8

Strategic Litigation

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8.1 INTRODUCTION

In the context of fundamental rights violations, we can observe an increase in the use of litigation strategies to call responsible actors to account.[1] This 'strategic' litigation can be described as 'the (intention of) legal action through a judicial mechanism in order to secure an outcome, either by an affected party or on behalf of an affected party ... used as a means to reach objectives which consist of creating change (e.g. legal, political, social) beyond the individual case or individual interest'.[2] Thus, litigation is pursued as a strategy as opposed to or in combination with (for example) lobbying or protesting, in order to achieve certain goals that have a broader purpose than winning a case.[3] The phenomenon has become widely known in the European context over the last few years especially in relation to climate change.[4]

[1] Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 4 Civil Justice Quarterly 407; Helen Duffy, *Strategic Human Rights Litigation* (Hart 2018); Annick Pijnenburg and Kris van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route' (2022) 24 European Journal of Migration and Law 402.

[2] Kris van der Pas 'Conceptualising Strategic Litigation' (2021) 11 Oñati Socio-Legal Series 116.

[3] Lisa Vanhala, 'Legal Mobilization under Neo-corporatist Governance: Environmental NGOs before the Conseil d'État in France, 1975–2010' (2016) 4 Journal of Law and Courts 103; Douglas NeJaime, 'Winning through Losing' (2011) 96 Iowa Law Review 941.

[4] This kickstarted with the first judgment in the *Urgenda* case: Rechtbank Den Haag [Netherlands] *Stichting Urgenda v State of the Netherlands* nr. 19/00135, ECLI:NL: RBDHA:2015:7145. See further Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2021 snapshot' (2021) Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy,

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However, also in the migration context, strategic litigation is broadly pursued.[5]

Strategic litigation can be seen as a form of legal mobilisation. Legal mobilisation entails 'any type of process by which individual or collective actors invoke legal norms, discourse, or symbols to influence policy, culture or behavior'.[6] Litigation, in that sense, is one of these processes. In legal mobilisation literature, different explanations have been offered for why social movements, organisations, or individuals 'turn to the courts'.[7] One of these explanatory theories focuses on legal opportunities that either encourage or discourage litigation. As has become clear from the previous chapters, the EU remedies system and especially the Court of Justice of the European Union (CJEU) does not offer many of these legal opportunities that enable strategic litigation. Nevertheless, the CJEU has become a forum where NGOs and other actors have taken their cases to attempt to achieve change beyond the individual.[8]

This begs the question: How are these actors (NGOs, lawyers, individuals) making use of this avenue and what lessons can be drawn therefrom? Relying on literature on legal mobilisation, this chapter first discusses how the EU remedies system enables or disables strategic litigation (Section 8.2). It then delves into several cases of mobilisation of the EU remedies system and describes the way in which the actors involved worked with or around the legal opportunities provided by this system (Section 8.3). This perspective contributes to a more bottom-up perspective (of the litigants) as opposed to the top-down approach taken in Part I of the book. The selection of cases is by no means exhaustive but rather serves to illustrate mobilisation of the EU remedies system in relation to different fundamental rights violations. Section 8.4 discusses actions that are not necessarily formal legal procedures but

London School of Economics and Political Science <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf> .

5 See, for example, the special issue of the German Law Journal in 2020 on 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 (3) German Law Journal; Pijnenburg and van der Pas (n 1).

6 Lisa Vanhala, 'Legal Mobilization' (2021) Oxford Bibliographies <www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0031.xml>.

7 See, for example, Lisa Conant and Others, 'Mobilizing European Law' (2018) 25 Journal of European Public Policy 1376.

8 Case C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865; Case C-673/13 P *European Commission v Stichting Greenpeace Nederland & Pesticide Action Network Europe* [2016] ECLI:EU:C:2016:889; Marion Guerrero, *Strategic litigation in EU gender equality law* (2020) European Commission, Chapter 3.

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nevertheless ways in which actors have tried to call the EU to account for fundamental rights violations. The lessons drawn from these actions can inform future action in this field (Section 8.5).

8.2 THE EU AS A SYSTEM WITH CLOSED LEGAL OPPORTUNITY STRUCTURES

As the other chapters in this volume have highlighted, it is not easy to address fundamental rights violations by the EU within the EU remedies system. Among other aspects, the dependency on the national judge in the preliminary reference procedure and the *Plaumann*[9] criteria in direct actions create a hostile environment for pursuing broad social and/or legal change through the available avenues.[10] Moreover, while the European Court of Human Rights (ECtHR) has a flourishing practice of third-party interventions, the CJEU does not easily allow access to interveners.[11] When discussing (im)possibilities of legal procedural rules and how these encourage or discourage strategic litigation, socio-legal scholars have referred to the concept of legal opportunity structures.[12] Legal opportunity structures find their origin in earlier theories on political opportunity structures that influence the choice of strategy of social movements.[13] Simply put: 'open' political opportunity structures entail access to political actors and these actors being receptive towards the claims of the social movement.[14] When this is the case, political strategies (such as lobbying) are turned to by a social movement. If political opportunity structures are closed, a different ('outside') strategy is much more attractive, such as protesting or litigation.[15] Legal opportunity structures, then, focus on the legal

[9] Case C-25/62 *Plaumann v Commission* [1963] ECLI:EU:C:1963:17.

