# Who does and who does not engage in strategic litigation in European law?

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# Who Does and Who Does Not Engage in Strategic Litigation in European Law?

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**Abstract**

Both European Union law and the European Convention on Human Rights offer an opportunity structure for a broad array of interests to pursue their objectives through strategic litigation. The spectrum of rights that litigants can claim is sufficiently broad that no consensus has emerged on the general consequences of such litigation. While much research has emphasized European law as a resource for civil society groups, EU law in particular has also been identified as a boon for businesses who challenge cornerstones of coordinated capitalism. This paper sets out to provide a better empirical basis for a normative evaluation of the consequences of strategic litigation in European law by asking who engages in it and who does not. It draws on data from a large-scale survey among interest groups in eight European countries. While results show significant differences in country-level litigation rates, the focus of this analysis is on the impact of group characteristics on the choice of litigation as a strategy. The findings confirm that litigation requires specific resources but highlight that groups with a prior interest in European affairs and those with antagonistic relations to national authorities are the most likely to turn to strategic litigation based in European law.

**Keywords:** Strategic litigation; European Union; legal mobilization; interest groups; social movement organizations

## A. Introduction

European sources of law, such as the law of the EU and the European Convention on Human Rights (ECHR), constitute resources for individuals, groups and companies to challenge the domestic status quo through strategic litigation. The potential for European law to disrupt national "politics as usual" is well established,[1] but there is no consensus on its normative implications. Much of the literature that has explored strategic litigation in Europe has focused on specific types of litigants and explored the opportunities offered by European law for their specific purposes. Individual studies point to specific groups and interests that have successfully mobilized European law to advance their political interests. The cases are quite diverse: The success of anti-discrimination and women's groups[2], disability rights

[1] *See generally* Karen J. Alter & Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMPAR. POL. STUD. 452 (2000); Lisa Conant, Andreas Hofmann, Dagmar Soennecken & Lisa Vanhala, *Mobilizing European Law*, 25 J. EUR. PUB. POL'Y 1376 (2018).

[2] *See generally* Rachel A. Cichowski, *Women's Rights, the European Court, and Supranational Constitutionalism*, 38 L. & SOC'Y REV. 489 (2004) [hereinafter Cichowski, *Women's Rights*]; Alter & Vargas, *supra* note 1; Rachel A. Cichowski, *Legal Mobilization, Transnational Activism, and Gender Equality in the EU*, 28 CANADIAN J. L. & SOC'Y 209 (2013) [hereinafter

advocates[3], environmental groups[4], minority rights activists,[5] or asylum seekers[6] point to the "progressive" potential of European law to empower marginalized groups. Other scholars highlight a market-making bias in the structure of EU law in particular, which grants an advantage to internationally mobile business interests. Richard Rawlings wrote in 1993 about the "potential in the internal market for the use of litigation strategies to achieve economic ends by powerful corporate interests."[7] Others have highlighted that corporate EU law litigation comes at the expense of domestically organized labor interests.[8] Similarly, the intense controversy over investor-state dispute settlement clauses in controversial free trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP) has focused on the potential for such sources of law to present opportunities for international commercial interests to undermine domestic regulatory standards.[9] As the introduction to this special issue states, it is an open question whom such strategic litigation empowers.

Empowerment is not an easy concept to measure empirically. Empowerment in the present context rests on how much individuals, groups or companies succeed in using the outcome of strategic litigation to achieve their wider political objectives. A necessary condition for such empowerment, however, is that groups engage in strategic litigation in the first place. This first step is easier to observe, but it too poses methodological problems. In particular, a systematic analysis of strategic litigants needs to compare the experiences of different types of interests, including groups that have not engaged in strategic litigation. Negative cases tell us a lot about the incentive structure for potential litigants, but research is only slowly turning to this.[10] The present Article addresses this issue by drawing on data from a large-scale survey of European interest groups, the "Comparative Interest Group Survey,"[11] which allows for a detailed comparative

Cichowski, *Legal Mobilization*]); Aude Lejeune & Julie Ringelheim, *The Differential Use of Litigation by NGOs: A Case Study on Antidiscrimination Legal Mobilization in Belgium*, 48 L. & Soc. Inquiry 1365 (2022).

[3]*See generally* Aude Lejeune & Julie Ringelheim, *Workers with Disabilities Between Legal Changes and Persisting Exclusion: How Contradictory Rights Shape Legal Mobilization*, 53 L. & Soc'y Rev. 983 (2019); Lisa Vanhala, *Fighting Discrimination Through Litigation in the UK: The Social Model of Disability and the EU Anti-Discrimination Directive*, 21 Disability & Soc'y 551 (2006).

[4]*See generally* Konstantin Reiners & Esther Versluis, *NGOs as New Guardians of the Treaties? Analysing the Effectiveness of NGOs as Decentralised Enforcers of EU Law*, 30 J. Eur. Pub. Pol'y 1518 (2022); Annette Elisabeth Töller, *Driving Bans for Diesel Cars in German Cities: The Role of ENGOs and Courts in Producing an Unlikely Outcome*, 7 Eur. Pol'y Analysis 486 (2021); Andreas Hofmann, *Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union*, 28 Env't Pol. 342 (2019); Rachel A. Cichowski, *Integrating the Environment: The European Court and the Construction of Supranational Policy*, 5 J. Eur. Pub. Pol'y 387,(1998); Tanja A. Börzel, *Participation Through Law Enforcement:The Case of the European Union*, 39 Compar. Pol. Stud. 128 (2006); Luz Muñoz & David Moya, *Creating Space for Supranational Law: Environmental Legal Mobilization and Spanish NGOs*, *in* Research Handbook on Law and Courts 23 (Susan M. Sterett & Lee D. Walker eds., 2019).

[5]*See generally* Sophie Jacquot & Tommaso Vitale, *Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level*, 21 J. Eur. Pub. Pol'y 587 (2014); Rhonda Evans Case & Terri E. Givens, *Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive*, 48 J. Common Mkt. Stud. 221 (2010).

[6]*See generally* Virginia Passalacqua, *Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU*, 15 L. & Dev. Rev. 381 2022) [hereinafter Passalacqua, *Who Mobilizes?*]; Kris van der Pas, *All That Glitters Is Not Gold? Civil Society Organisations and the (Non-)Mobilisation of European Union Law*, 62 J. Common Mkt. Stud. 525 (2024).

[7]Richard Rawlings, *The Eurolaw Game: Some Deductions from a Saga*, 20 J. L. & Soc'y, 309, 309 (1993).

