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Who does it empower?

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Strategic litigation in EU law: Who does it empower?

Pola Cebulak, Marta Morvillo, Stefan Salomon*

A. Introduction

Strategic litigation is a legal action initiated to achieve broader social, political, or economic ends. It is a form of legal mobilization and a way to exert influence over policies and political processes. It can be used by various actors pursuing different interests and agendas (public or private, progressive or conservative) and often operates alongside other forms of mobilization, such as lobbying or civil society campaigning. For a long time, civil society actors and interest groups in the European Union (EU) have primarily sought to influence policies through lobbying and activism rather than through litigation. The Court of Justice of the EU (CJEU) has therefore remained off the radar of public-interest litigators in Europe. National courts and the European Court of Human Rights provided more possibilities for direct actions and third-party interventions. In the past two decades, however, the CJEU adjudicated more regularly on politically salient and socially divisive issues related to the protection of the environment,[1] digital rights and or human mobility.[2] Many of these cases have been initiated by activist lawyers, scholars, and advocacy groups and non-governmental organizations. Pharmaceutical companies, agricultural businesses, and airline industries, among others, have also used EU law strategically to advance broader deregulatory agendas.

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[1] Joana Setzer, Harj Narulla, Catherine Higham, Emily Bradeen, *Climate litigation in Europe*, Report for the EU Forum of Judges for the Environment, 5-6 (2022), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/12/Climate-litigation-in-Europe_A-summary-report-for-the-EU-Forum-of-Judges-for-the-Environment.pdf.

[2] For an increase of CJEU decisions in the fields of asylum law see, MORITZ BAUMGÄRTEL, DEMANDING RIGHTS. EUROPE'S SUPRANATIONAL COURTS AND THE DILEMMA OF MIGRANT VULNERABILITY 5 (2019).

Against the twofold background of an increasing practice of strategic litigation in EU law and a growing societal and scholarly interest in law as a tool for social, political, and economic transformation, this special issue investigates the systemic features of EU law from the perspective of strategic litigants. The core question that this special issue pursues is: who does strategic litigation in EU law empower? In addressing this question, we adopt a contextual and normatively open understanding of strategic litigation. Contextual, in so far as we see strategic litigation as embedded in specific social, institutional and economic settings, including broader advocacy campaigns and non-judicial strategies. Normatively open, in so far as we understand strategic litigation as open to the pursuing of a wide range of agendas ranging from normatively desirable (i.e. progressive, public-interest oriented) to normatively undesirable (conservative, private-interest oriented) agendas, and as advanced by powerful and disempowered actors alike. In this special issue, we collectively interrogate the interplay between the structural features of the EU legal order, the variety of actors involved in strategic litigation and their respective agendas, as well as the broader systemic effects induced by the practice. This special issue focuses on three areas of EU law – mobility, environment, and digital rights – and juxtaposes scholars' and practitioners' perspectives to take account of the thick context of specific cases of strategic litigation.

In this introductory article, we put forward an analytical framework for the study of strategic litigation in EU law. Our framework entails three analytical dimensions that characterize practices of strategic litigation in the EU legal order: the actors in strategic litigation, the specific legal structures of EU law that determine the legal conditions for strategic litigation, and the effects of strategic litigation both in a narrow sense of the concrete legal effects and the broader political, legal, or economic effects of a judgment.

This article proceeds as follows. First, we embed the debates on strategic litigation through a comparative overview of United States (US) and EU legal literature (section B). We highlight common trends and divergencies in approaching the topic across the Atlantic (I) and identify a number of blind spots affecting current EU law debates on strategic litigation (II). Against this background, we then put forward our approach to the study of strategic litigation and characterize it as actor-centered, systematic, and focused on power shifts (III). In section C, we articulate our approach into an analytical

framework for a law-in-context study of strategic litigation in European law. The analytical framework identifies categories and ideal types of actors, structures and effects that all together constitute strategic litigation as a practice.

B. Conceptualizing strategic litigation

I. Strategic litigation: an increasing practice in EU law

Finding the historical origins of the emergence of strategic litigation is as elusive as it is arcane and, as any such endeavor, would inevitably be shaped by the preferences and prior definitions of the author. While some scholars trace the origins of strategic litigation to late eighteenth century England and judicial proceedings initiated with the aim to abolish slavery,[3] others argue that strategic litigation 'originated in the United States in the years of the Kennedy presidency',[4] or point to the role of the funding of the Ford Foundation that gave rise to strategic litigation as a field.[5]

In the context of EU law, strategic litigation occurred already in the early years of European integration.[6] Many key judgments pushing forward European integration resulted from strategic litigation.[7] Achieving legal, political or social change through the Court in Luxembourg, however, was a way to reach the goal without triggering agonistic debates in politically blocked EU legislative process. It was a quiet way to build up legitimacy for solutions that then needed to be implemented by national administrations. According to a well-established narrative among EU studies scholars, the CJEU has for decades managed to act as the 'engine of European integration', while avoiding the spotlight of public and political debates.[8] This lack of academic and public attention has also been true for strategic litigation using EU law.

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[3] CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW (1992), chapter 1.

[4] Public Law Project, quoted in: Michael Ramsden, Kris Gledhill, *Defining strategic litigation*, 38 CIVIL JUSTICE QUARTERLY 407, 418 (2019).

[5] ALAN CHEN & SCOTT CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE (2013) quoted in Ramsden and Geldhill, *supra* note 4, at 20.

[6] See for instance the early strategic cases in EU law: Case 6-64 *Costa v ENEL*, 15.7.1964 ECLI:EU:C:1964:66, Case 43/75 *Defrenne v Sabena* 8.4.1976 ECLI:EU:C:1976:56

[7] See TOMMASO PAVONE, THE GHOSTWRITERS: LAWYERS AND THE POLITICS BEHIND THE JUDICIAL CONSTRUCTION OF EUROPE (2022). On early strategic litigation on women rights (*Defrenne*): RACHEL CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY 173 (2007).

[8] Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 *Am. J. Int'l L.* 1 (1981); THE POWER OF THE EUROPEAN COURT OF JUSTICE (Susanne K Schmidt & Daniel Kelemen eds, 2013).

This has been significantly different in the US legal context. In the US legal context academic interest in strategic litigation significantly increased during the 1960s[9] and became gradually institutionalized in the following decades. The rise of strategic litigation as a mode of governance in the US can be seen as an expression of a legal culture pivoted around "adversarial legalism", i.e. a *method* of policymaking, policy-implementation, and dispute resolution that relies on formal legal contestation and litigant activism as day-to-day practice.[10] While adversarial legalism has long been considered an expression of "American exceptionalism",[11] its expansion in EU law – as well as in national legal orders in Europe – has been convincingly argued.[12] This expansion has been linked to specific features of the EU's legal and political order, namely its institutional fragmentation and increased reliance on formal regulation and private enforcement.[13]

It is difficult to assess whether a generalized increase of strategic litigation in all areas of EU law occurred. No such data set exists yet that permits to draw such general conclusions. However, the literature suggests that strategic litigation increased in different policy fields. In the field of climate change law, strategic litigation has been on the upsurge. The perhaps most comprehensive study on climate change litigation by Setzer et al, which analyses climate change litigation before domestic and European courts (ECtHR and CJEU) over a period of 20 years (1993-2022), identifies a 'boom in European climate litigation' by the mid-2000s.[14] This upsurge of strategic climate

[9] See for example, *The New Public Interest Lawyers* 79 *Yale L. J.* 1069 (1970); Robert L Rabin, *Lawyers for Social Change_ Perspectives on Public Interest law* 28 Stanford Law Rev. 207 (1975). Black's Law Dictionary has an entry on public interest litigation (which in the US context is often used synonymously with strategic litigation) that dates back to 1969 and defines it as the '[l]egal practice that advances social justice or other causes for the public good'. See Ramsden and Geldhill, *supra* note 4, at 20.

[10] ROBERT A KAGAN, ADVERSARIAL LEGALISM. THE AMERICAN WAY OF LAW 10 (2019).

[11] *Id*, at 8 and 10.

[12] R Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMPARATIVE POLITICAL STUDIES 101 (2006); R. DANIEL KELEMEN, EUROLEGALISM (2011); Emmanouil Fokas, *Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion*, 5 OXFORD JOURNAL OF LAW AND RELIGION 541 (2016); Kagan, *supra* note 10. But see also Chase Foster, *Legalism without adversarialism? Bureaucratic legalism and the politics of regulatory implementation in the European Union*, 18 *REGULATION & GOVERNANCE* 53 (2024).

[13] Kelemen, *supra* note 12, at 102; also, Kagan *supra* note 10, at 10 (weak hierarchy and fragmentation).