[10] Virginia Passalacqua, 'Legal mobilization via preliminary reference: Insights from the case of migrant rights' (2021) 58 Common Market Law Review 751.

[11] Jasper Krommendijk and Kris van der Pas, 'To intervene or not to intervene: intervention before the court of justice of the european union in environmental and migration law' (2022) 26 The International Journal of Human Rights 1394.

[12] Chris Hilson 'New Social Movements: the Role of Legal Opportunity' (2002) 9 Journal of European Public Policy 238. See also Ellen Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2006); Gianluca De Fazio, 'Legal opportunity structure and social movement strategy in Northern Ireland and southern United States' (2012) 53 International Journal of Comparative Sociology 3.

[13] Hilson, 'New Social Movements' (n 12).

[14] Hanspeter Kriesi, 'Political Context and Opportunity' in D Snow, S Soule, and H Kriesi (eds), *The Blackwell Companion to Social Movements* (Blackwell 2004) 70; Andersen (n 12) 7.

[15] Cary Coglianese, 'Litigating within Relationships: Disputes and Disturbance in the Regulatory Process' (1996) 30 Law & Society Review 738.

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factors that influence strategy choice. When 'open', legal opportunity structures enable litigation and therefore this strategy is used.[16]

These legal opportunities entail different dimensions according to different authors. Andersen distinguishes four different dimensions, including access to justice, the 'configuration of elites' (receptiveness of judges towards the claims made), 'alliance and conflict systems' (in the courtroom), and 'cultural and legal frames' (societal views that shape legal opportunity structures).[17] This approach has been criticised by Vanhala, who agrees to some extent with the first two dimensions but argues that the last two dimensions are not really 'structures'.[18] De Fazio argues for three dimensions: access to the courts, availability of justiciable rights, and receptivity of the judiciary.[19] Although it is not the purpose of this chapter to provide a definitive approach to legal opportunity structures, these dimensions identified and applied to the EU remedies help to see how 'open' or 'closed' the system is. It should also be emphasised that legal opportunity structures are not static: they can change over time and even be the target of instances of litigation, trying to 'loosen' rules on standing, for example.[20]

De Fazio's dimensions here are taken as point of departure, as they are most suitable to adapt to the EU.[21] The first, access to the courts, is severely limited in the EU context: accessing the CJEU (as described above) is difficult. The second and third dimension, on the other hand, are more favourable in the EU remedies system: EU law has (generally speaking) created a set of rights that can be invoked in court, some more justiciable than others (for example, the Charter of Fundamental Rights of the European Union,[22] in the following 'the Charter').[23] Moreover, EU judges have not always shied away from delivering judgments on politically salient issues.[24] This paints a mixed picture: on the one hand, the EU courts can be a valuable avenue for strategic litigation but, on the other hand, access is limited.

[16] Andersen (n 12); Gianluca De Fazio, 'Legal opportunity structure and social movement strategy in Northern Ireland and southern United States' (2012) 53 International Journal of Comparative Sociology 3.
[17] Andersen (n 12) 11–14.
[18] Lisa Vanhala, *Making Rights a Reality* (Cambridge University Press 2011) 15–18.
[19] De Fazio, 'Legal opportunity structure and social movement strategy' (n 16) 6.
[20] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 Law & Society Review 523, 523.
[21] See also Passalacqua, 'Legal mobilization via preliminary reference' (n 10).
[22] Charter of Fundamental Rights of the European Union [2007] OJ C303/1.
[23] Tobias Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 Common Market Law Review 1201.
[24] See, for an overview, Mark Dawson, Bruno de Witte, and Elise Muir, *Judicial activism at the European Court of Justice: causes, responses and solutions* (Edward Elgar 2013).

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8.3 EXAMPLES OF SUCCESSFULLY MOBILISING BEFORE THE CJEU

Despite the closed first dimension of EU legal opportunities (access to the EU courts), examples of successful mobilisation of this system can be found in practice: in the preliminary reference procedure, in some direct actions before the CJEU, and in third-party interventions. Next to that, the EU system offers more quasi-legal avenues, which have been explored by different actors in different fields of law as well. The following sections will explore these examples, focusing on the 'closed' aspects of EU legal opportunities and investigating how the litigants worked with or around these obstacles.

8.3.1 *Mobilising the Preliminary Reference Procedure*

In several instances, actors have mobilised by making use of Article 267 Treaty on the Functioning of the European Union (TFEU).[25] This procedure, primarily intended for resolving conflicts between national laws and policies and EU law or interpreting EU legislation, has the major downside of a dependency on national judges to pose a question to the CJEU. This has notably been explored by Passalacqua, who has researched how from the bottom up, focusing on the litigants, the decision to refer can be influenced with Euro-expertise (EU legal expertise) in the field of migration law.[26] By having better resources available (i.e., knowledge), litigants are more likely to succeed in their endeavours (i.e., getting a judge to refer to the CJEU).[27] Passalacqua focuses in her article on three instances of mobilisation against national laws and policies in the United Kingdom, the Netherlands, and Italy. Other such examples exist, for example, in the field of gender equality and non-discrimination law.[28] The procedure has also been used to challenge acts of EU institutions due to alleged fundamental rights violations.[29]. One field of law where this has been particularly successful is explored here, looking at the

[25] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

[26] Passalacqua, 'Legal mobilization via preliminary reference' (n 10); see also Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022).

