.

Schrems acts as a significant lobbyist on EU data transfers. Neither Schrems nor NOYB are arguably adequately 'reflected' for their significant in official lobbying channels, emphasising how their effects are initiated elsewhere, to similar effect in litigation output. A focus upon the work of Schrems in EU data transfer law aides debates as to the global effects of EU law and contemporary debates on US convergence to EU standards. The consequences of the implementation of enforceable rights relating to cross-border data transfers has brought about an extraordinary array of legal consequences. These also include a range of 'Brussels Effect' type developments.

The evolution of EU law's power over and in relation to Big Tech, not limited to data privacy, is also an important story of transatlantic litigation; begun in lower-level EU courts by an individual, harnessing the power of preliminary references and individual rights enforcement as to data transfers, and ultimately leading to the invalidation of EU laws. The outcome of such litigation has arguably also been to embolden the individual to litigate further- to a point. The actions here of NOYB / Schrems as litigant are notable in that they are actively supported and sustained through 'good lobbying' conducted in parallel to litigation. NOYB has itself no litigation at CJEU level to its name. Schrems continues to be a significant 'threat' to EU legislators, reminding them and highlighting shortcomings, explicitly enunciated in the form of litigation. Schrems is distinctive for his broad engagement in many academic, scholarly, policy-led and other fora, i.e. his reach is significant. The precise nature of the relationship here between lawyering and lobbying is complex in so far as Schrems personally engages much in social media campaigns directed often at the EU but not utilising formal lobbying channels. Rather, the activities of Schrems support the views of political scientists that the judicialization of interest groups is becoming more prominent and important to policymakers.[98] Yet such actions are highly significant for the way in which they affect the shape and direction of EU law and its procedural capacity to effect change. The article demonstrates the significance of the work of Schrems particularly before and after the introduction of the GDPR, within the confines of the courtroom of the CJEU and in lobbying, directly to the EU institutions and indirectly in other communication channels as a broad spectrum of the place of EU law in his work, with immense consequences for the global dimension to EU law.

[98] Andreas Hofmann and Daniel Naurin, 'Explaining interest group litigation in Europe: Evidence from the comparative interest group survey' (2021) 34(4) Governance 1235.

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