[14] Joanna Setzer et al, *supra* note 1, at 5-6. Although the report by Setzer et al analyses climate change litigation and does not explicitly focus on strategic climate change litigation, it nevertheless functions as a proxy to illustrate the upsurge of strategic climate change litigation. First, Setzer adopts a narrow definition of climate change litigation in which climate change is raised by the plaintiffs as the central material issue in the case. Second, the upsurge of climate litigation is predominantly driven by individual plaintiffs and

litigation derives not merely from the increased amount of EU legislation and thus more litigation in general. While the authors credit the upsurge to the first iteration of the EU Trading Emissions System, they also emphasize a growing societal awareness of climate change and its detrimental effects.[15] Approximately 21% of the cases in geographical Europe in this period were lodged before the CJEU.[16] One of the "most distinctive features" of the upsurge of climate change litigation in the mid-2000s is, according to Setzer, the "growing use of litigation to fill in the gaps" where legislation was deemed to be lacking by individual and civil society plaintiffs.[17] Individuals and civil society plaintiffs are also the most represented plaintiffs and tend to be responsible for the "majority of strategic climate change litigation": around 50% of the climate change cases before national courts and the CJEU have been lodged by individuals or civil society organizations.[18]

A similar increase of strategic litigation can be observed in the fields of citizenship and data protection. In the field of citizenship, the expansion of EU competences has resulted in the adoption of new legislation (*in primis* the Citizens Rights Directive - Directive 2004/38, CRD). In the field of data protection, the adoption of both primary (the Charter of Fundamental Rights of the European Union – CFREU) and secondary legislation (the Data Protection Directive - Directive 95/46, DPD, and of the General Data Protection Regulation – Regulation 2016/679, GDPR), provided prospective litigants with new legal provisions to mobilize. These developments resulted in a general increase in litigation in these areas (from 2 preliminary references in the two areas combined in 2003, to 25 in 2023) and a parallel increase in strategic litigation, as shown in figure 1. Similarly to climate change litigation, citizenship and data protection litigation also sees a frequent and growing involvement of NGOs, which we read as a sign of growing legal mobilization, using litigation as a tool to pursue broader agendas.

civil society organizations with the aim to 'fill in the gaps' where legislation was deemed to be insufficient by the plaintiffs.

[15] Setzer et al *supra* note 1, at 7.

[16] Of 285 cases in total in geographical Europe more than 60 cases were filed before the CJEU. Setzer et al *supra* note 1, at 6.

[17] *Id.*

[18] *Id*, at 7.

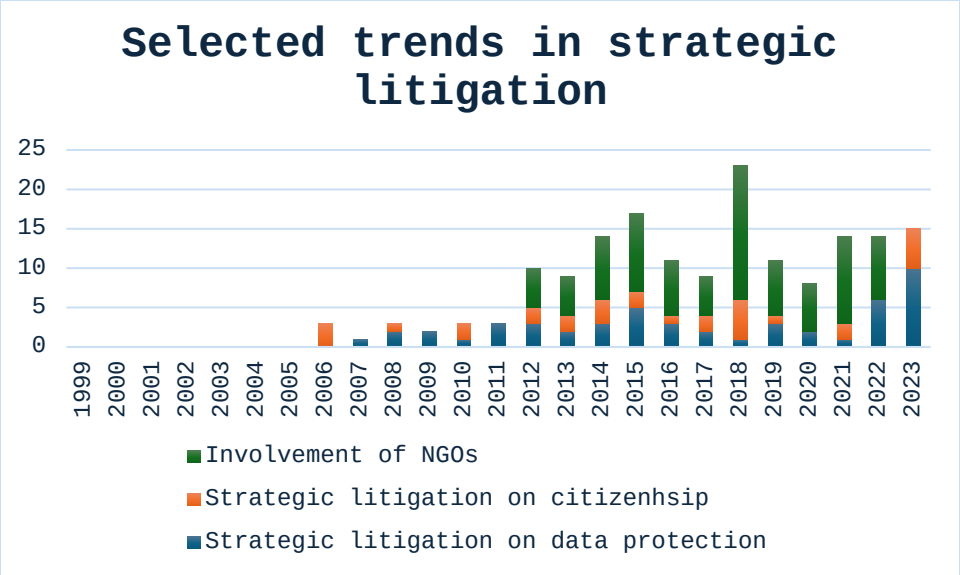

Figure 1: The research on the CJEU case law is based on the following search criteria. Citizenship: Article 20 and 21 TFEU, Article 45 CFR, and Directive 2004/38. Data protection: Art. 7 and 8 CFR, Directive 95/46, and Regulation 2016/679. Involvement of NGOs: reference to 'Non-governmental organisation', 'Non-profit organisation' and 'association' among the parties and interveners. For dubious cases, additional research has been conducted on the applicants, attorneys, and media coverage of the case. Whereas the classification of a case as strategic or non-strategic would ultimately require carrying out qualitative interviews with the applicants and their attorneys, the above mentioned criteria allowed us to identify cases which are plausibly strategic based on the definition adopted in this paper.

Figure 1 shows general trends in selected domains of litigation, corresponding to the case studies selected in this special issue (environment, digital rights, and mobility). While the increase in environmental strategic litigation has already been shown elsewhere[19], we map strategic litigation based on the main EU legal instruments relating to data

[19] The Climate Change litigation database of the Sabin Centre at Columbia University includes 39 cases (we excluded 5 inter-institutional and Commission vs member state cases) in the field of climate change law before the Court of Justice: 71% of these cases (28 cases) were brought after 2012. See, *Sabin Centre for Climate Change Law Litigation Database* (2023), http://climatecasechart.com/non-us-jurisdiction/european-court-of-justice/.

protection and citizenship in the EU. In order to complement the picture of an increased legal mobilization around the Court in Luxembourg, Figure 1 also include litigation involving NGOs as litigants or intervening parties.

This rise in the practice of strategic litigation has been accompanied by growing public and scholarly attention. In terms of public attention, we can observe an increase in public-interest litigation with NGOs acting as applicants before the CJEU.[20] In the period 1952-2012, 34 cases before the CJEU mentioned a non-governmental organization,[21] while in 2012-2023 the cases rose to 104. By contrast, the early cases involved more of what Pavone refers to as "ghostwriters": individual applicants were either scouted by the interested lawyers or turned out to have close connections to the, then, small group of EU lawyers.[22] In those cases, the broader socio-political goals stayed more hidden than in public-interest cases brought by NGOs.[23] While the times of a quiet integration through law are over, the role of the Court and lawyers in European governance remains central.[24] They hold a "critical position in a political system deprived of a State capable of organizing stable relationships and hierarchies between groups and institutions".[25] Another relevant difference compared to the early days of strategic litigation in the EU is that the circle of lawyers familiar with EU law has grown. While the field might have become weaker in terms of identifying with EU law as a primary and exclusive category, it has quantitatively expanded.[26] The EU gained competences in areas, especially migration and criminal law, in which strategic litigation has 'traditionally' been strong. The lawyers and NGOs active in these field and already experienced with strategic litigation in front of national and

[20] This also fits in a more general trend of increased strategic litigation in front of national courts (e.g. in relation to climate change. See *State of the Netherlands v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Netherlands); *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (Germany); *Commune de Grande-Synthe v France* [2021] No. 427301 (France); *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] 2015/4585/A (Belgium)).

[21] See also on the increase of associations and NGOs as litigants in preliminary ruling on social provisions from 1980-2003: Chichowski, *supra* note 7, at 175.

[22] Pavone *supra* note 7; also, EU LAW STORIES.CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE (Fernanda Nicola & Bill Davies eds., 2017).

[23] See e.g. C-507/18, *Associazione Avvocatura per i dritti* [2020] ECLI:EU:C:2020:289.

[24] PAIVI LEINO SANDBERG, THE POLITICS OF LEGAL EXPERTISE IN EU POLICY-MAKING (2021).

[25] Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)* 2 INTERNATIONAL POLITICAL SOCIOLOGY,) 130 (2008).

[26] ANTOINE VAUCHEZ, L'UNION PAR LE DROIT. L'INVENTION D'UN PROGRAMME INSTITUTIONNEL POUR L'EUROPE (2013).

international courts, expanded their palette to include EU law.[27] Moreover, knowledge, familiarity and trust in the EU legal system also grew among national judges, making them more willing to refer preliminary ruling questions to the CJEU.[28]

Scholarly attention devoted to strategic litigation has also grown. The current 'wave' of strategic litigation literature is characterised by a focus on individual cases or domains of strategic litigation and an emphasis on public-interest litigation.[29] This results in a difficulty, to articulate a clear conceptual understanding of 'strategic litigation', in light of the heterogeneity of the practice. In fact, most academic literature on strategic litigation does not devote much effort to its conceptualization.[30]

Both features, case-based and conceptually 'weak' approach, resonate with the US legal scholarship on the topic. On both sides of the Atlantic, multiple 'labels', emphasizing different features of the practice (e.g. public interest litigation, impact litigation, cause lawyering, legal advocacy) and links with broader phenomena (e.g. legal mobilization, lobbying, lawyering for change) have proliferated.[31] In spite of some parallels, the EU and US strategic litigation scholarship differ on one crucial aspect: their normative view on strategic litigation. US scholars often emphasizes the practices' normatively open nature regarding its goals. Several important studies emphasized the counter-mobilization or right-wing legal mobilization and its influence on the American political and legal system.[32] An explanation for this may be that US scholarship is influenced by legal

[27] Virginia Passalacqua, *Legal Mobilization Via Preliminary Reference: Insights From the Case of Migrant Rights* 58 COMMON MARKET LAW REVIEW 751, 766 (2021).

[28] Juan A Mayoral, *Impact through Trust, the CJEU as a Trust-enhancing Institution*, in INTERNATIONAL COURTS AND DOMESTIC POLITICS, 160-178 (Marlene Wind ed., 2018).

[29] Karen Alter and Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy* 33 COMPARATIVE POLITICAL STUDIES 452 (2000); Passalacqua, *supra* note 28; Christina Eckes, *Tackling the Climate Crisis with Counter-majoritarian Instruments: Judges Between Political Paralysis, Science, and International Law* 6 EUROPEAN PAPERS 1307 (2021); Rhonda Evans & Terri E Givens, *Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive* 4 JCMS 221 (2010).