[27] Marc Galanter, 'Why the "haves" come out ahead: speculations on the limits of legal change' (1974) 9 Law & Society Review 95, 95.

[28] For example, the famous *Defrenne* cases brought by Belgian feminist lawyer Élaine Vogel-Polsky, see Éliane Gubin, 'Éliane Vogel-Polsky: a woman of conviction' (2018) Institute for the Equality of Women and Men, Belgium, 89–91.

[29] Jos Hoevenaars, *A People's Court? A bottom-up approach to litigation before the European Court of Justice* (Eleven 2018).

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cases, the actors behind them, the procedural hurdles they have had to overcome, and how they did so. This field of law is data protection.

The first widely known example is the case of *Digital Rights Ireland*, decided by the CJEU in April 2014.[30] In that case, the EU Data Retention Directive was declared invalid due to non-compliance with Articles 7 and 8 of the Charter. The Directive required Internet Service Providers (ISPs) to retain internet data for a period of six months to two years.[31] The successful challenge was started in 2006 before an Irish court by the digital rights lobbying and advocacy NGO Digital Rights Ireland.[32] It challenged both the EU Directive and the Irish implementation thereof. Importantly, the NGO was allowed to conduct the proceedings in *actio popularis*, meaning that the organisation litigated for a public interest (namely the privacy rights of individuals).[33] This possibility is not present in all EU Member States, highlighting the importance of beneficial national procedural rules. Moreover, among the members of the NGO (which has no staff or office) are practicing lawyers and legal academics.[34] Digital Rights Ireland was supported by many other similar organisations, such as the Electronic Frontier Foundation and Privacy International.[35] This means that the level of (Euro-)expertise within the NGO and in its relations with others was high. Despite significant delays that were suffered by the NGO in the national proceedings, eventually a preliminary reference was sent to the CJEU by the Irish court, which led to the CJEU judgment.[36]

[30] Case C-293/12 and C-594/12 *Digital Rights Ireland* [2014] ECLI:EU:C:2014:238.

[31] Directive (EC) 24/2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54, specifically arts 5 and 6.

[32] See <www.digitalrights.ie/>; Digital Rights Ireland (DRI), 'DRI brings legal action over mass surveillance' (*Digital Rights Ireland*, 14 September 2006) <www.digitalrights.ie/dri-brings-legal-action-over-mass-surveillance/>.

[33] Orla Lynskey, 'The role of collective actors in the enforcement of the right to data protection under EU law' in Elise Muir and others (eds), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum* (EUI Working Papers 2017/17).

[34] See <www.digitalrights.ie/about/>; Electronic Frontier Foundation, 'How Digital Rights Ireland Litigated Against the EU Data Retention Directive and Won' <www.eff.org/nl/node/81899>.

[35] DRI (n 32); Electronic Frontier Foundation (n 34).

[36] For more information about the impact of the case, see Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in *Digital Rights Ireland*: Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection' (2014) 6 European Law Review 6.

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The second example from the field of data protection is a fraction of a multitude of legal challenges brought by activist Maximilian Schrems. A preliminary ruling decided by the CJEU in October 2015, in the case of *Schrems I*, had significant consequences for the transfer of personal data from companies in the EU to the United States.[37] The judgment invalidated the 'Safe Harbor' agreement between the EU and the United States, which allowed for the transfer of such data.[38] The CJEU found that there were not enough safeguards in this agreement in light of Articles 7 and 8 of the Charter. Maximilian Schrems, an Austrian citizen (then law student) and Facebook user, challenged the transfer of his personal data from Facebook's servers in Ireland to those in the United States (after the revelations made in 2013 by Edward Snowden).[39] The Irish High Court was uncertain about the validity of the underlying Safe Harbor decision and decided to pose a question about its validity to the CJEU. The CJEU largely followed the arguments made by Schrems and declared the Decision invalid. Notably, as a third-party intervener, Digital Rights Ireland was involved in the case. Schrems himself is now a privacy lawyer and founder of an organisation (noyb) fighting for digital rights.[40] *Schrems I* is one of the many legal challenges brought by the activist and his organisation.[41]

These cases tell us several things. Firstly, the NGO Digital Rights Ireland benefitted from the possibility of starting an *actio popularis* in an Irish court, which is not possible in every EU Member State. Secondly, all litigants described in this section benefitted from legal, and specifically EU law, expertise, either through their own resources or with the help of a coalition of other individuals and organisations (sometimes formally through a third-party intervention).[42] This is necessary at times to provide a counterweight to the power of the national government to delay a procedure, such as in the Irish proceedings leading up to *Digital Rights Ireland*. It should be

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

[38] See Global Freedom of Expression, 'Schrems v. Data Protection Commissioner' <https://globalfreedomofexpression.columbia.edu/cases/schrems-v-data-protection-commissioner/>.

[39] See Global Freedom of Expression (n 38); NOYB, 'Data transfers' <https://noyb.eu/en/project/eu-us-transfers>.

[40] See <https://noyb.eu/en>.

[41] See, for example, Case C-311/18 *Data Protection Commissioner v Facebook Ireland Ltd & Maximilian Schrems* [2020] ECLI:EU:C:2020:559; Vincent Manancourt, 'Meta faces record EU privacy fines' (*Politico*, 4 December 2022) <www.politico.eu/article/eu-fines-meta-privacy-tech-security-facebook-whatsapp-instagram/>.