[8]*See generally* Fritz W. Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy'*, 8 Socio-Econ. Rev. 211 (2010); Sacha Garben, *The Constitutional (Im)Balance between 'the Market' and 'the Social' in the European Union*, 13 Eur. Const. L. Rev. 23(2017); Andreas Hofmann, *The Legal Mobilisation of EU Market Freedoms: Strategic Action or Random Noise?*, W. Eur. Pol. 1 (2024) (online first).

[9]Taylor St John, The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences 5 (Oxford University Press 2018).

[10]van der Pas, *supra* note 6; Passalaqua, *Who Mobilizes?*, *supra* note 6.

[11]*See generally* Jan Beyers, Danica Fink-Hafner, William A. Maloney, Meta Novak, & Frederik Heylen, *The Comparative Interest Group-Survey Project: Design, Practical Lessons, and Data Sets*, 9 Int. Grps. & Advoc. 272 (2020).

analysis with significant variance on the variable of interest: strategic litigation in European law. The Article will use data from surveys conducted in Belgium, the Czech Republic, Lithuania, the Netherlands, Poland, Portugal, Slovenia, and Sweden. The central advantage of these data is their representativeness for the wider interest group population, which allows for a consideration of negative cases. This is important because a large majority of interest groups do not engage in strategic litigation. A drawback is that this approach perpetuates the existing literature's focus on civil society actors because the survey was not administered to companies. However, the survey comprises more than public interests. It samples the whole interest group population, including business groups, professional associations, trade unions, and non-governmental organizations (NGOs). As in my previous work,[12] it allows for a comprehensive test of assumptions about the drivers of strategic litigation but adds here a focus on European law as a specific resource for strategic litigators.

The Article is structured as follows. In the next section, I will discuss the terms "strategic litigation" and "empowerment" in more detail. This is followed by an overview of theoretical assumptions about the drivers of strategic litigation in European law, which guides the subsequent analysis. I proceed by introducing the data and then show results based on my operationalization of theoretical concepts. A final Section concludes.

## B. Strategic Litigation, Repeat Players, and Empowerment

As Pola Cebulak, Marta Morvillo, and Stefan Salomon write in their introduction, strategic litigation is "a legal action initiated to achieve broader social, political, or economic ends."[13] While pointing out the ambiguities of the term, Kris van der Pas highlights that for litigation to be "strategic," it must entail an element of choice on the part of the litigant, plus the pursuit of an objective beyond the individual case at hand.[14] Strategic litigation overlaps with Marc Galanter's notion of "playing for the rules."[15] Litigation that "plays for the rules" is concerned with "the rules which govern future cases of the same kind,"[16] and has comparatively low stakes in the immediate outcome of a case. This type of litigation is usually the purview of "repeat players."[17] Repeat players are actors who regularly—even routinely—engage in litigation and can discount individual case outcomes against gains that will increase the likelihood of success for future action, within or outside the courtroom. Strategic litigation constitutes an alternative to more traditional means to affect the policy status quo: Advocacy, lobbying, mobilization, or protest. However, strategic litigation is rarely pursued in isolation from other efforts.[18] Research has also demonstrated that strategic litigation will rarely have a lasting impact on the policy status quo if it is not flanked by political mobilization.[19]

A central normative concern in the literature on strategic litigation is who most stands to benefit from it. Galanter's notion of the repeat player explicitly states that the concept "is not to be equated with 'haves' (in terms of power, wealth and status)", even though, "in the American setting most [repeat players] are larger, richer and more powerful" than other litigants.[20] Repeat

[12]*See generally* Andreas Hofmann & Daniel Naurin, *Explaining Interest Group Litigation in Europe: Evidence from the Comparative Interest Group Survey*, 34 Governance 1235 (2021).

[13]Pola Cebulak, Marta Morvillo & Stefan Salomon, *Strategic Litigation in EU Law: Who Does It Empower?*, 25 German Law Journal (2024).

[14]Kris van der Pas, *Conceptualising Strategic Litigation*, 11 Oñati Socio-Legal Series 116, 119–20 (2021).

[15]Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev., 95, 100 (1974).

[16]*Id.*

[17]*Id.*

[18]*Id.*; Hofmann & Naurin, *supra* note 12.

[19]Gerald Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 420 (University of Chicago Press. 2d ed. 2008).

[20]Galanter, *supra* note 15, at 103.

players, however, may include "champions of the 'have-nots.'"[21] Cebulak, Morvillo, and Salomon put it similarly in their introduction: "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."[22] Similarly, accounts of European public interest litigation highlight that European courts can be venues for actors that have limited access to domestic policy making, whereas literature on EU market liberalization highlights the actions of business interests. Both accounts, of course, are not mutually exclusive, and an overall evaluation will need to rest on a circumspect assessment of conflicting trends. Whether strategic litigation in European law brings about "a shift or redistribution of power,"[23] depends on the outcome of a chain of events; not all of which can always be observed at the same time. An actor with an interest in shifting the status quo will need to decide whether to engage in litigation. Court judgments, even when they do bring about the desired shift in the litigant's legal position, do not automatically have real world effects.[24] A lasting redistribution of power requires effects in "the square," and "the palace."[25] Capturing the latter requires a larger research program. The first step—litigation—is easier to observe. Because litigation is a necessary condition for impact—empowerment—this Section will focus on the immediately observable. This Section will therefore ask which actors make use of strategic litigation in European law, without the ability to assess whether it actually "empowers" them. This Section can only give a small indication in this regard by reviewing how litigants self-assess the outcome of their litigation effort.

## C. Who does and who does not Engage in Strategic Litigation in European Law?

Strategic litigation is a demanding course of action that not every actor with an interest in changing the status quo will be able to pursue. In their introduction, Cebulak, Morvillo, and Salomon identify a number of factors that can influence the propensity of actors to pursue such a strategy. These factors relate to the actors themselves as well as the structure within which such actors operate.

### *I. Actors*

At the level of individual actors, Cebulak, Morvillo, and Salomon name resources, expertise and actors' involvement in networks as important factors structuring strategic litigation in European law. This gives expression to the "party capability" literature[26] and conforms to what we know about legal mobilization and strategic litigation more broadly.[27] Group resources are a central factor to determining strategy choice that has been widely studied in interest group research.[28] All advocacy efforts require some sort of investment, mainly in terms of manpower, but also in additional material resources for such things as procuring and distributing information, campaign materials, travel expenses, and back-office support.[29] Litigation as a specific type of advocacy tactic also requires specific resources[30] in the form of legal representation and physical access to the

[21] *Id.*

[22] Cebulak, Morvillo & Salomon, *supra* note 13, at 8.