[30] For a notable exception see Kris Van der Pas, *Conceptualising Strategic Litigation* 11 OÑATI SOCIO-LEGAL SERIES 1 (2021) (providing a systematic research in relevant databases).

[31] On the US context see, Ramsden and Gledhill, *supra* note 4.

[32] See ANN SOUTHWORTH, LAWYERS OF THE RIGHT. PROFESSIONALIZING THE CONSERVATIVE COALITION (2009); Karen O'Connor and Lee Epstein, *The Rise of Conservative Interest Group Litigation*, 45 THE JOURNAL OF POLITICS (1983); Mark Tushnet and Katya Lezin, *What Really Happened in Brown v. Board of Education* 91 *Columbia Law Review* 1867 (1991).

realism, which emphasizes the distributive effects of litigation rather than its frequency,[33] and the bipartisan polarization of US politics.[34] Thus, from a constitutional perspective, strategic litigation can either be seen as an expression of checks and balances, which enhances participation and ultimately reinforces "the political legitimacy of the system of government as a whole";[35] or as aggravating participatory imbalances and putting under strain legal certainty and the separation of powers by unleashing judicial law-making.[36]

In contrast, EU legal scholarship tends to have a normatively closed view of strategic litigation, limiting it to public-interest litigation,[37] i.e. litigation that pursues the common good, is altruistic in nature and often linked to broader social justice goals, rather than furthering individual rights and the private interests of particular individuals or companies.[38] In a similar fashion, a common feature of the current European academic debates is a prevalent focus on civil-society actors (e.g. NGOs and CSOs).[39] Some scholars even limit the scope of strategic litigants to civil-society,[40] conflating actors with interests in strategic litigation. As a result, practices of strategic litigation as currently investigated by EU law scholars largely coincide with progressive public interest litigation and assume a normatively positive ring.[41] Conservative and private interest litigation, on the other

[33] Duncan Kennedy, *The Stakes of Law, or Hale and Foucault* 15 LEGAL STUDIES FORUM 327 (1991).

[34] See e.g. Kagan, *supra* note 10.

[35] Kagan *supra* note 10, at 4.

[36] *Id*; see also Kelemen, *supra* note 12.

[37] see among others Andreas Fischer-Lescano, *From Strategic Litigation to Juridical Action*, in TRANSNATIONAL LEGAL ACTIVISM IN GLOBAL VALUE CHAINS (M Saage-Maaß, P Zumbansen, M Bader, P Shahab eds., 2021); Jeff Handmaker and Sanne Taekema, *O Lungo Drom: Legal Mobilisation as Counterpower*, 15 JOURNAL OF HUMAN RIGHTS PRACTICE 6 (2023); Passalacqua, *supra note* 28. Some authors conceive strategic litigation as a normatively open practice. For instance, Ramsden and Gledhill, *supra* note 4, at 407, describe strategic litigation as a method of advocacy that is used for multiple causes and to promote multiple views, rather than for a specific cause.

[38] Passalacqua, *supra* note 28; Sergio Carrera & Bilyana Petkova, *The potential of civil society and human rights organisations through third-party interventions before the European Courts: the EU's area of freedom, security and justice*, in JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE (M Dawson & B de Witte & E Muir eds.,) 2013); see also the contributions in, M Saage-Maaß et al , *supra* note 37.

[39] Handmaker and Taekema, *supra* note 37.

[40] For instance, Handmaker and Takeama distinguish between lawfare and strategic litigation (*supra* note 37).

[41] Fokas, *supra* note 12; Carrera and Petkova, *supra* note 38. And exception in the literature that adopts a normatively open conceptualization is: Lisa Conant, Andreas Hofmann, Dagmar Soennecken, Lisa Vanhala, *Mobilising European Law* 25 JOURNAL OF EUR. PUB. POLICY 1376, 1382 ff (2018) (even though the paper enquires into legal mobilization, the definition of legal mobilization is in the 'narrow sense of private litigants engaging in court proceedings based on a European source of law, be it EU law or the Convention.' at 1378).

hand, seem not to find a place under the umbrella of strategic litigation and tend to be classified instead under different categories, such as "SLAPP" or "lawfare", that arguably have a distinct negative normative connotation.[42]

More generally, strategic litigation literature reflects a common tendency to focus on judicial fora as the sole formal institutional mechanism.[43] In the specific context of the multi-level EU legal system, this means that literature on strategic litigation tends to put the spotlight on the role of the CJEU and national courts, the latter both as referring courts and as enforcers of EU law. One strand in EU legal scholarship therefore links strategic litigation to the judicial advancement of EU law and the Court in Luxembourg as a 'motor of European integration'.[44] This tendency roots back to an understanding of litigation as an important part of consolidating the community of EU lawyers and the (weak) European legal field.[45]

As a combined result of these approaches, scholarship in EU law largely focusses on the promises held by strategic litigation, either as a way to promote EU integration or as a way to empower civil society actors. While this undoubtedly reflects a significant part of the practice of strategic litigation, it also fails to capture a larger picture of strategic litigation in EU law that is more diverse, ambivalent and nuanced, as we show in the following.

II. Blind spots in the study of strategic litigation in the EU

The normatively closed, court-focused, and sectoral approaches to strategic litigation discussed above miss the complexity and multi-purpose use of EU law by different actors in different fora and for different ends. Cases such as *Plastics Europe v ECHA*, in which an association of plastic producers and importers challenged a Commission decision that

[42] Handmaker and Taekema, *supra* note 37.

[43] Emilio Lehoucq and Whitney K. Taylor, *Conceptualising Legal Mobilisation: How Should We Understand the Deployment of Legal Strategies?* 45 LAW AND SOCIAL INQUIRY 168 (2020).

[44] Pavone, *supra* note 7.

[45] Harm Schepel and Rein Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe* 3 EUROPEAN LAW JOURNAL 165 (1997); Vauchez, *supra* note 25, at 128.

restricted the use of a harmful chemical in plastic products,[46] or Clientearth's – an environmental law charity – appeal to the Commission's internal review board against the classification of bioenergy as sustainable under the Taxonomy regulation,[47] remained so far under the radar of the EU legal literature on strategic litigation. And so have the systemic implications of these cases. The current blind spot in the EU legal literature on strategic litigation results from three different factors.

First, the normatively closed view of strategic litigation as progressive, public interest oriented and civil society-led, obscures manifestations of the practice which, albeit less normatively desirable, still present features of strategic litigation. By way of example, in the field of climate change litigation more than 30% of the cases in a period of 20 years (1993-2022) have been brought by corporate actors.[48] In the field of risk regulation, business organizations representing entire productive sectors routinely use litigation as a tool to advance generalizable private interests (e.g. the freedom to conduct a business) and deregulatory agendas at both the national and the EU level.[49]Small and medium enterprises are also frequent litigants before the Luxembourg Court.[50] When litigating strategically, business organizations also pursue generalizable interests which transcend their purely individual interest as applicants. Beyond the progressive/conservative and public/private interest dichotomies, strategic litigation in the EU has from the outset been used to pursue a wide range of agendas, from furthering European integration, as in the

[46] Case T-636/17, *PlasticsEurope v ECHA* [2019] ECLI:EU:T:2019:639 and C-876/19 P, *PlasticsEurope v ECHA* [2021] ECLI:EU:C:2021:1047.
[47] Client Earth, Environmental lawyers take first step to challenge EU taxonomy in court (Feb. 4, 2022), https://www.clientearth.org/latest/press-office/press/environmental-lawyers-take-first-step-to-challenge-eu-taxonomy-in-court/.
[48] Setzer et al, *supra* note 1, at 7.
[49] On the importance of business litigation in the internal market, see Andreas Hofmann, *The legal mobilisation of EU market freedoms: strategic action or random noise?* WEST EUROPEAN POLITICS 1 (2024). On its strategic features, in particular against national restrictions to economic activities: Richard Rawlings, The Eurolaw Game: Deductions from a Saga', 20 *Journal of Law and Society* 309 (1993); MIGUEL POIARES MADURO, WE THE COURT. THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION, 29 (1998). On economic actors' choice of litigation as an influence strategy, see P Bouwen and M Mccown, *Lobbying versus Litigation: Political and Legal Strategies of Interest Representation in the European Union*, 14 J. EUR. PUB. POLICY 422, 443 (2007). On the participatory imbalance between economic actors and NGOs in regulatory litigation, see Marta Morvillo & Maria Weimer, *Who shapes the CJEU regulatory jurisprudence? On the epistemic power of economic actors and ways to counter it* , 1 EUROPEAN LAW OPEN 510, 518 (2022).
[50] SUSANNE K SCHMIDT, THE EUROPEAN COURT OF JUSTICE AND THE POLICY PROCESS: THE SHADOW OF CASE LAW (2018).

case of the first generation of Euro-lawyers,[51] to challenging illiberal reforms.[52] Effectively capturing the diversity of these practices under the umbrella of strategic litigation requires a normatively open analytical approach, i.e. one which sets aside the normative desirability of the agendas pursued through litigation. Such an open conceptualization of strategic litigation is not only more accurate in *capturing* the heterogenous practices of strategic litigation in EU law; it also has the analytical advantage of allowing to uncover the political-economic dimension of strategic litigation, and to eventually account for it in the *assessment* of the practice itself.