[42] Antoine Vauchez has coined the term 'Euro-lawyers' in this regard. See Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

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emphasised that these instances of mobilisation are rather exceptional: national implementation is necessary as litigation against EU acts cannot be brought before national courts. Therefore, challenging EU legislation or EU complicity in fundamental rights violations needs to be combined with a Member State 'element', so to say.

8.3.2 *Direct Actions*

The second type of mobilisation before the CJEU addressed here are direct actions, based on Article 263, 265, or 340 TFEU. Addressing fundamental rights violations by the EU through these procedures is difficult for a variety of reasons. Most obviously, the plaintiffs in the action for annulment and failure to act run into the difficulties of the *Plaumann* criteria of direct and individual concern.[43] As emphasised in Chapter 2, the conditions under which compensation is granted in the action for damages are strict. Most likely related to these difficulties, only very few strategic procedures as direct actions before the CJEU have been initiated.[44] Many attempts have been made to overcome these criteria especially in the field of environmental law. This line of case law, and case law more generally before the CJEU on environmental issues, is set out first in this section. The second part of this section focuses on two cases brought against the European Border and Coast Guard Agency, Frontex. One is an action for annulment, brought on behalf of two individuals by the NGO *front*-LEX.[45] The other is an action for damages, brought on behalf of a Syrian family by Prakken d'Oliveira Human Rights Lawyers.[46]

The requirement of individual concern that follows from *Plaumann* is especially difficult to satisfy in environmental litigation: environmental

[43] Case C-25/62 *Plaumann v Commission* [1963] ECLI:EU:C:1963:17.

[44] Exceptions can be found in relation to EU legislation on pesticides and access to documents, where several actions are successful as there is no implementation decision required (Article 263(4) TFEU) and a decision to refuse to provide documents is given. See, for example, Case C-458/19 P *ClientEarth v Commission* [2021] ECLI:EU:C:2021:802 and Case C-612/18 P *ClientEarth v Commission* [2020] ECLI:EU:C:2020:223.

[45] Case T-282/21 *SS and ST v Frontex* [2021]; see also Statewatch, 'EU: Frontex asks court to reject human rights case, seeks legal costs from asylum seekers' (*Statewatch.org*, 5 January 2022) <www.statewatch.org/news/2022/january/eu-frontex-asks-court-to-reject-human-rights-case-seeks-legal-costs-from-asylum-seekers/>.

[46] Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492; see also Prakken d'Oliveira, 'EU agency Frontex charged with illegal pushbacks' (*Prakken d'Oliveira*, News 2021) <www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks>; Statewatch, 'Frontex: the ongoing failure to implement human rights safeguards'(*Statewatch.org*, 25 January 2022) <www.statewatch.org/analyses/2022/frontex-the-ongoing-failure-to-implement-human-rights-safeguards/>.

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measures are of a general nature and do not concern specific individuals.[47] The first case in which this was explicitly dealt with was a case initiated by Greenpeace before the General Court (then the Court of First Instance) and later the Court of Justice.[48] In relation to the procedural hurdle, Greenpeace defended the view that the environmental legal field is separate from other fields of law, as there is a particular type of public and shared interest at stake, unsuitable for a requirement such as individual concern.[49] If *locus standi* was not granted in the case, Greenpeace argued that a legal vacuum would come into being. This case did not succeed. Shortly thereafter, the Aarhus Convention was signed by the EU in 2005.[50] The third pillar of that Convention ensures access to justice in environmental matters, also (and specifically) for NGOs.[51] This led to a series of challenges to the strict *locus standi* rules in CJEU direct actions.[52] Still, no substantial change to the *Plaumann* criteria could be realised. Also attempts by individuals (together with an NGO) to overcome these criteria have proven unsuccessful.[53] A different strategy was adopted by ClientEarth, who questioned the EU's implementation of the Aarhus Convention before the Aarhus Convention Compliance Committee. This Committee found the EU to be incompliant with the Convention. This was subsequently used in litigation by the NGO Mellifera before the CJEU, but the Court rejected the Aarhus Committee's finding alleging it is non-binding (a 'draft version').[54] Environmental NGOs have not given up in this regard and continue to bring claims before the CJEU to overcome the *Plaumann* criteria. These cases form an example of the challenging of legal opportunity structures as part of strategic litigation: the NGOs in the cases purposefully litigate about procedural requirements to 'loosen' them.[55]

[47] Mario Pagano, 'Overcoming Plaumann in EU environmental litigation: An analysis of ENGOs legal arguments in actions for annulment' (2019) Diritto e Processo 311.

[48] Case C-321/95 P *Stichting Greenpeace Council and Others v Commission of the European Communities* [1998] ECLI:EU:C:1998:153.

[49] Ibid para 18.

[50] See the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en>.

[51] Ibid art 11.

[52] For example, Case C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* [2015] ECLI:EU:C:2015:5.

[53] Case C-565/19 P *Carvalho and Others v Parliament and Council* [2021] ECLI:EU:C:2021:252.

[54] Case C-784/18 P *Mellifera v Commission* [2020] ECLI:EU:C:2020:630.

[55] As also described in the UK context by Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (n 20).