[23] *Id.*

[24] Rosenberg, *supra* note 19.

[25] Cebulak, Morvillo & Salomon, *supra* note 13.

[26] Ian Brodie, Friends of the Court : The Privileging of Interest Group Litigants in Canada 7 (SUNY Press 2002); Paul M. Collins, Friends of the Supreme Court: Interest Groups and Judicial Decision Making 21 (Oxford University Press 2008).

[27] Hofmann & Naurin, *supra* note 12.

[28] Thomas L. Gais & Jack L. Walker, *Pathways to Influence in American Politics*, *in* Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements 105 (Jack L. Walker ed., 1991).

[29] *Id.* at 112; Karen O'Connor, Women's Organizations' Use of the Courts 19–20 (Lexington Books 1980).

[30] O'Connor, *supra* note 29, at 23; Carol Harlow & Richard Rawlings, Pressure through Law 115 (Routledge, 1st ed., 1992).

courtroom, including court fees and travel expenses. European law, moreover, is a specialty field not necessarily covered by groups active in domestic policy sectors even where they may have some legal expertise. It takes a certain amount of specialized knowledge to be aware about the opportunities offered by European law and how to seize them. Such awareness and perception affect strategy choice.[31] Legal proceedings involving European law may also prove more protracted, as cases may be referred to the Court of Justice of the European Union (CJEU) or result in an application lodged with the European Court of Human Rights (ECtHR), causing long delays and substantial additional legal costs and other expenses—such as for travel.[32] The actors most likely to overcome such obstacles are groups with large, paid staff that can process the required amount of information, legal expertise, and specialist knowledge about European law. The involvement in networks of like-minded actors alleviates some of the resource constraints, as shared resources can lead to efficiency gains.

The observation that strategic litigation is regularly embedded in other advocacy efforts points to another factor that affects an actor's propensity to pursue strategic litigation: The availability of alternative courses of action. Groups with good access to policymakers have more opportunities for influence than groups that do not. Early studies of strategic litigation by US interest groups followed the assumption that courts could be venues for the politically disadvantaged.[33] Where access to policymakers was scarce, largely because of adverse political preferences, courts would be more open to unpopular claims. Strategic litigation would therefore be a tactic favored by outsiders. Later literature has emphasized that this assumption was too one-sided.[34] Focusing on Europe, Daniel Naurin and I found—on a smaller sample of cases—that there is no contradiction between good access to policymakers and strategic litigation.[35] Powerful insiders also litigate.[36] However, European law offers domestically disadvantaged groups a set of new resources, through procedural and substantive rights and new venues that they can use to bypass unsympathetic national venues. Karen Alter and Jeanette Vargas voiced this assumption in one of the earliest studies on strategic litigation in EU law. They emphasized EU law as a resource for "politically marginalized actors."[37] Rachel Cichowski has argued that EU law opens "new social spaces" that can "serve as opportunities" to individuals and groups.[38] This premise has since been widely repeated. Virginia Passalacqua finds that EU migration law has opened new venues and "given migrants new tools to contest State policies."[39] Also writing about migration, Kris van der Pas holds that "the CJEU has presented [civil society organizations] with a new forum in which to litigate; a potential extra 'asylum court.'"[40] Jos Hoevenaars finds that EU law "provides the public with new means of addressing possible government trespasses".[41] More concretely, van der Pas writes that the groups she observes adopting a strategy of litigation in EU law do so out of

[31]Lisa Vanhala, *Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy*, 51 Compar. Pol. Stud. 380, 395 (2018); van der Pas, *supra* note 6.

[32]Passalacqua, *Who Mobilizes? supra* note 6, at 398.

[33]Collins, *supra* note 26, at 20; Brodie, *supra* note 26, at 3; Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP and the Restrictive Covenant Cases (University of California Press 1959); Richard C. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. Pub. L. 287, 287 (1968).

[34]Brodie, *supra* note 26, at 6.

[35]Hofmann & Naurin, *supra* note 12.

[36]Susan M. Olson, *Interest Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. Pol. 854, 863 (1990).

[37]Alter & Vargas, *supra* note 1, at 455 .

[38]Cichowski, *Legal Mobilization*, *supra* note 2, at 211.

[39]Virginia Passalacqua, *Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights*, Common Mkt. L. Rev. 751, 753 (2021) [hereinafter Passalacqua, *Legal Mobilization*].

[40]van der Pas, *supra* note 6, at 529.

[41]Jos Hoevenaars, *Lawyering Eurolaw: An Empirical Exploration into the Practice of Preliminary References*, 5 Eur. Papers 777, 781 (2020).

dissatisfaction with domestic opportunities.[42] Lisa Vanhala, also finds that environmental NGOs engage in EU law litigation out of a "perceived inability to participate in [domestic] policy making,"[43] and Passalacqua describes how migrant defenders took to strategic litigation in EU law as the result of "a lengthy battle against the [UK] home office."[44] All these studies suggest that the "political disadvantage theory" might be more applicable to strategic litigation in European law than in domestic contexts.

### II. Structure

Beyond agent characteristics, Cebulak, Morvillo, and Salomon expect structural factors to influence the use of strategic litigation in EU law. These structural features are primarily procedural rules and the substantive content of European law that might offer potential litigants an advantage to move the domestic status quo.

Strategic litigation in European law largely depends on access to the national judiciary. Direct action before the CJEU is limited. To challenge EU acts before the CJEU, individuals, groups and companies need to show direct and, in many cases, individual concern. The CJEU has interpreted this restrictively. Standing is limited to litigants that can show that the act was addressed to them individually, or a closely analogous situation.[45] Much of the "life" of EU law therefore takes place in national courts. At times, national courts refer such cases to the CJEU. There is now extensive literature on variance in national and subnational reference rates and the motivations of national judges to refer.[46] What we do not know, due to restrictive publication practices for domestic judgments,[47] is the ratio of cases in which a point of EU law has been raised that were referred to the CJEU to those cases that were not. The intuition, however, is that the vast majority of this "universe of cases" stays in domestic courtrooms, where judges independently apply EU law.[48] A reference is not always a priority of strategic litigants. It is generally only in their interest if national judges are otherwise unlikely to follow the interpretation of EU law proposed by the plaintiffs. Otherwise, a reference adds to the costs and the duration of the proceedings. Some litigants are overwhelmed by this process.[49] Litigation before the ECtHR, however, generally requires an exhaustion of domestic remedies. Here, too, litigants are usually better off if they can convince national judges to apply the ECHR themselves. The ECtHR admits only a small fraction of all cases and relies on national courts to give wider effect to the ECHR.[50]

For strategic litigation in European law, the national legal system is therefore key. National procedural rules structure access to courts for potential litigants. The totality of such rules is often referred to as the "legal opportunity structure"[51] for strategic litigation. As Passalacqua points out,

[42]van der Pas, *supra* note 6, at 533.