Second, the alignment between actors and interests is often presumed. While actors and interests are in fact often aligned, it is important to note that this is not always the case. In order to capture the complexity of strategic litigation in EU law, it is therefore crucial to understand the ambivalence of the actors themselves vis-à-vis the interest pursued. Judges are an example of such ambivalent actors. In Croatia, judges are responsible for a significant part of the SLAPP lawsuits brought against newspapers publishing stories about potential corruption.[53] At the same time, judges from Poland have been active in using EU law avenues in support of the political campaign to defend their independence. This active role of judges included actions both in the realm of their professional function (referring last minute preliminary questions to the CJEU before a legislative reform entered into force) and as individual applicants trying to affect policy changes in the judiciary more broadly.[54] Judges can therefore act both as plaintiffs, whose individual rights are affected, and in the general interest by upholding the rule of law.

[51] Pavone, *supra* note 7, chapter 5.

[52] E.g. Case C-380/05 [2008] *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, ECLI:EU:C:2008:59.

[53] David Spaic-Kovacic, *SLAPP cases of growing concern, says Croatian democracy watchdog* (EURACTIV, March 1, 2023), https://www.euractiv.com/section/politics/news/slapp-cases-of-growing-concern-says-croatian-democracy-watchdog/.

[54] See Case C-64/16 *ASJP* [2018] ECLI:EU:C:2018:117, where the CJEU for the first time established the principle of judicial independence as a general principle of EU law in a case initiated by the Portuguese Judges Association; see also Case T-532/22, *Association of European Administrative Judges v Council*, filed on 28 August 2022, where a bundle of judges' organisation with the support of the Good Lobby, filed a direct action before the General Court to annul the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland.

Third, the sectoral focus of strategic litigation scholarship has so far made it difficult to develop any horizontal considerations on the specific features of EU law as a tool for strategic litigants. EU law is a system animated by its own internal logic, which has a bearing on the ways in which actors litigate strategically. The features of the preliminary ruling procedure, for example, are likely to affect litigants' strategic choices as to whether and how to litigate, regardless of the substantive area at stake, be it migration or data protection. Shifting the focus away from sectoral specificities and redirecting it towards the structural features of EU law, allows, on the one hand, to understand whether EU law operates as obstacle or as enabler for different types of litigants and, on the other, to shed light on the role of EU lawyers, acting as applicants, as attorneys, or as back-stage advisors, in the context of strategic litigation. The debate on strategic litigation in EU law is closely linked to European integration, the "authors of Europe rally[ing] as one around the Court in its patient creation of a genuine supreme European legal order".[55] EU legal scholarship tends to be committed to the project of European integration.[56] In this context, it is relevant to study that commitment being translated into a goal of strategic litigation. To what extent is strategic litigation in EU law about empowering EU law as a field?

Fourth, the practice of strategic litigation does not exhaust itself in formal judicial proceedings. Rather, it interacts with other channels of influence pursued by the same actors (e.g. lobbying, political or media campaigns), and with actions brought to non- or quasi-judicial venues (e.g. Ombudspersons, internal review boards, self-regulatory bodies), or to other courts (e.g. the European Court of Human Rights, International Court of Justice). It can also go hand in hand with the creation of coalitions coordinating their mobilization strategies across Member States. Yet, EU strategic litigation scholarship has so far been focusing almost exclusively on the strictly judicial phase. This can be at least partly explained with the court centric approach that is characteristic of the discipline. To understand the complexity of practices of strategic litigation in the multi-level EU context, it is however important to relate the actual litigation with the broader strategy within

[55] Schepel and Wesseling, *supra* note 45, at 186. There is a debate in socio-legal academia about the degree of homogeneity or heterogeneity of the EU legal field (Vauchez, *supra* note 25, at 128).

[56] Hans W. Micklitz, *The measuring of the law through EU politics*. in POLITICS OF EUROPEAN LEGAL RESEARCH (M Bartl, JC Lawrence eds., 2022).

which litigation occurs, including the pre- and the post-litigation phase at both EU and national level.

In order to address these blind spots, we put forward a two-fold proposal. First, at an analytical level to study strategic litigation as a normatively open exercise of power mediated by (EU) law. Thus understood, strategic litigation can be deployed by actors who already hold significant power in the society or economy and pursue their private but generalizable interests; or it can be used by disempowered actors who pursue general public interests. Secondly, at a normative level we propose to assess the pros and cons of strategic litigation in light of its distributive effects in the legal, political, and socio-economic realms. In the next section, we articulate our approach based on the concept of empowerment.

III. Strategic litigation and empowerment

Any conceptualization presupposes a particular understanding of a concept and what a concept ought to do. Our conceptualization of strategic litigation hinges on the distinction between a 'crisp concept' with clearly identifiable boundaries of meaning, on the one hand, and a 'fuzzy' concept on the other. A 'fuzzy concept' has a graded structure and whether it applies to a given practice or not is a matter of degree.[57] We adopt a 'fuzzy' conceptualization of strategic litigation as the use of legal action in judicial or quasi-judicial fora to achieve broader (i.e. beyond the specific case) social, political, or economic ends.[58] This fuzzy conceptualization ought to capture the complex variety of normatively open practices in which widely heterogenous actors (both socially marginalized and economically powerful) are involved who use judicial proceedings strategically in order to advance broader objectives beyond their individual case. These practices of strategic litigation are however also highly contextual as they are embedded in specific legal, political, and socio-economic structures which determine to a large degree litigant's choices and strategies. In order to capture the interplay between actors, legal structures, and the broader effects of strategic litigation, we suggest focusing on the relation between

[57] Petr Hájek, *Fuzzy Logic*, in THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (Edward Zalta ed. 2016), https://plato.stanford.edu/archives/fall2016/entries/logic-fuzzy/.
[58] See also Van der Pas, *supra* note 31; Ramsden and Gledhill, *supra* note 4, at 407.

change and empowerment. We thus suggest that the pertinent question to be asked when analyzing strategic litigation in EU law is: who does strategic litigation empower?

Empowerment entails a shift or a redistribution of power among the actors involved in the relevant practice. In the case of strategic litigation, this shift is mediated by law. Any enquiry into empowerment is based on the notion of power. In this regard, we distinguish between two different forms of power in practices of strategic litigation: concentrated power and dispersed power. Concentrated power describes whether the intended effects of strategic litigation were achieved. It thus often operates according to a win/lose binary. Imagine a court decision in a strategic case that either entirely or partly reflects the legal claims of the plaintiff. The judgement abrogates an obligation, invalidates a norm, or establishes a right. These are concrete legal changes that directly empower the individual litigant by providing her with an enforceable judicial decision and indirectly empower a broader circle of individuals who can rely on that decision. This understanding of empowerment through judicial decisions rests on an understanding of power as 'hard power'. The legal changes ushered in by the judicial decision can, eventually, be enforced through physical or economic power, e.g. financial sanctions are imposed to comply with a judgement or the police shuts down premises of polluting companies. However, even if a strategic litigant legally 'wins' a case, it remains often uncertain whether the broader social, economic, environmental, or institutional effects pursued materialize. Especially in multi-level legal orders, such as the EU legal order, changes on one legal level do not necessarily result in changes on another legal level. For instance, the CJEU may provide a specific interpretation of a norm of EU law in a preliminary reference procedure, but the referring national court may subsequently circumvent or openly refuse to adopt the interpretation issued by Luxembourg. Or a member state's government may simply refuse to comply with a politically contentious decision by the CJEU. Moreover, scholarship on fundamental rights governance has convincingly shown that courts are not always the most effective path to pursue broader fundamental rights agendas; a more promising route might lead via non-judicial bodies, such as the ombudspersons or professional self-regulatory bodies.[59] Thus, empowerment is also linked to the reasons that induce an actor

[59] MARK DAWSON, THE GOVERNANCE OF EU FUNDAMENTAL RIGHTS (2017), chapter 5.

to follow a decision of a self-regulatory body or an ombudsperson, which points towards a different understanding of power, i.e. dispersed power.

Dispersed power can be illustrated by a 'lost' case of strategic litigation in which the court does not follow the legal arguments of the plaintiff. From a purely legal perspective, the case is lost and the plaintiff not empowered. For instance, an unfavorable judgement in a strategic case might result in legally maintaining the status quo. However, beyond the purely legal realm a judgment might unfold broader effects in the social realm by introducing novel reasons and narratives into a public debate. These are not only the reasons of the court, but also the reasons of the plaintiff who contests the status quo. By foregrounding and backgrounding specific narratives, strategic litigation challenges what Bourdieu called *doxa*: the unquestioned acceptance of social relations of power that consistently produce unequal societal positions.[60] In Rainer Forst's words, this is "noumenal power": the power of reasons that make someone to think or act in the way intended by the reason giver.[61] Even a 'lost' case (the judgement does not affirm the legal objectives sought by the applicant) may result in mobilizing people or capital and in the formation of new alliances to challenge the status quo.[62] If exerting power means being able to determine the space of justifications for others, strategic litigation is disruptive by closing down or opening up the space of reasons. Dispersed power relates also to empowering certain types of expertise, experts and transnational elites. This is a more subtle process of building a professional field around certain legal domain, which gives law authority and a distinctive distributive power.[63]

In the following section we elaborate on this distinction between concentrated power and dispersed power by considering the effects of strategic litigation on the redistribution of power. We thereby take into account the specificities of the EU legal system and the concrete contexts in which it operates.

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[60] PIERRE BOURDIEU, THE LOGIC OF PRACTICE (1990), chapter 4

[61] Rainer Forst, *Noumenal Power*, 23 THE JOURNAL OF POLITICAL PHILOSOPHY 111 (2015).