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The action for failure to act and the action for damages brought against Frontex are pending at the time of writing, and it is uncertain whether the use of these procedures will be successful, that is, whether the applicants will have their cases declared admissible by the CJEU. Nevertheless, it is interesting to look at these cases in more detail, as they are one of the few examples in which these actions have been purposefully mobilised to address fundamental rights violations by the EU. The failure to act brought by *front*-LEX alleges a failure by Frontex to terminate its operation in the Aegean Sea, in the context of which the applicants suffered fundamental rights violations on their journey to Greece.[56] Frontex argues that the complaint should be declared inadmissible as the actors that invited Frontex to act in the first place are the NGOs behind the complaint and not the applicants themselves.[57] Moreover, the argument of a lack of *locus standi* (once again based on the *Plaumann* criteria) is put forward by Frontex as well.[58] The second procedure, the action for damages initiated by human rights lawyers, is on behalf of a Syrian family who were allegedly victims of a 'pushback' by Frontex.[59] The family applied for asylum in Greece but were deported by Frontex and Greek authorities on a plane to Turkey, where they were subsequently imprisoned.[60] It is noteworthy that in both procedures, a more 'strategic' actor is acting on behalf of individuals, namely a human rights law firm and an NGO. The procedural reality of Articles 265 and 340 TFEU require this, as these actors (NGO and law firm) themselves cannot prove that they suffered damage or were directly harmed by a failure to act. Similar to the environmental field, these legal actions do not stand alone but are part of a multitude of political and legal efforts undertaken by different actors.[61] This shows the deployment of 'integrated advocacy', using a multitude of strategies simultaneously alongside litigation efforts.[62]

[56] Case T-282/21 *SS and ST v Frontex* [2022] ECLI:EU:T:2022:235; see also Statewatch, 'EU: Frontex asks court to reject human rights case' (n 44).

[57] See Formal Plea of Inadmissibility T-282/21 (*Statewatch.org*, 1 October 2021) <www.statewatch.org/media/3023/formal-plea-of-inadmissibility_redacted.pdf>.

[58] See Ibid.

[59] See Prakken d'Oliveira (n 46).

[60] See Ibid.

[61] See European Ombudsman, 'Ombudsman opens inquiry to assess European Border and Coast Guard Agency (Frontex) 'Complaints Mechanism" (*Ombudsman.europa.eu*, 12 November 2020) <www.ombudsman.europa.eu/en/news-document/en/134739>; Bellingcat, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks' (*Bellingcat*, 23 October 2020) <www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>; Jacopo Barigazzi, 'EU watchdog opens investigation into border agency Frontex' (*Politico*, 11 January 2021) <www.politico.eu/article/olaf-opens-investigation-on-frontex-for-allegations-of-pushbacks-and-misconduct/>.

[62] David Scott FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019) 257–258.

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As can be seen from these examples, the procedural barriers in direct actions are high for strategic litigators. Direct access to the CJEU is limited, which requires legal action to overcome these barriers or legal action by making use of individual complainants. As stated in Section 8.2, EU legal opportunity structures are more 'open' when it comes to the availability of rights: an aspect that is used by the environmental NGOs to their advantage, by arguing for procedural flexibility due to strong substantive protection. EU legal expertise here is, once again, vital to successfully mobilise these procedures. Alongside this, relations need to be established with individuals on behalf of whom strategic litigation can be initiated. Moreover, a persistent strategy with multiple legal actions brought could increase the chances of success, but only time will tell. If the Frontex procedures prove unsuccessful, they can still provide a compelling argument for civil society in Europe that there is a lack of access to justice for fundamental rights violation by EU agencies.[63] This could feed into the discussion of accession to the European Convention on Human Rights as well (see also Chapter 7).

8.3.3 *Third-Party Interventions*

In both the preliminary reference procedure and direct actions, there is the possibility for actors to intervene as a third party. Third-party intervention can be compared to the practice of using an *amicus curiae*, 'friend of the court', who can provide information to the judges to help them decide on the case.[64] By providing the CJEU with arguments, the result of a court procedure can potentially be influenced. This is, therefore, a useful tool in strategic litigation. Moreover, as accessing the Court as a direct litigant is difficult, third-party intervention ensures participation in the proceedings.[65] Nevertheless, intervening in CJEU cases is not an easy feat either, as is described below. In any case, the third party must 'accept the case as he finds it', meaning that no new grounds can be put forward.[66] Still, this tool has been used by several actors before the CJEU. This section first delves into third-party intervention in the preliminary reference procedure, after which intervention in direct actions is discussed.

[63] And in some ways, losing these procedures can be (more) effective. See NeJaime, 'Winning through Losing' (n 3).

[64] Differing views on this exist, nevertheless, the two are used interchangeably in for example Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (Nomos 2018).

[65] Krommendijk and van der Pas, 'To intervene or not to intervene' (n 11), 1395.

[66] Rules of Procedure of the Court of Justice of the European Union [2012] OJ L 265/1, arts 97, 129.