[43]Vanhala, *supra* note 31, at 400–01.

[44]Passalacqua, *Legal Mobilization, supra* note 39, at 763.

[45]Giulia Gentile, *The Power of Procedure: Fundamental Rights in the Action for Annulment before EU Courts*, *in* REDRESSING FUNDAMENTAL RIGHTS VIOLATIONS BY THE EU 13, 19 (Melanie Fink ed., 2024).

[46]*See generally* Cliffrod J. Carruba & Lacey Murrah, *Legal Integration and the Use of the Prliminary Ruling Process in the European Union*, 59 INT'L ORG. 399, 401 (2005); Karin Leijon & Monika Glavina, *Why Passive? Exploring National Judges' Motives for Not Requesting Preliminary Rulings*, 29 MAASTRICHT J. EUR. & COMPAR. L. 263 (2022); R. Daniel Kelemen & Tommaso Pavone, *The Political Geography of Legal Integration: Visualizing Institutional Change in the European Union*, 70 WORLD POL. 358 (2018); Arthur Dyevre, Monika Glavina, & Angelina Atanasova, *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, 27 J. EUR. PUB. POL'Y 912 (2020).

[47]Hanjo Hamann, *Der Blinde Fleck Der Deutschen Rechtswissenschaft – Zur Digitalen Verfügbarkeit Instanzgerichtlicher Rechtsprechung*, 76 JURISTENZEITUNG, 656, 656 (2021) (Ger.).

[48]Alter & Vargas, *supra* note 1, at 475.

[49]JOS HOEVENAARS, A PEOPLE'S COURT? A BOTTOM-UP APPROACH TO LITIGATION BEFORE THE EUROPEAN COURT OF JUSTICE (Eleven International Publishing 2018); Passalacqua, *Who Mobilizes?*, *supra* note 6.

[50]DANIEL THYM, EUROPEAN MIGRATION LAW 132 (Oxford University Press 2023).

[51]*See generally* Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 J. EUR. PUB. POL'Y 238 (2011); Case & Givens, *supra* note 5; ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS. LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (University of Michigan Press. 2004).

this could potentially "indicate anything that affects opportunities for mobilization,"[52] which makes it a murky analytical concept. The consensus is that it includes rules on legal standing, but other procedural aspects such as available remedies, preclusion rules, rules on the burden of proof, statutes of limitation, rules on legal fees and the allocation of costs, award caps, or the availability of legal aid also contribute to opportunities for strategic litigation.[53] Beyond strict procedural rules, research has focused on the existence of a "support structure" for strategic litigation,[54] such as legal clinics or pro bono work by law firms.[55] This is a factor of the strength of civil society engagement rather than aspects of legal systems.

Three additional factors complicate work that relies on legal opportunity structures as an explanatory variable for strategic litigation. First, Chris Hilson argued that opportunities for strategic litigation include the "receptivity" of judges towards certain types of legal arguments.[56] Such a focus is especially pronounced in work on strategic litigation in European law, which requires a national judiciary that is willing to accept arguments that transgress the domestic legal order. Research points to cross-national differences in the judiciary in this regard.[57] Rates of preliminary references have sometimes been used as a proxy for such receptivity, and factors that have been tested include a monist versus a dualist legal system, and the presence or absence of a tradition of judicial review.[58] However, as Alter and Vargas point out, "no national legal system [ . . .] is so monolithic or complete as to preclude the existence of a sympathetic judge".[59]

Second, while the term "structure" denotes a frame that is generally stable and external to the actors that act within it; procedural rules themselves can be the subject of strategic litigation. As Vanhala highlights, "movement activists are not passive actors simply responding to externally imposed legal opportunities but instead play a role in creating their own legal opportunities."[60] She goes on to show that some litigants will go to court even when there is a low likelihood of success, because legal defeat can be a valuable focal point for political mobilization that demonstrates the inequities of existing rules.

Third, Vanhala and others have pointed out that legal opportunities need to be perceived as such by potential litigants, and that there are stark discrepancies in how groups evaluate opportunities within the same set of procedural rules.[61] Aude Lejeune and Julie Ringelheim therefore speak of legal opportunity as a "necessary condition" for strategic litigation.[62] It is conceivable that once a threshold on one of the factors that shape legal opportunity is met, strategic litigation becomes possible, but that increasing opportunity does not necessarily correspond to increasing litigation efforts.[63] From the point of view of potential litigants, legal opportunity is undoubtably an important factor that shapes litigation campaigns, but, analytically, it may be of lesser explanatory value in correlational studies.

[52]Passalacqua, *Legal Mobilization, supra* note 39, at 757.

[53]Lejeune & Ringelheim, *supra* note 2, at 1367; Alter & Vargas, *supra* note 1, at 471.

[54]Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective 3 (University of Chicago Press. 1998).

[55]Case & Givens, *supra* note 5, at 224–25.

[56]Hilson, *supra* note 51, at 243.

[57]*See generally* Marlene Wind, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, 48 J. Common Mkt. Stud. 1039 (2010); Jonathan Golub, *The Politics of Judicial Discretion: Rethinking the Interaction Between National Courts and the European Court of Justice*, 19 W. Eur. Pol. 360 (1996); Alter & Vargas, *supra* note 1, at 474.

[58]Carruba & Murrah, *supra* note 46, at 403–04.

[59]Alter & Vargas, *supra* note 1, at 475.

[60]Lisa Vanhala, *Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, 46 L. & Soc'y Rev., 523, 525 (2012).

[61]Vanhala, *supra* note 31; van der Pas, *supra* note 6; Lejeune & Ringelheim, *supra* note 2.

[62]Lejeune & Ringelheim, *supra* note 2, at 1368.

[63]*See* Charles R. Epp, *The Support Structure as a Necessary Condition for Sustained Judicial Attention to Rights: A Response*, 73 J. Pol. 406, 406–09 (2011) (presenting a similar argument).