[62] See the account on the mobilisation of Italian migrant rights NGOs in Passalacqua, *supra* note 28.

[63] Niilo Kauppi and Mikael R. Madsen, *Fields of Global Governance: How Transnational Power Elites Can Make Global Governance Intelligible*, 8 INTERNATIONAL POLITICAL SOCIOLOGY 324, 324-330 (2014); DUNCAN KENNEDY, 'A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

C. Who does strategic litigation empower? An analytical framework

To answer the question of who does strategic litigation empower, we articulate an analytical framework based on three interlinked dimensions: actors, structures, and effects.

I. Actors

The type of applicant is crucial when enquiring into whether a case is strategic or not. Applicants in EU law include natural and legal persons: companies, non-governmental organizations, lobby organizations, civil-society organizations, and individual applicants may all initiate litigation. Institutional actors, such as Ombudspersons, can also engage in strategic litigation, with or without the collaboration of broader national and trans-national civil society networks.[64] While we acknowledge that a multiplicity of actors can be involved in strategic litigation in various capacities – funders, legal clinics as amici curiae and external legal advisors among others – our focus is on the applicants. We understand the applicant not in a narrow legal sense (i.e. the plaintiff) but in a broader socio-legal sense as encompassing, in addition to the formal applicant in a case, also the principal actors that initiate and drive the litigation. Strategic litigation is often initiated by coalition of actors. For instance, the EU lawyer may strategically choose the most suitable petitioner (e.g. an individual suffering from Uhthoff's syndrome, a neurological disease resulting in blocking of nerve impulses and paralysis when the body overheats) for a litigation that tackles climate adaptation legislation deemed insufficient.[65] In a similar vein, behind an individual applicant there might be a civil society organization that provides the essential legal expertise and financial resources for litigation. Both examples illustrate that focusing on the formal petitioner alone would only insufficiently explain the strategic dimension of the litigation and its broader effects.

We identify below three ideal types of strategic litigants, based on the presence, absence, and degree of three factors: resources, EU law expertise, and network. Resources mean the capacity to access economic capital for the purpose of litigating. Litigation in EU

[64] Regarding institutional actors, we differentiate between institutional actors that carry out their mandate through litigation on the one hand and institutional actors that pursue with the litigation a broader agenda that is not limited to the fulfilments of their institutional mandate. We consider the former as non-strategic litigation, while the latter may constitute strategic litigation.
[65] Case pending before the European Court of Human Rights, *Müllner v Austria*, App. No. 18859/21.

courts can be lengthy and involve significant economic costs for the applicants. Moreover, litigation strategies may include filing several repeat cases, hopeless cases, or even just a credible threat of high-profile litigation. While economic capital is not a necessary condition to engage in strategic litigation, well-resourced applicants have a significant advantage over their penniless peers.

EU legal expertise is crucial to litigating strategically in EU law. Litigating in front of European courts significantly differs from litigating before national courts. Not only does the CJEU have its own rules of procedures which are difficult to navigate for the non-initiated, but also, and more significantly, because the EU legal order in general and the CJEU as its interpreter follow their own inner logics (on which we elaborate in the next section). Access to EU law expertise is highly likely to have a bearing not only on the success of a case but already on the very choice to litigate in EU law in the first place.

The applicant's embeddedness in a network is a relevant factor in so far as it reveals the degree of organization and professionalism with regard to litigation. A network can be of a professional (a network of migration or competition lawyers, circles of EU legal scholars, umbrella associations for civil society organizations, or an epistemic community, among others) or of a social nature (ad hoc campaigns, crowdfunding, or social movements among others), each with varying degrees of density. Being networked determines access to epistemic and economic resources that are essential for litigating strategically. Recent empirical research on litigation crowdfunding in the UK suggests that it is very common for community groups that adopt a collective framing and groups that mobilize law within broader campaigns for social or legal reform to crowdfund their litigation. By contrast, individuals litigating against administrative decisions concerning their entitlements who are not embedded in a broader collective are seriously underrepresented.[66]

Based on the interplay between these three factors (expertise, network and resources), we can identify three ideal-types of strategic litigants. In keeping with our normatively open approach to strategic litigation, each ideal-type can either pursue progressive or conservative agendas, as well as general private or public interests:

[66] Sam Guy, *Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation*, 86 MODERN LAW REVIEW 331, 346 (2023).

(1) *The loner* has extensive knowledge of EU law but is only weakly if at all embedded in a network. The loner's professional network does not entail connection to economic resources and individuals or organizations with professional experience in litigating strategically. Manifestations of this type of litigant are the EU law scholar initiating cases in their specific area of expertise[67] or the lawyer with EU expertise representing an individual petitioner.[68] The loner as strategic litigant is also not connected to a broader social campaign, aimed at influencing the media and the public debate. Despite access to epistemic capital (knowledge of EU law), access to economic capital (i.e. resources) and social networks are likely to be more difficult for this type of litigant.

(2) *The organization* has medium to low expertise in EU law or access to such expertise. As organizations often operate and are rooted in national rather than transnational contexts, they are also more likely to have expertise on domestic law rather than EU law. Organizations may be nodes of social (e.g. NGOs) or professional (small scale professional organization) networks, which are however rather dispersed (e.g. members and sympathizers). Strategic litigation does not form the core of their activities. A manifestation of this type of litigant is a national NGO for migrant's rights or a professional organization that represents the interests of small enterprises. In contrast to the loner, the organization has actual or potential access to economic capital, albeit not on a large scale, and often depends on raising funds with private donors, governments and/or international organizations.[69]

(3) *The corporation* has access to the economic capital needed to sustain strategic litigation. It has the economic capacity, to borrow a term from Galanter, to act as

[67] See for example: Case T-683/21 *Leino-Sandberg v Council* [2024] ECLI:EU:T:2024:165 and Case C-761/18 P *Leino-Sandberg v Parliament* [2021] ECLI:EU:C:2021:52 ; Case T-628/22 *Répasi v Commission* [2023] ECLI:EU:T:2023:353; Joined cases C-368/20 and C-369/20 *Landespolizeidirektion Steiermark* [2022] ECLI:EU:C:2022:298.
[68] See e.g. the early 'ghostwritten' cases recounted by Pavone, *supra* note 7, chapter 5.
[69] For example, 53,7% of the annual income in 2022 of the Hungarian Helsinki Committee, one of the principal organizations that engages in strategic litigation in Eastern Europe, consists of donations from 10 different private foundations.

a 'repeat player'.[70] The corporation also has access to EU law expertise either through specialized law firms, its own in-house EU legal experts, or through established networks with EU legal academics. The corporation is embedded in a dense issue-specific professional rather than a broader social network. Manifestations of this type of litigant are professional organizations that represent an entire industrial sector or employees of a particular sector, as well as highly specialized public-interest organizations such as Clientearth.[71]

Overall, the defining factors that are conditions for empowering strategic litigants appear to be EU legal expertise, a dense network and access to economic resources in order to sustain litigation. Yet, how exactly these conditions are related to the concrete effects of a particular case is more difficult to tell and contingent on a variety of contextual factors.[72]

II. Structures

Concrete practices of strategic litigation are determined by the legal structures within which they take place. Strategic litigation in EU law is shaped by the particular features of the EU legal order in a threefold way. EU procedural law determines the particular remedies that are available to an applicant (1.). Applicants in a strategic case often have the choice to ground their legal claims on a variety of substantive rules of EU law that in turn impact the 'strength' of the legal arguments (2.). Finally, litigation before the EU courts needs to take into account the constitutional principles of the EU legal order, which are taken seriously by the Court of Justice in its interpretation of EU law (3.).

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[70] Mark Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change,* 9 *Law & Society Review* 95, 97 (1974).

[71] Similar to organization-type litigants the budget of Clientearth is also composed of private donors contributions. In this sense the litigation of Clientearth also depends on private donors contributions. However, the annual budget (2022) of Clientearth amounted in 2022 to more than € 29,5 million (Clientearth, *Annual Report and Financial Statements 2022* (2023), at 50, https://www.clientearth.org/media/jvcllskn/clientearth-annual-report-and-financial-statements-2022.pdf). Compare this to the annual budget of the Hungarian Helsinki Committee, a Hungarian NGO that engages in strategic litigation on migrants' rights in Hungary, which amounted to barely € 2,1 million in 2022 (see, Hungarian Helsinki Committee, *The Income of the Hungarian Helsinki Committee in 2022* (2023), https://helsinki.hu/wp-content/uploads/2023/05/2022-es_bevetelek.pdf).

[72] See Hofmann, *supra* note 51, at 16 (pointing out that Finnish workers' unions established after the Laval decision specialised litigation units that partly managed to roll back the effects of the Laval decision through litigation before the CJEU).

1. Procedural features

Procedural rules determine who and under what conditions has access to the CJEU. Procedural rules thus operate as gatekeepers for strategic and non-strategic litigants alike. Considering the general interests advanced through strategic litigation, procedural rules, especially those governing standing, play a crucial role in determining to what extent concerns broader than those at stake in the specific case at hand can be heard by the Luxembourg Court. Procedural rules in EU law thus condition the very possibility of strategic litigation.

Individual litigants have in principle two different paths to access the Court of Justice: direct actions or indirect actions. Each legal remedy has consequences on applicants' standing and framing of the legal questions.

1.1. Direct actions: actions for annulment & action for damages

Direct actions are often the default tool for strategic litigation. However, due to strict interpretation of standing requirements by the Court of Justice the role of direct actions is limited in EU law. Direct actions include the action for annulment under Article 263 TFEU and the actions for damages against EU institutions under Articles 268 and 340 TFEU.