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According to Articles 96 and 97 of the Court's Rules of Procedure, only parties to the main proceedings can submit their observations to the CJEU in a reference for a preliminary ruling. In practice, this means that actors have to be involved at the national level already, otherwise the gates to intervene are closed.[67] In turn, national rules on third-party intervention or submitting amicus briefs differ greatly among the twenty-seven EU Member States.[68] This creates an uneven playing field. In the common law jurisdictions, submitting amicus briefs is relatively easy. This has resulted in some 'strategic' third-party interventions in important cases coming from UK and Irish preliminary references. Most notably, in the case of *N.S. and M.E.*, there were multiple NGOs who intervened, such as UNHCR, Amnesty, and the AIRE Centre.[69] The involvement of the NGOs in this case, a landmark case on the 'Dublin system' and the transfer of asylum seekers in the European Union, was the result of strategic involvement that started at the national level, otherwise intervention at CJEU level would not have been possible. The UK-based AIRE Centre has intervened in multiple CJEU cases in the field of migration and social policy.[70] UNHCR has also intervened in a few CJEU cases, but when formal access was closed, it has turned to informally submitting its views (see Section 8.4.3).[71] As well as these examples from the migration field, interventions are also common in the aforementioned data protection cases.[72] Similarly, these cases originate from a common law jurisdiction and it can be assumed that the actors keep one another involved. This procedural framework places a heavy burden on NGOs who want to be involved in preliminary reference procedures at CJEU level, as they need to be aware of cases at the national level and national rules need to allow for intervention.[73]

[67] Krommendijk and van der Pas, 'To intervene or not to intervene' (n 11).

[68] Sergio Carrera, Marie de Somer, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice', (2012) CEPS paper 49, 16.

[69] Case C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865.

[70] Krommendijk and van der Pas, 'To intervene or not to intervene' (n 11), 1400.

[71] See UNHCR, 'UNHCR Interventions before the Court of Justice of the EU' <www.unhcr.org/protection/operations/5f9ab7d44/unhcr-interventions-court-justice-eu.html>.

[72] Digital Rights Ireland intervened, for example, in the case of Schrems, Case C-362/14 *Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650.

[73] Jasper Krommendijk and Kris van der Pas, 'Third-party interventions before the Court of Justice in migration law cases', (*EU Migration Law Blog*, 29 November 2022) <https://eumigrationlawblog.eu/third-party-interventions-before-the-court-of-justice-in-migration-law-cases/>.

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In direct actions, the possibilities to intervene are a bit broader, as any person that 'can establish an interest in the result of a case submitted to the Court' can intervene.[74] This interest is generally interpreted by the CJEU as meaning that the economic situation of the intervener is directly affected, but there has been a more flexible approach towards associations promoting collective interests.[75] Several environmental cases can be found before the CJEU where parties intervened; however, a problematic aspect for the interveners is that if the applicants in the main proceedings lack standing, there is no possibility to intervene on the merits.[76] Thus, the strict *locus standi* requirements in direct actions have an effect on third-party intervention as well. It is only exceptionally that third-party intervention in direct actions happens in practice.[77]

In sum, although third-party intervention could be a way for NGOs to be involved in strategic litigation, only a few successful examples can be found. A dependency on national rules and the strict requirements in direct procedures before the court form obstacles for this strategic litigation avenue. This makes this avenue resource-intensive: there needs to be awareness of cases brought at the national level for third-party intervention in preliminary rulings and intervening in direct actions is a waste of time if a case does not pass the admissibility stage. Moreover, relations among organisations seem to be of importance: keeping each other informed so that third-party interventions can be submitted.

8.4 OTHER (CREATIVE) WAYS OF USING THE EU REMEDIES SYSTEM

The sections above have elaborated on the most common and well-known form of strategic litigation within the EU remedies system: going to the CJEU. Nevertheless, other avenues are also thinkable and have been used by different actors already. This section elaborates on some of these.

8.4.1 *Petition to the European Court of Auditors*

One institution that has been called upon regarding alleged fundamental rights violations by the EU is the European Court of Auditors (ECA). The

[74] Protocol (No 3) on the Statute of the Court of Justice of the European Union, [2016] OJ C 202/210, art 40.

[75] Krommendijk and van der Pas, 'To intervene or not to intervene' (n 11), 1402; Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Oxford University Press 2015), 787.

[76] Krommendijk and van der Pas, 'To intervene or not to intervene' (n 11), 1402.

[77] Case T-189/14 Deza v ECHA [2017] ECLI:EU:C:2017:4.

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ECA is responsible for carrying out the EU's external audit, supervising control over the EU budget.[78] In April 2020, three NGOs submitted a complaint to the ECA about the mismanagement of EU funds through the 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme.[79] These NGOs are repeat-players in strategic litigation, especially when it comes to the field of migration law.[80] In a novel way, the NGOs link fundamental rights obligations of the EU to the management of funds, alleging that the EU budget is used to violate fundamental rights (in Libya). The ECA responded in May 2020 that it would not initiate a review of the IBM programme at that time, partly due to its limited resources.[81] Still, this complaint presents an interesting case study of a route that could be used successfully. As a downside, the actors submitting such a complaint can do no more than that: submit information to the institution. There is no possibility of formal involvement in any procedure that follows.[82] Nonetheless, if a formal review is initiated by the ECA, this could lead to more accountability of the EU for possible fundamental rights violations and could become a useful avenue in fields other than migration as well.

8.4.2 *Calling upon Other (Non-Judicial) European Institutions*

The aforementioned strategies relate to the use of courts, but other EU institutions can also be called upon to challenge alleged fundamental rights violations by the EU. Under Article 227 TFEU, natural and legal persons

[78] TFEU, arts 285, 287; Nikos Vogiatzis, 'The Independence of the European Court of Auditors', (2019) 56 Common Market Law Review 667.