Next to procedural rules, the second structural factor that Cebulak, Morvillo, and Salomon suggest shapes strategic litigation in European law is the substantive content of such law. The collection of rights and obligations on which litigation can rely is often referred to as "legal stock" in socio-legal studies, and many studies count it towards the legal opportunity structure discussed above. For the purposes here, however, it is useful to treat it separately. As discussed in the context of the "political disadvantage theory," European law can be of value to individuals, groups, and companies that feel disadvantaged by domestic law and lack access to domestic policymaking venues. This value may differ between areas of interest, as concomitant rights in European law are not uniform. Economic actors, as discussed, can find resources in EU internal market law, environmental groups in EU environmental law, human rights groups in the ECHR and the EU Charter of Fundamental Rights. This, however, points to a difficulty in deriving predictions from the legal stock. European law covers nearly every policy field. Even trade unions, widely held to be disadvantaged in industrial action by EU rights for entrepreneurs, have been active litigants in promoting gender equality, better working conditions and other individual labor rights based in European sources of law.[64] Fritz Scharpf's expectation that EU law litigants will "constitute an extremely skewed sample of all the interest constellations that are affected by European integration," and, that they will "reflect the interests of the parties who have a major economic or personal stake in increased factor or personal mobility"[65] has recently faced criticism.[66] The EU legislature has enacted a broad catalogue of market-correcting legislation that the CJEU is willing to uphold.[67] As with procedural rules, the meaning of European law, and with it its potential as a resource, is to some degree in the eye of the beholder. Nonetheless, an answer to the question of who sees opportunities in European law is a necessary precondition for an assessment of who it ultimately empowers, and a finding of systematic biases in favor of certain interest would be a strong result.

## D. Data

In order to test these assumptions, I use data from the Comparative Interest Group Survey Project (CIGS), which collects "systematic data on various organizational aspects of interest groups in a wide range of European political systems."[68] At the time of writing, data are available for eight countries: Belgium, the Czech Republic, Lithuania, Netherlands, Poland, Portugal, Slovenia and Sweden. In these countries, CIGS constructed a representative overview of the domestic interest group population. The survey targeted organized groups with a demonstrated aim to influence public policy outside the electoral arena.[69] As mentioned, this excludes individual companies but includes business groups and professional associations. The country surveys used different methods in establishing the baseline population, relying on sources such as directories and registries, or lists of groups that had contacted government agencies. The project's principal investigators outline these methods in more detail in their introduction to the project,[70] and detailed information is also available from the data page on the CIGS website.[71] All methods have

[64]Hofmann, *supra* note 8; Filiz Kahraman, *What Makes an International Institution Work for Labor Activists? Shaping International Law Through Strategic Litigation*, 57 L. & Soc'y Rev. 61, 73–74 (2023); Rachel A. Cichowski, The European Court and Civil Society: Litigation, Mobilization and Governance 74–76 (Cambridge University Press 2007).

[65]Scharpf, *supra* note 8, at 221.

[66]*See generally* Jan Zglinski, *The End of Negative Market Integration: 60 Years of Free Movement of Goods Litigation in the EU (1961–2020)*, 31 J. Eur. Pub. Pol'y 633 (2024).

[67]Martijn van den Brink, Mark Dawson, & Jan Zglinski, *Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU*, 31 J. Eur. Pub. Pol'y 1, 13 (2023).

[68]Beyers, Fink-Hafner, Maloney, Novak, & Heylen, *supra* note 11, at 273.

[69]*Id.* at 276.

[70]*Id.* at 279–81.

[71]Beyers, J., Fink-Hafer, D., Maloney, W., Novak, M., Heylen, F., *The Comparative Interest Group Survey Project*, CIGS Data (Oct. 16, 2024), http://www.cigsurvey.eu/data.

in common that they do not establish a cut-off point for political activity. As a result, the survey contains groups that were only occasionally politically active. Data for Belgium, Lithuania, the Netherlands, Slovenia and Sweden were collected between 2015 and 2016, and in the Czech Republic, Poland and Portugal between 2018 and 2019. Response rates to the survey were mostly in line with standards for such research, with an average of about 35 percent.

All surveyed countries are members of the EU, spanning both Western European neo-corporatist and Eastern European post-communist political systems as well as a Southern European country. These countries have not yet received the same amount of academic attention as the UK, France or Germany in research on strategic litigation. Their diversity increases the generalizability of the results. I have no *a priori* theoretical reason to believe that patterns identified in this analysis should look very different in other types of political systems in Europe.

## E. Analysis and Results[72]

I start with a descriptive overview of the litigation activity of the groups in my sample. I use a survey item that asks the following question to discern between respondents who have engaged in strategic litigation and those who have not engaged in strategic litigation: "During the past three years, did your organization initiate or in other ways contribute to legal proceedings, in order to claim rights and/or promote your organization's goals"? I believe that this question adequately captures the concept of strategic litigation, without specifically priming respondents to think in terms of social change. In addition, I use an indicator for the specific source of law. This is a survey item that asks: "Did the issues at stake in these proceedings concern the relationship between [your country] and international/European law"? The wording of the question does not allow me to differentiate between different sources of European or international law. The fact that the survey exclusively comprises interest groups in EU and Council of Europe member states suggests, however, that EU law and the ECHR will have figured prominently among the available sources of law.

The combined survey items allow me to create an outcome variable that can take on three values. I assigned the value "did not litigate" to groups that answered "no" or "do not know" to the first question, the value "litigated European/international law" to groups that answered "yes" to the second question, and "litigated national law" to groups that answered "no" or "do not know" to the second question or did not answer this question at all. Out of the 2,798 groups in the survey which answered all relevant questions, 623—22%—responded that they engaged in litigation. Out of the 623 groups that litigated, 191 reported that this litigation involved European or international law, a ratio of about three in ten. This indicates that strategic litigation in European law is a rare but not a marginal phenomenon. I will proceed with the analysis in reverse order of the presentation of theoretical assumptions in the previous section. I will start with the substantive focus of the sampled groups, continue with potential effects of national procedural rules, and move on to the effect of group characteristics such as resources, expertise, networks and access to domestic policymakers. A final section of the empirical analysis explores how groups evaluate their experience of strategic litigation.

### *I. Substantive Law*

Figure I addresses possible effects of the legal stock of European law on interest group litigation in the eight European countries. The CIGS survey differentiates between eight group types: Business groups, professional associations, trade unions, cause groups—largely equivalent to public interest NGOs—identity groups—such as religious organizations—leisure groups—such as associations of bird watchers—public authorities—such as associations of municipalities—and "other" groups that were not classifiable. Group types are interesting to the degree that they give an indication of

[72]R code for replication is available at (Oct. 16, 2024) https://github.com/ahofmann-eu/Interest_group_litigation.