Natural or legal persons can only bring an action for annulment against an act of an EU institution under Article 263 TFEU, if the act is (i) directly addressed to them, (ii) of direct and individual concern to them, or (iii) is a regulatory act of direct concern and that does not entail any implementing measures. The criteria in the first prong are met if an act is directly addressed to a person. In the context of strategic litigation, this concerns especially litigation against decisions that deny individuals requests to public access to documents of EU institutions. The second prong enables non-addressees of an act to challenge it, as long as they are directly and individually concerned. Since its decision in *Plaumann*,[73] the Court of Justice has interpreted the standing criteria in this prong in a highly restrictive fashion. Direct concern means that non-privileged applicants may only seeks annulment of an act that unfolds direct legal effects on them and leaves no

[73] Case 25-62 *Plaumann* [1963] ECLI:EU:C:1963:17.

discretion for the implementing authorities. Individual concern means that the contested act must affect the applicant by reason of particular attributes or circumstances which distinguish them individually – just in the same way as an act that would be individually addressed to the applicant. An applicant must prove that they belong to a closed category of persons that is particularly concerned and substantively distinct from other persons to whom the Directive or Regulation applies. This requirement is often impossible to meet and 'extensively curtails' applicants' ability to bring actions for annulment,[74] in particular in the environmental field. Even though the Lisbon Treaty reform changed the wording of article 263(4) TFEU, adding the possibility to challenge regulatory acts (i.e. non legislative acts of general application) of direct concern and not entailing implementing measures, the CJEU stuck to its ultra-narrow interpretation of the standing requirement for legal and natural persons. Despite widespread academic criticism[75] and several attempts by litigants to widen the interpretation of standing requirements under article 263 TFEU,[76] the CJEU has so far resisted any change.

This restrictive interpretation of standing requirements under Article 263 TFEU means challenges to Regulations and Directives by natural or legal persons, even when transnationally organized and legally well-equipped, are regularly held to be inadmissible by the Luxembourg Court.[77] What is more, it seems to structurally empower, at least in climate change litigation, economic actors who strategically challenge EU acts that apply to them. While the Court of Justice has until now regularly rejected strategic cases brought by citizens or NGOs against Directives or Regulations that include insufficient

[74] KOEN LENAERTS, IGNACE MASELIS, KATHLEEN GUTMAN, EU PROCEDURAL LAW, 324 (2014).
[75] See *inter alia,* Gerd Winter, *Plaumann withering: standing before the EU General Court underway from distinctive to substantial concern,* 15 EUR. J. LEGAL STUD. 86 (2023); Niels Baeten & Pieter Augustijn Van Malleghem, *Before the law stands a gatekeeper* 51 CMLR 1187 (2015); Michael Rhimes, *The EU Courts Stand Their Ground: Why Are the Standing Rules for Direct Actions Still So Restrictive?* 9 EUR. J. LEGAL STUD. 103 (2017).
[76] Case C-565/19 P *Carvalho and Others v Parliament and Council* [2021] ECLI:EU:C:2021:252.
[77] Mario Pagano, PhD thesis (EUI) *Overcoming Plaumann: Environmental NGOs and access to justice before the CJEU,* 2022.

climate mitigation measures,[78] challenges by companies against climate legislation are frequently held (partly) admissible by the Court of Justice.[79]

Another possible direct action, which has been used by strategic litigants, is the action for damages under article 268 TFEU. A recent example of such a strategic litigation is the pending action for damages brought by a Syrian family with four children against the European Border and Coast Guard Agency (Frontex) for its involvement in pushbacks.[80] The deportation of the family from Greece to Turkey was carried out in a joint return operation by the Greek authorities and Frontex and, according to the applicants, in violation of the prohibition of non-refoulement in Article 4 EU-CFR, among others. The applicants in the case are represented by lawyers from the Amsterdam-based law firm Prakken d'Oliveira; the lawyers from Prakken d'Oliveira in turn were supported by EU law academics[81] and the case is also part of a broader international campaign organized by the Dutch Council for Refugees, BKB, Sea-Watch Legal Aid Fund, and Jungle Minds.[82] Similar to climate litigation, practices of strategic litigation regarding migration and deterrence policies in the Mediterranean are often part of broader transnational legal campaigns. However, even those specialized legal campaigns are unlikely to change the procedural set-up of EU law with limited access through direct actions. The fact that those direct actions are still being filed, despite the low chances of them moving beyond the admissibility stage, demonstrates the discursive power that direct actions might hold. Even though they do not legally empower the applicant (as a case is unlikely to move beyond the admissibility stage), direct actions permit to frame a case in the classical imaginary of the (weak) individual against public power (whether in the form of a state or

[78] Case C-565/19 P *Carvalho and Others v Parliament and Council* [2021] ECLI:EU:C:2021:252; Case T-141/19 *Peter Sabo and Others v European Parliament and Council of the European Union* [2020] ECLI:EU:T:2020:179, confirmed on appeal: Case C-297/20 P *Peter Sabo and others v European Parliament and Council of the European Union* [2021] ECLI:EU:C:2021:24.

[79] Case T-16/04 *Arcelor SA* [2010], para 122 (action for annulment inadmissible due to lack of individual and direct concern), but action for damages admissible (para 137). Similar trends have been observed in risk regulation litigation see Morvillo and Weimer, *supra* note 51.

[80] Case T-600/21 *WS and Others v Frontex* ECLI:EU:T:2023:492 (appeal pending before the Court of Justice).

[81] Melanie Fink, *Expert Opinion: Case T-600/21 WS and Others v Frontex* (February 3, 2022), https://ssrn.com/abstract=4553835 or http://dx.doi.org/10.2139/ssrn.4553835.

[82] Prakken d'Oliveira, *EU Agency Frontex charged with illegal pushbacks,* https://www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks.

an international organization) and thus has the potential to produce broader effects in the political and social realms.

Direct actions also have particular financial risks. The defeated party has to bear the costs of the successful party which often amount to tens of thousands of Euros. In these settings, the lack of access to economic capital might seriously discourage starting strategic litigation in the first place. The European Border and Coast Guard Agency's decision to recover more than € 23.700 in legal fees from a journalist who had lost a case regarding public access to documents is a case in in point.[83] The specter of such costs might discourage future litigation.[84]

1.2. Indirect actions

Strategic litigants may have indirect access to the CJEU when a national court refers questions on the interpretation or validity of EU law in relation to a pending case to Luxembourg via the preliminary ruling procedure under Article 267 TFEU. The purpose of the procedure is in principle to ensure the uniform interpretation of EU law by member states' courts. Preliminary rulings account for 63% of new proceedings introduced before the Court of Justice.[85] Due to the strict standing requirements in direct actions, the preliminary ruling procedure is the principal legal action in EU law that strategic litigants rely on.[86] However, the nature of the preliminary procedure includes drawbacks for strategic litigants. The two-level judicial proceedings – the proceedings before the national court and the Court of Justice are formally two separate procedures – have a significant impact on the agency of strategic litigants over 'their' case. First, under Article 267 TFEU all domestic courts have the right to refer preliminary questions to the CJEU, but only highest courts in a member state have an obligation to do so. However, even that obligation can in practice often be avoided by engaging in an autonomous interpretation

[83] Case T-31/18 DEP *Luisa Izuzquiza and Arne Semsrott v Frontex* [2021] ECLI:EU:T:2021:173 , para 3.
[84] European Parliament, quoted in: Melanie Fink and Maarten Hillebrandt, *Access to documents and the EU agency Frontex: growing pains or outright obstruction*?, in (IN)VISIBLE EUROPEAN GOVERNMENT: CRITICAL APPROACHES TO TRANSPARENCY AS AN IDEAL AND A PRACTICE, 247-248 (Maarten Hillebrandt, Päivi Leino-Sandberg, Ida Koivisto eds., 2023).
[85] In the five-year period 2019-2023. See, Court of Justice of the EU, *Annual Report 2023: statistics concerning the judicial activity of the Court of Justice*, https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/en_ra_2023_cour_stats_web_bat_22042024.pdf
[86] For the field of migration law see: Passalacqua, *supra* note 28.

and application of EU law. The literature has convincingly shown that national judges are key actors who decide on the fate of preliminary ruling procedures.[87] National judges enjoy significant discretion in deciding whether to refer a case to the EU court or whether to apply national law to the case at hand, which limits applicants' agency over their case. Arguably, the case law of the European Court of Human Rights on Article 6 ECHR (right to a fair trial) reins in, at least to some extent, national judges' discretion on whether to refer. The Court in Strasbourg held that non-referral by a highest member states' court may, if a party explicitly requested a preliminary reference during the proceedings, amount to a violation of Article 6 ECHR. However, the European Court of Human Rights also made clear that its scrutiny is limited to a procedural review: it checks only whether a highest domestic court provided reasons to justify non-referral and it does not engage in a substantive assessment of those reasons.[88] The European Court of Human Rights therefore does not engage in any assessment on whether the highest domestic courts made any errors in the interpretation of EU law.[89] Second, even after the case is referred to the CJEU, applicants have a limited influence over its legal framing. National as well as EU judges often tend to (re-)formulate the legal questions themselves.[90] Legal questions that are linked to broader social campaigns or regulatory effects pursued, might not even end up being addressed by the Court in Luxembourg. Yet, despite these structural limitations, the preliminary ruling procedure represents the principal procedural vehicle for strategic litigation in EU law.