[79] GLAN, ASGI, ARCI, 'Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme Submitted by Global Legal Action Network (GLAN), Association for Juridical Studies on Immigration (ASGI), and Italian Recreational and Cultural Association (ARCI)' (2020) <www.glanlaw.org/_files/ugd/14ee1a_ae6a20e6b5ea4b00b0aa0e77ece91241.pdf>.

[80] The NGOs are the Association for Juridical Studies on Immigration (ASGI), the Italian Recreational and Cultural Association (ARCI), and the Global Legal Action Network (GLAN). The latter is no longer involved in this complaint, but involvement has been taken over by the NGO De:Border Collective. See GLAN, 'EU Financial Complicity in Libyan Migrant Abuses' <www.glanlaw.org/eu-complicity-in-libyan-abuses>; see Pijnenburg and van der Pas (n 1).

[81] GLAN, 'Petition to European Parliament Challenging EU's Material Support to Libyan Abuses against Migrants' (2020) <www.glanlaw.org/single-post/2020/06/11/petition-to-european-parliament-challenges-eu-s-material-support-to-libyan-abuses-against>.

[82] This can be compared to complaints and information submitted to the International Criminal Court, Pijnenburg and van der Pas (n 1).

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are given the right to address a petition to the European Parliament on EU activities that affect them directly. The same three organisations that submitted the complaint to the ECA have made use of this right of petition on the same topic, the mismanagement of EU funds leading to fundamental rights violations in Libya.[83] The argument made to use Article 227 TFEU is that the organisations consist of EU taxpayers, hence the mismanagement of funds affects them directly.[84] A Committee on Petitions of the European Parliament considers and can follow up on these petitions.[85] For strategic purposes, a downside is that the petition must be brought by the ones directly affected by the EU's activities. Therefore, a strategic litigator cannot send the petition on behalf of a large group of individuals who suffer from EU fundamental rights violations.

A second available route that makes use of an EU non-judicial institution is the submission of information to an EU body such as the European Data Protection Board (EDPB). The NGO noyb of privacy activist Maximilian Schrems has made use of this option, by submitting a complaint to multiple Data Protection Authorities (DPA) in May 2018 about the tech company Meta running personalised ads without user consent.[86] Four years later, in December 2022, news broke that Meta will have to pay a fine of almost 400 million euros.[87] Although the decision on the fine was taken by the Irish DPA, it was pushed by the EDPB to do so. The EDPB coordinates the consistent application of EU privacy rules throughout the EU.[88] Similar to the procedures mentioned before, the involvement of strategic actors stops after submitting a complaint and information. Nevertheless, if the consequent procedure has a positive outcome, the desired impact can become a reality.

A last avenue that is already elaborated on elsewhere in this volume (Chapter 5) is the submission of complaints to the EU Ombudsman. As the Ombudsman is responsible for investigating complaints about

[83] See GLAN (n 81).
[84] See ibid; GLAN, ASGI, ARCI (n 79).
[85] See <www.europarl.europa.eu/committees/en/peti/about>.
[86] See noyb, 'noby win: Personalized Ads on Facebook, Instagram and WhatsApp declared illegal' (6 December 2022) <https://noyb.eu/en/noyb-win-personalized-ads-facebook-instagram-and-whatsapp-declared-illegal>; noyb, 'noyb.eu filed complains of 'forced consent' against Google, Instagram, WhatsApp and Facebook' (25 May 2018) <https://noyb.eu/en/noybeu-filed-complaints-over-forced-consent-against-google-instagram-whatsapp-and-facebook>.
[87] See Thomas Hill and AP, 'Meta fined 390m for privacy law breaches in the EU' (*Euronews*, 4 January 2023) <www.euronews.com/2023/01/04/meta-fined-390m-for-privacy-law-breaches-in-the-eu#:~:text=European%20Union%20regulators%20on%20Wednesday,based%20on%20their%20online%20activity>.
[88] See <https://edpb.europa.eu/about-edpb/about-edpb/who-we-are_en>.

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maladministration of the EU, fundamental rights issues have also been brought to the attention of the EU Ombudsman.[89] For example, several environmental NGOs have submitted a complaint on the European Investment Bank not disclosing information about the environmental impacts of financed projects.[90] This led to the Ombudsman issuing decisions on this topic in April 2022.[91] However, such decisions are non-binding, which poses limits to the effectiveness of this option (if decisions are positive for the strategic actors in the first place).

8.4.3 *Informal Involvement*

Strategic litigation is not always visible: at times, strategic involvement by actors is 'hidden', behind individual clients or other organisations. Such informal involvement can still be a way of influencing legal procedures, including within the EU remedies system, and therefore deserves attention here. For example, as described above, formal third-party intervention in the preliminary reference procedure before the CJEU is rather difficult. In that regard, it is interesting to note that UNHCR has resorted to informal third-party intervention submissions in the form of 'written observations' or 'public statements'.[92] Although the influence of such informal involvement is difficult to measure, it is a way for actors to have their voice heard in Luxembourg. Another way of being involved is through the provision of expert opinions or expertise to lawyers who have cases pending before the CJEU. This is the strategy deployed by the Dutch Council for Refugees (DCR). Due to their network with Dutch migration lawyers, the DCR and their Committee Strategic Litigation is able to (at times) provide arguments to lawyers in preliminary references before the CJEU that originate from the Netherlands.[93] Additionally, in their written submissions before Dutch courts, the Committee often pushes for preliminary questions to be asked.[94] Similarly

[89] It is specifically one of the areas of work of the Ombudsman, see <www.ombudsman.europa.eu/en/areas-of-work>.