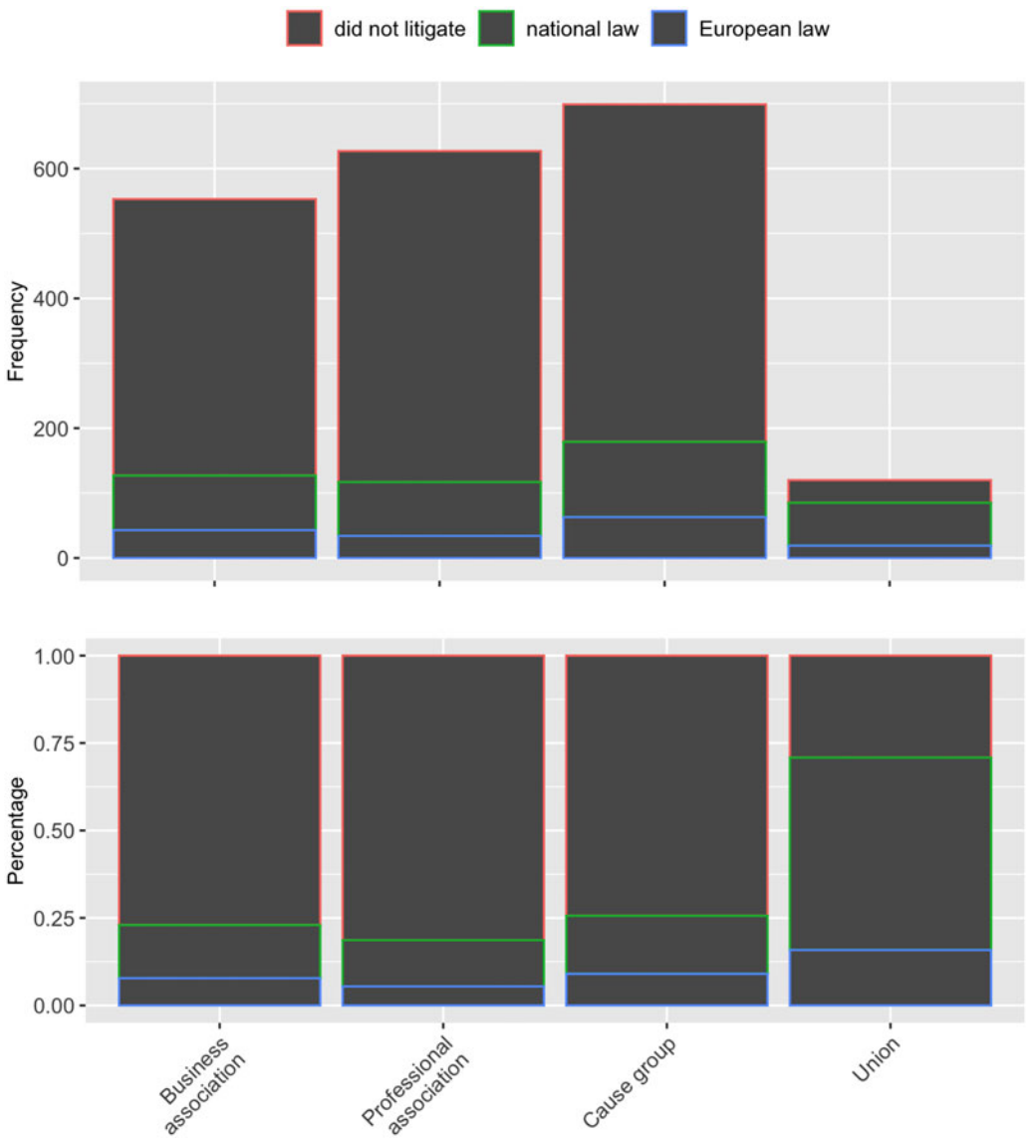


**Figure 1.** Strategic litigation by type of interest

the substantive interests these groups pursue. Their "litigation profile" therefore gives an indication of what legal stock is attractive to litigants. In a rough approximation, business groups and professional associations are more likely to pursue market-liberal interests, trade unions are more likely to pursue market-correcting interests, and cause groups are more likely to pursue public interests of various kinds. Figure I focuses on these four group types, which together make up about two-thirds of the total sample.

The upper part of the figure presents absolute frequencies, while the lower part presents percentages. Business groups, professional associations, and cause groups look very similar in their choice of strategic litigation as a strategy. For all three types, about one in three groups that have pursued strategic litigation have done so based on European or international law. CIGS data, therefore, give no indication that European law is more attractive to market-liberal interests than

public interests. All three group types find European legal stock to support their litigation strategies. Trade unions are a special case. For one, they are more litigious than other group types. Legal representation—of their members—in labor conflicts is part of the core services unions offer. This makes them much more likely to answer "yes" to the outcome question. About fifteen percent of all unions in the sample reported having engaged in strategic litigation based on a European or international source of law—about one in five of those who have pursued strategic litigation of any kind. This indicates that there is—market correcting—European legal stock that is attractive to trade unions.

### II. (Procedural) Legal Opportunity Structures

Figure II presents results aggregated by country of origin, my proxy for the most important source of variation in legal opportunity structures. As above, the upper part of the figure presents absolute frequencies, while the lower part presents percentages. Litigation activity differs markedly across countries, but the patterns are not intuitive. With only eight cases and given the large number of elements that make up legal opportunity structures, it is difficult to explore such cross-national differences systematically—such a research design would be substantially over-determined. Any generalization can only be speculative. I will, therefore, merely point out where findings contradict existing assumptions, keeping in mind that findings for individual countries could be outliers. My variable of interest is the use of European law by groups in different legal systems. Groups in Portugal, Sweden, and the Netherlands were the most likely to have reported strategic litigation based on European law. The Netherlands have a strong monist tradition, but Sweden is a dualist country. Neither country has a tradition of judicial review of statutes. They differ markedly in rates of preliminary references from domestic courts—few from Sweden, many from the Netherlands[73]—which is sometimes used as a proxy for judges' receptivity for arguments based on EU law. This points to the difficulty of deriving systematic expectations about litigant behavior from the concept of legal opportunity structures, given the ultimately limited number of cases even if the current sample were to be expanded.