The second indirect route for a case to reach the CJEU is through an infringement procedure brought by the European Commission (Article 258 TFEU) or a member state (Article 259 TFEU) against a member state for failing to fulfill its obligations under the

[87] See Arthur Dyevre, Monika Glavina, and Angelina Atanasova, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System* 27 J. EUROP. PUBL. POLICY 1 (2019); Anna Wallerman, *Who is the National Judge? A Typology of Judicial Attitudes and Behaviours Regarding Preliminary References*, in THE EUROSCEPTIC CHALLENGE: NATIONAL IMPLEMENTATION AND INTERPRETATION OF EU LAW, 155-173 (Clara Rauchegger & Anna Wallerman eds., 2019); NATIONAL COURTS AND EU LAW: NEW ISSUES, THEORIES AND METHODS (Bruno de Witte et al eds., 2016); JASPER KROMMEDIJK, NATIONAL COURTS AND PRELIMINARY REFERENCES TO THE COURT OF JUSTICE (2021).

[88] *Georgiou v Greece* App. no. 57378/18, ECtHR, judgment of March 14 2023, para 23.

[89] *Dhabi v. Italy* App. no 17120/09, ECtHR, judgment of April 8 2014, para 31.

[90] See Urska Šadl & Anna Wallerman, '*The referring court asks, in essence': Is reformulation of preliminary questions by the Court of Justice a decision writing fixture or a decision-making approach?* 25 EUROPEAN LAW JOURNAL 416 (2019).

EU Treaties. Infringement proceedings can only by initiated by the Commission (or another member state) and, according to the established case law of the Court of Justice, the Commission does not have an obligation to initiate proceedings against a member state: direct strategic litigation via the infringement procedure is thus foreclosed. Individuals only have the possibility to lobby with the European Commission or a member state's government to initiate infringement actions against a member state. This can be considered a form of litigating by proxy. Indeed, when filing infringement proceedings against a member state, the European Commission traditionally relies heavily on legal or natural persons denouncing EU law violations at national level. In the past decades, however, the European Commission has partially stepped down from its role as the 'guardian of the Treaties', and the amount of infringement proceedings it initiated has significantly reduced across all areas of EU law.[91] These institutional developments have significantly reduced the probability of successfully poking the Commission to initiate infringement proceedings and thus of strategically litigating by proxy.

These structural limitations in gaining access to EU courts limit, as Alberto Alemanno points out, applicants' agency and renders strategic litigation in EU law more unpredictable and uncertain than strategic litigation at the national level.[92] However, we caution not to over-emphasize the structural differences between the EU legal order and national legal orders. First, similar structural limitations for accessing, say, constitutional courts also exist in national legal orders. By way of example, the strict interpretation of standing requirements for individual applicants under Article 93(1)(4a) of the German Basic Law (constitutional complaints) by the German Federal Constitutional Court result in an admissibility rate of a meagre 0,9%.[93] Second, navigating the institutional dynamics in the national judicial system and identifying the courts with a higher propensity to refer is an integral part of any professional strategy to litigate strategically in EU law. This requires, in addition to expertise in EU law, also a relatively high degree of being

[91] R. Daniel Kelemen & Tommaso Pavone, *Where have the Guardians gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union* 75 WORLD POLITICS 779 (2023).

[92] Alberto Alemanno, *Beyond EU law heroes: unleashing legal mobilisation as a form of participation in the Union's democratic life*, GERMAN L.J (2024).

[93] Bundesverfassungsgericht [German Federal Constitutional Court], *2023 Annual Report* (2024), at 53, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2023.pdf?__blob=publicationFile&v=4.

professionally networked in the domestic context.[94] Third, in so far as they apply EU law, domestic courts functionally also constitute EU courts and applicants' interest might therefore be limited to the national court applying EU law.

2. Substantive features

Identifying the material legal provisions on which to base their legal arguments is perhaps the most strategic choice the applicant faces. The very architecture of EU law may result in some framings being more likely to succeed than others.

First, the content and specificity of EU secondary legislation affect the framing and effects of strategic litigation using EU law. The EU legislative action is characterized by difficulties to achieve the necessary transnational majorities in the Council and European Parliament. As a result, the EU legislative framework tends to be uneven – more developed and specific in certain policy domains than in others. The existence and the contents of EU directives, regulations and decisions affect the strategies adopted by all litigants, also those pursuing broader goals. For instance, the General Data Protection Regulation (GDPR) entered into force in 2018 harmonizing the standards of data protection in the EU. As a regulation it has direct effect and does not need transposition by Member States, as opposed to directives in the domain of EU asylum law, such as the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive. The GDPR foresaw the possibilities to impose fines on actors violating the EU data protection rules and enforce them directly in national and European courts. Figure 1 earlier shows the relevant increase of strategic litigation after the entry into force of the GDPR.

The lack of secondary legislation in a field also has effects on strategic litigation. The free movement of workers and especially the question of workers posted from one Member State to work in another has been adjudicated largely based on EU Treaties directly. Directive 96/71/EC on the posting of workers was adopted 1996 and amended only in 2018. Until then, based on general EU primary law provisions, the CJEU has had more

[94] Passalacqua, *supra* note 28.

freedom to develop and adjust its case law on the rights of economically active migrants in the EU, often based on European citizenship rather than only movement of workers.[95]

The substance of the provisions is also a relevant factor affecting strategic litigation. While the GDPR has been praised as setting global standards for data protection,[96] the EU's legislation in the domain of preventing and mitigating climate change in the period 2019-2024 has been perceived as less ambitious than the calls by transnational civil society. For instance, the Energy Efficiency Directive set a reduction of primary and final energy consumption of 11.7% at EU level by 2030. The EU legislation by directives in this domain mostly operates with minimal targets. While Member States are free to go beyond them and adopt more ambitious climate measures, these substantive thresholds make the EU legislation adopted under the "Fit for 55" legislative package less attractive as a legal basis for litigating to induce broader change.

Second, strategic litigation in EU law shaped by the legally and historically established division of competences between the EU and its Member States. The EU legal order is centered around the principle of conferral. Strategic litigation using EU law has to be based on existing EU legal rules and within the domain where the EU has competence. This feature of EU substantive law might explain why the judicial challenges to the populist Hungarian government pushing the Central European University out of Hungary are framed rather as an issue of freedom of establishment (shared competence) and trade law (exclusive competence) than as an issue of EU education policy (complimentary competence). The division of competences between the EU and the Member States has also solidified over time. Consequently, legal claims based on areas where the EU's competence is more established (e.g. internal market) are often more promising than others, based on historically 'weaker' EU powers (e.g. fundamental rights). Whereas the incorporation of the Charter into primary law seems to have at least partly rebalanced the CJEU's economic focus, internal market framings may still retain a comparative advantage relative to legal claims based on citizenship or fundamental rights.

[95] Urska Šadl & Mikael Rask Madsen, *Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Financial Crisis* 22 *European Law Journal* 40 (2016).
[96] ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020).

In view of the principles of conferral and subsidiarity, a skilled EU legal expert might chose to rely on norms from a substantively different domain of EU law than the case at hand, just because they provide a clearer legal basis or stronger enforcement mechanisms. Such a dynamic can be observed with regard to the deployment of the Representative Action Directive 2020/1828 in order to enforce digital rights. The Directive is meant to ensure that consumers are able to protect their collective interests in the EU through representative actions. The avenue of litigating collectively in defense of digital rights as a consumer law issue opens new perspectives in terms of standing before national courts for strategic litigants as well as in financial terms, because of possibilities of funding and damages awards. The reliance on specific provisions of EU law from other substantive domains requires a general expertise in EU law. From an empowerment perspective, the relevant question is therefore how different actors are empowered or disempowered by the different available framings.

3. Constitutional features

Several constitutional features of the EU legal order shape the practice of strategic litigation with EU law. First, the EU is not a sovereign state but an international organization claiming to have established an autonomous and self-contained legal regime.[97] The principle of autonomy results in a relatively holistic approach by the CJEU when interpreting EU law. The constitutionalization of the EU legal order means that the Court of Justice relies in its interpretation of EU law on common principles across various policy domains. Lawyers involved in strategic litigation in EU law must be familiar with this 'inner logic' of the EU legal order when arguing a case before the CJEU or national courts. In depth knowledge of international refugee law might not be sufficient to argue an asylum law case before the CJEU, as the CJEU can develop its own definition of international law terms based on the autonomy of the EU legal order.[98]

A second, related, issue is the particular type of politicization of the CJEU. The commitment of the judicial branch to a political project, such as European integration

[97] Christina Eckes, *EU Autonomy: Jurisdictional Sovereignty by a Different Name?* 5 EUROPEAN PAPERS 319 (2020).

[98] Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2014] ECLI:EU:C:2014:39.

under the EU's umbrella, has been problematized in the literature in light of the separation of powers doctrine and judicial legitimacy.[99] Other strands in the literature also questioned to what extent the CJEU channels the political preferences of EU member states[100] or other interest groups.[101] And yet other scholars turned their attention to the institution itself – the autonomization of the CJEU as a court[102] and its legal reasoning.[103] As a result, the CJEU is characterized by a close relationship with the EU institutions in view of their shared commitment to the project of European integration. It is not a politicized court in terms of 'left-' or 'right-wing' politics. Compared to national high courts, the CJEU is rarely present in public debates and it shows immense deference to its own precedent to increase the legitimacy of its decisions. (Which is closely related to the self-referential character of the EU law academic debates discussed above.)