[90] See ClientEarth, 'EU Ombudsman reprimands EIB for lack of transparency on funding's environmental impacts' (25 April 2022) <www.clientearth.org/latest/press-office/press/eu-ombudsman-reprimands-eib-for-lack-of-transparency-on-funding-s-environmental-impacts/>.

[91] See Ombudsman, 'Ombudman asks EIB to improve transparency around the projects it finances' (25 April 2022) <www.ombudsman.europa.eu/en/news-document/en/155122>.

[92] See UNHCR (n 71) .

[93] Hoevenaars (n 29); Kris van der Pas, 'All That Glitters Is Not Gold? Civil Society Organisations (non-)Mobilisation of European Union Law' (2024) 62 Journal of Common Market Studies 525.

[94] van der Pas, 'All That Glitters Is Not Gold?' (n 93).

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from the Dutch context, the informal involvement of a law clinic can be pointed out. At the Vrije Universiteit Amsterdam, the Migration Law Clinic has been submitting 'expert opinions', which support the reasoning of the lawyers in the preliminary ruling procedure.[95] Through these lawyers' pleadings, the submissions of the DCR and the law clinic are brought into the case. Again, these types of involvement show the relevance of coalitions and networks, such as contact with national lawyers and knowledge of pending preliminary references and the importance of Euro-expertise.

8.5 CONCLUSION

The collection of examples above warrants several questions. Firstly, how did these actors manage to successfully mobilise or litigate? The answer to that question differs by procedure, but some common denominators can be found. Most importantly, all actors involved have a certain (high) level of EU legal expertise, also referred to as Euro-expertise. In his seminal 1974 article, Galanter already referred to the notion and importance of being a litigating 'repeat-player'.[96] The more resources, knowledge, and experience a litigant has, the higher the chances of success, according to Galanter. Applying this to the present chapter, the same seems to hold true within the EU context. This indicates that more investment into Euro-expertise is worth it. Substantively, Euro-expertise makes benefitting from the availability of rights within the EU remedies system possible. Procedurally, Euro-expertise helps litigants to access the rather closed system and make use of this substantive protection that the EU offers. This chapter has shown the relevance of relations, networks, and coalitions in this respect. A lack of Euro-expertise in one organisation can be compensated with the involvement of another.

Moreover, as litigants sometimes have to work through individual complainants, relations with communities and grassroots organisations seem of importance as well. There is no *actio popularis* possible before the EU courts, which makes clients all the more relevant. Nevertheless, as Section 8.4 has shown, other ways of involvement can circumvent possible difficulties in finding the 'perfect' case, by working around the EU courts in other parts of the EU remedies system.

Additionally, some applicants seem to have gone forum shopping, finding the national legal system most suitable and procedurally more favourable for

[95] See Migration Law Clinic, 'CJEU: Judge must review legality of migration detention measure ex officio' (8 November 2022) <https://migrationlawclinic.org/2022/11/08/cjeu-judge-must-review-legality-of-detention-measure-ex-officio/>.

[96] Galanter, 'Why the "haves" come out ahead' (n 27).

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bringing a complaint about EU fundamental rights violations. This shows the unequal playing field among EU Member States when it comes to strategic litigation. Some systems are more 'open' in terms of legal opportunities than others. For example, in some countries judges might be more willing to pose a preliminary question to the CJEU than in others.[97] Or third-party intervention at the national level is easier. This makes EU legal opportunities dependent on the national level and opens access but not to everybody. Litigators seem to have made use of the available avenues in some Member States, where others are closed.

The second question that results from the current chapter is: How can access to the EU remedies system for strategic litigants be improved? Although a non-normative answer to this question is impossible to provide, the closedness of the EU system in terms of the first dimension of legal opportunity structures indicates that more access to the CJEU and other formal procedural options are desirable. In this regard, there are two different ways forward. The first is the creation of a new procedure, such as a form of collective action or *actio popularis* before the CJEU. Political support for something like this might be lacking.

There is also a (perhaps more feasible) second option: a more relaxed approach towards certain procedural requirements. The *Plaumann* criteria are the most telling example of this, but relaxing the requirements for third-party interventions before the CJEU is also possible (such as the approach of the ECtHR). This opens up EU legal opportunity structures and creates possibilities for strategic litigation. Moreover, what has been highlighted already are the differences between the EU Member States when it comes to procedural rules on access to courts, which in turn influences access to the CJEU. A more equal playing field in this regard is one of the ways in which the current availability of procedures can be streamlined as well. For example, the three EU non-discrimination Directives contain a provision that ensures standing for organisations wanting to tackle discrimination in an administrative or judicial procedure.[98] Such harmonisation on collective action or litigation for a public interest can be a way of securing a more 'open' EU remedies system.

[97] Tommaso Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa' (2018) 53 Law & Society Review 851.

[98] Directive (EC) 54/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23, art 17; Council Directive (EC) 43/2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, art 7; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, art 9.

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