### III. Actors

In the next analytical step, I look at actor characteristics that may favor strategic litigation in European law. For this, I ran a multinomial regression on the outcome categories. I chose a multinomial model because the outcome variable has three categories. In this fashion, I get comparable predictors.[74] First, I extract information from the survey that can give me an indication of a group's resources, its legal expertise and its involvement in networks. The public CIGS data do not contain information on actual group budget, but because groups spend much of their resources on manpower, I use an item that asked about the number of the group's paid staff—in full time equivalents.[75] Due to the right-skewedness of the distribution—a large majority of groups have very few paid staff members while a small amount of groups have very many—I use logarithmic staff numbers. For a measure of—general—legal expertise, I included—as a dichotomous variable—a survey item that asked about the presence of an "in-house legal expert." For the involvement in networks, I used a survey item that asked the group about the frequency of various activities, one of which was "establish coalitions with like-minded organizations."

[73]Court of Justice of the European Union, Annual Report 2023. Statistics Concerning the Judicial Activity of the Court of Justice 31 (2024).

[74]The replication material includes alternative models, such as a seemingly related regression. Results do not differ markedly.

[75]Jan Beyers, Danica Fink-Hafner, William A. Maloney, Meta Novak, Frederik Heylen, *Comparative Interest Group Survey Questionnaire,* CIGS (Oct. 16, 2024) https://www.cigsurvey.eu/wp-content/uploads/2024/03/survey_questionnaire_basic.pdf.

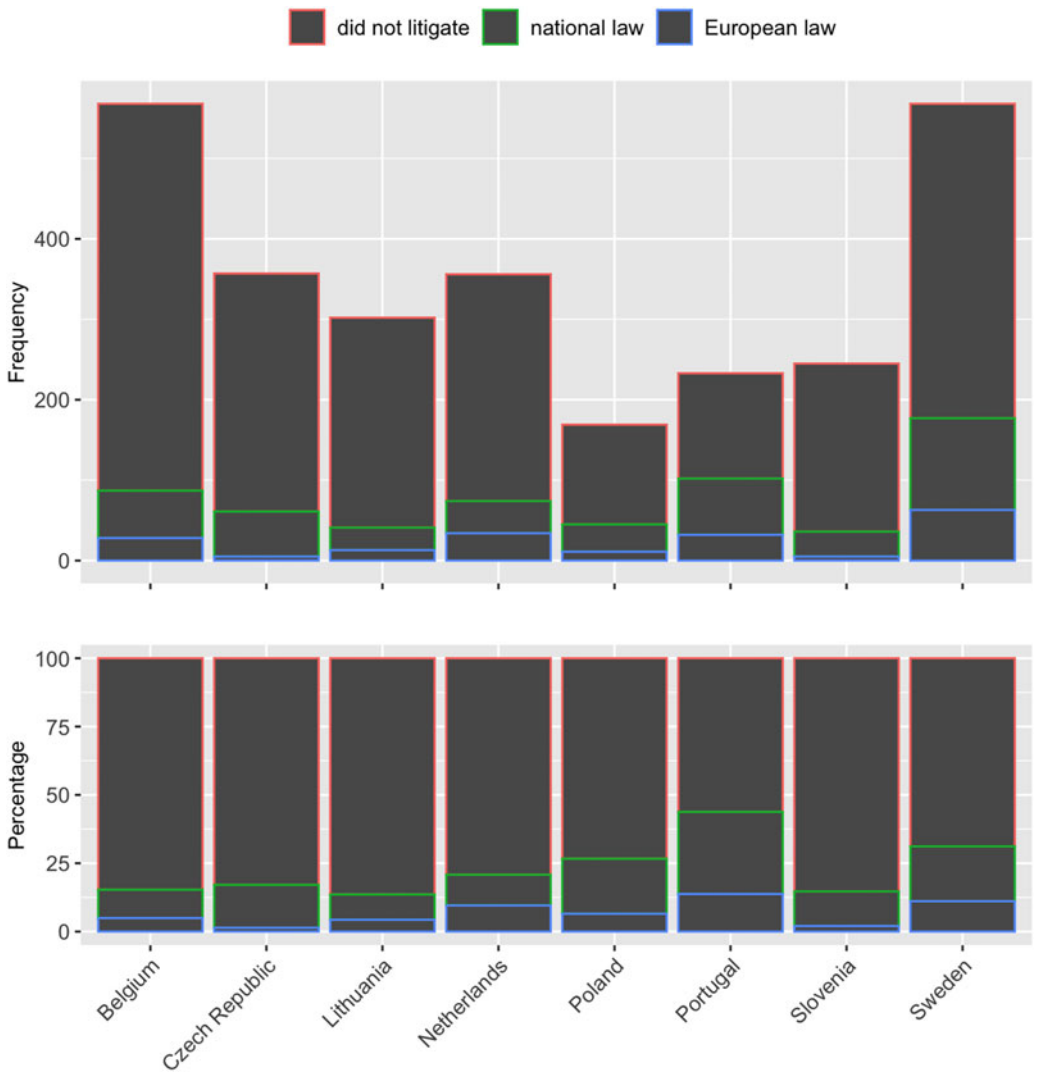


**Figure 2.** Strategic litigation by country of origin

The answer is coded on a five-point scale that goes from "we did not do this," to "we do this at least once a week."

Because strategic litigation in European law requires an awareness of the opportunities offered by the European legal system, which might not be readily available to all groups operating domestically, I included three survey items that can give an indication of a group's expertise regarding European and international affairs. The first is about EU funding. I use a survey question that asked groups to indicate which percentage of their previous year's budget came from the European Union.[76] Presumably, groups that receive funding from the EU have at least rudimentary knowledge about its operations. Second, I used a survey item that asked groups about their membership in "European/international organizations or networks"—coded as yes or no.

[76]The wording was "Funding from the European Union (e.g. payments from EU projects or programs)." I divided the answer by ten to bring the scale closer in line with other answers scales.

Groups that are members of such networks will presumably have more awareness of policy beyond the domestic sphere. Membership can serve for information exchange or provide opportunities for burden sharing. Third, I used a survey item that asked groups how important EU policies are for them. I coded answers to range from "of no importance whatsoever," at a value of 1 to "the most important focus" at a value of 4.[77]

To test whether the political disadvantage theory might apply to strategic litigation in European law, I included two items in the analysis. The first is a measure of the degree of a group's connection to—domestic—policy makers. I include a question from the survey that asks how often policymakers initiate contact with the organization. Answers are coded on a five-point scale from "never" (1) to "at least once a week" (5). When public authorities frequently initiate contact with a group, it can be assumed that authorities accept this group as an insider. Groups that are never contacted by policymakers are outsiders by necessity, and not primarily by choice. The second is an item that asks about the quality of such contact with national policymakers. Here, groups were asked to characterize their relationship with national authorities. I coded answers to range from "very cooperative"—coded as 1—to "very conflictual"—coded as 4.[78]

Finally, Beyers and his coauthors highlight that the CIGS sampling frame included interest groups whose main objective may be service provision rather than advocacy.[79] Therefore, to control for a group's overall level of political ambition, I included a question that asked whether a group was involved in advocacy or lobbying—coded as yes or no.