Whereas the CJEU's preoccupation for the autonomy of the EU legal order might be an ambivalent feature with regard to the empowering or disempowering effects of strategic litigation, due to its unpredictability, other constitutional features of the EU legal order make it a promising avenue for strategic litigation. These include primacy, direct effect, and effectiveness. Together, they ensure that a judgment rendered in a strategic case becomes effectively part of the EU and national legal order, prevailing over incompatible national law. The breadth (across the 27 Member States) and depth (within the respective national legal orders) of the reach of a CJEU judgment represents an appealing prospect and an empowering feature for successful strategic litigants. Yet, doubts remain whether, in light of the pro-integration attitude shared by both the Court and EU lawyers, the ultimate beneficiary of strategic litigation in terms of empowerment might be EU law itself.

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[99] Koen Lenaerts, *How the ECJ Thinks: A Study on Judicial Legitimacy*, 36 FORDHAM INTERNATIONAL LAW JOURNAL 1302, 1310 (2013); THOMAS HORSLEY, THE COURT OF JUSTICE OF THE EUROPEAN UNION AS AN INSTITUTIONAL ACTOR. JUDICIAL LAWMAKING AND ITS LIMITS (2018).

[100] Schmidt, *supra* note 51; KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014); HANS W. MICKLITZ & BRUNO DE WITTE, THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES (2012), chapter 1.

[101] LISA CONANT, JUSTICE CONTAINED. LAW AND POLITICS IN THE EUROPEAN UNION (2002).

[102] L PIERDOMINICI, THE MIMETIC EVOLUTION OF THE COURT OF JUSTICE OF THE EU (2020).

[103] GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU (2013); GERARD CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE (2012); JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE. TOWARDS A EUROPEAN JURISPRUDENCE (1993).

III. Effects

If strategic litigation is a legal action initiated in a specific case with a view to achieving broader, legal, political, socio-economic aims, its effects are what lies between the outcome of the decision and the achievement of the goal. The effects of strategic litigation can be analyzed starting from three symbolic venues: the courtroom, the square, and the palace. It is their interplay that determines whether the goal of strategic litigation has been achieved.

(1) *The courtroom* is where the legal outcome of the case is established. Going back to the distinction between concentrated and dispersed power, it is where the former operates. If a strategic case succeeds in the courtroom, a legal obligation in line with the goal pursued will be established. Regardless of whether the judgment is implemented or not, a favorable change in the legal order has been achieved. In this sense, and in light of the appealing constitutional features of the EU legal order discussed above, a strategic case succeeding in the courtroom in principle empowers the applicant. Yet, this empowerment might be only apparent. The reasoning style of the CJEU is laconic and mostly limited to statements related to the concrete case at hand,[104] thus requiring further action in order to secure the desired outcome.

(2) *The square*, digital or built, is where the social-economic meaning of the case is constructed. It is the place of dispersed power, which operates independently from its concentrated counterpart. Court decisions may become 'important drivers' in the communication strategies of strategic litigants.[105] As discussed above, a strategic case which is unsuccessful in the courtroom, may nonetheless introduce new arguments in the public discourse and contribute to changing the narrative around the issue at stake. Conversely, a case succeeding in the courtroom may fail to mobilize the square, either because it never reaches it, or because it is not understood or supported, to the detriment of its very goal. Networks (media, social

[104] Bengoetxea, *supra* note 106; Conway, *supra* note 106.

[105] Bruno Hess, *Strategic Litigation: a new phenomenon in dispute resolution?* 3 MPI LUXEMBOURG FOR PROCEDURAL LAW RESEARCH PAPER SERIES 1, 3-4 (2022).

movements, professional organizations) play an essential role in bridging the space between the courtroom and the square, not least because of their role as translators. From an empowerment perspective, the square rewards applicants who are socially well networked (e.g. organizations) and punishes those who are not (e.g. loners), ultimately risking to jeopardize the achievement of their goals, even upon a success in the courtroom.

(3) *The palace* is where the political weight of the case is put to test. The legislative and the executive, in their national or EU incarnations, take stock of the change occurred on the legal level, or the lack thereof, and decide whether to uphold it, resist it, or ignore it. Similarly to the square, the palace and the courtroom follow different logics: an unfavorable judgment could nonetheless trigger a political reaction. More critically, a legally successful case might be politically irrelevant or event trigger backlash. As most judgments require implementation, the palace plays a crucial role in the achievement of a strategic case's aims. Securing access to the palace is therefore an important consideration for strategic litigants, who often combine litigation with other forms of legal mobilization, such as advocacy and lobbying. From an empowerment perspective, well-resourced and professionally well networked applicants are likely to enjoy a significant advantage when it comes to the palace. Lawyers representing the corporate type of applicant usually pursue multi-venue advocacy, juggling between different legal tools to advance their client's interests. In the case of EU-level decision making, litigants with EU law expertise may also be advantaged in terms of access to the palace.

Whereas the broader goals of a strategic case can seldom be achieved by courts alone, applicants must carefully navigate both the square and the palace. More generally, strategic litigants need to reflect on the effects of a legal framing of political and social problems. De-politicizing certain issues and turning them into legal questions to be solved by judges through the application of legal syllogisms can backfire and trigger backlash.[106]

[106] Mikael Rask Madsen, Pola Cebulak, Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 197 (2018).

Many European countries are witnessing debates about 'juristocracy' and strategic litigation, framed by populist actors as threats to the ideals of a majoritarian democracy. In Hungary, George Soros, founder among others of the Open Society Initiative, was one of the major targets of campaigns warning the population against foreign influence in Hungarian politics. In the Netherlands, the Parliament decided, in February 2023, to initiate an inquiry into the possibilities to limit access to the courts for environmental NGOs bringing climate change litigation, such as *Urgenda*.[107] These examples illustrate how strategic litigation is perceived as a counterpower to the parliaments and executives representing the democratic majority. In such a context, actors starting strategic litigation have to be mindful to link it also discursively to political and social movements. In the context of the debates about the EU's democratic deficit, it is particularly relevant to study the effects of strategic litigation on politicization and de-politicization of certain issues.

Strategic litigation can also backfire in other ways. If strategic litigation efforts are not linked to a political platform, they risk legitimizing existing or future illiberal reforms. This is of course true of the risk of 'giving a win' to illiberal governments, mentioned earlier as affecting the strategy of the Commission of not using article 2 TEU in its infringement procedures. Moreover, following a CJEU judgement declaring unlawful the prolongation of border controls within Schengen, if they exceed 6 months, the Council of the EU proceeded to act on a long-dormant legislative procedure regarding the reforms of the Schengen Borders Code. It proposed to introduce practically unlimited exceptions for Member States to reinstate border controls based on national security.[108] It might seem that the Court's judgement, obtained through strategic litigation, has fostered the political consensus to limit free movement of EU citizens.

D. Conclusions

This article proposes an analytical framework for the study of strategic litigation in Europe. It focuses on specific features of EU law that make up for its attractiveness, or lack thereof, as a platform for pursuing general private or public interests through

[107] *Kamer wil onderzoek: namens wie spreken milieuclubs bij de rechter?* (NOS, 21 February 2023), https://nos.nl/artikel/2464752-kamer-wil-onderzoek-namens-wie-spreken-milieuclubs-bij-de-rechter.

108 See Stefan Salomon & Jorrit Rijpma, The Promise of Free Movement in the Schengen Area: The Decision of the Court of Justice in Landespolizeidirektion Steiermark (NW) 1 European Law Review 123 (2023).

litigation. First element to study when analyzing a case of strategic litigation are the actors. We identify three ideal types of actors, on a spectrum of network, expertise and resources – ranging from a loner to an organization and a corporation. Second, we highlight the structural features of EU law that affects strategic litigation. The predominance of indirect access to the EU Court, the uneven degree of regulation across various domains and the particular constitutional legacy of EU law make it a particularly interesting tool for strategic litigation including a (broadly defined) European integration agenda. Third, we should evaluate the effects of strategic litigation in light of a dispersed understanding of power. Strategic cases can unfold effects in the court, but also in the street or in the palace. Corporate or public-interest litigation is often part of broader lobbying or advocacy campaigns. The analytical framework focusing on the distributive power of strategic litigation can be used for a broad range of law-in-context studies of strategic litigation.

The proposed definition of strategic litigation can include both public-interest cases initiated by NGOs and corporate litigation by repeat players in Luxembourg. This normatively open definition provides for a historically more accurate picture of strategic litigation in EU law, as in particular during the time of construction of the EU internal market, companies and business associations have represented a significant share of applicants in cases before the CJEU. Focusing only on public-interest litigation would omit how EU law litigation can be a means to pursue generalizable private interests. A broader definition of strategic litigation allows us also to examine what private and public interest strategic litigation initiatives share and what distinguishes them in turn.

Our framework also encourages normative questions about the societal effects of strategic litigation. Legal mobilization creates more avenues for individual actors, civil society and minority groups to contest policies adopted by governments and parliaments. It can give a voice to disempowered individuals and groups and enrich the public debate with rationalized arguments brought before judges. This can be desirable from a democratic point of view. At the same time, however, strategic litigation can also be used to entrench the existing power relations. Its growing role in the social fabric increases the framing of political issues in terms of rights and politicization of the judiciary. Finally, the focus on strategic cases can also have consequences for the costs of litigation and the political

economy of the justice system. Externally funded strategic litigation could in the long run increase costs of rights enforcement in general. Answering these normative questions in a nuanced way for the context of EU law requires more law-in-context studies of various instances of strategic litigation across policy fields and time.