Figure III presents the results of the regression analysis. The estimates give an indication of whether the listed factors increase the likelihood of a group to be in the two categories: "Have engaged in strategic litigation based on national law"— denoted in green—and "have engaged in strategic litigation based on European or international law"—denoted in red—relative to the category "have not engaged in strategic litigation." An estimate greater than zero indicates that the factor has a positive relation to the outcome—it increases the likelihood of a group to report having engaged in strategic litigation—an estimate smaller than zero indicates the opposite. An estimate of zero indicates no effect. Dashes represent confidence intervals, that is the interval within which we expect the "true" effect to be, with ninety-five percent confidence. If this interval includes zero, then we cannot exclude that the factor has no effect. We then interpret it as not having a statistically significant effect on the outcome. The model contains controls for country of origin and the group type. For better readability, the figure does not display group or country effects.[80]

The results indicate that staffing does not have an effect on the use of European and international law, but it does have a small but statistically significant effect on the use of national law. This is an indication that, contrary to expectations, litigation based on an international source of law does not seem to require greater financial resources, which are usually spent on staff. The measure of general legal expertise, the presence of a legal expert on staff, however, clearly has an effect on the propensity of groups to turn to the courts. Figure III indicates that the effect is slightly stronger for European law, but the difference is not statistically significant. General legal expertise appears not to be of greater relevance for litigation strategies based on European sources of law than for domestic ones. The analysis produces a similar result for coalitions with like-minded

[77]This item was missing from the Swedish questionnaire. For Swedish groups, I used the answer to a survey item that asked about the "percentage of your organization's time [that] is spent at the European level," which I divided by 25 to approximate the other scale. Dropping this indicator did not change the overall results.

[78]The survey also included the answer category "not applicable." 601 groups in my sample chose this answer. There are two ways of dealing with this. I could drop the 601 cases and proceed with the others, or I could interpret this answer as suggesting a neutral position towards national authorities (2.5 on the scale from 1 to 4). I chose the latter option, but reran the analysis with the first option, which did not change the results.

[79]Beyers, Fink-Hafner, Maloney, Novak, & Heylen, *supra* note 11, at 277.

[80]Full regression results are included in the replication material. Note that the estimates depicted here are log odds. The replication material contains a plot of marginal effects.

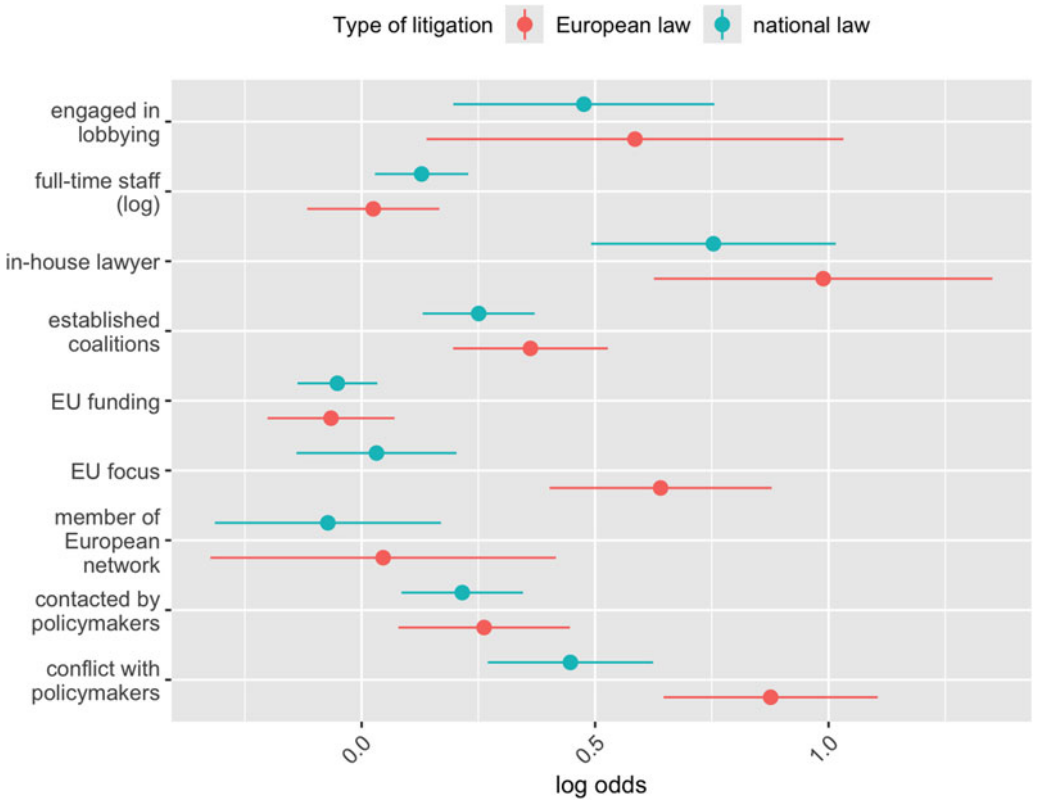


**Figure 3.** Regression results for actor level characteristics

groups: Groups that forge inter-group ties are more likely to engage in strategic litigation, but this is so irrespective of the source of law.

The first statistically significant difference between domestic and European litigants concerns one of the indicators for EU expertise. Although EU funding or membership in a European or international network does not have an effect on the propensity to engage in—any—strategic litigation, a focus on EU policies does. The greater this focus, the more likely a group is to engage in strategic litigation in European law. The second statistically significant difference between groups of litigants relates to the political disadvantage theory. My two indicators replicate earlier findings but show an interesting nuance. First, litigation goes together with insider status. Increasing acceptance as an insider by domestic authorities correlates with an increasing likelihood to engage in strategic litigation. There is no contradiction between insider status and strategic litigation—this holds both for domestic and European litigants. Second, groups are more likely to engage in strategic litigation when they have conflictual relationships with national policymakers. Although this effect exists for domestic litigants, it is stronger for groups that litigate European sources of law—the difference is statistically significant.

## *IV. Empowerment?*

As outlined above, establishing who engages in strategic litigation in European law is only a first step in evaluating whom European law empowers. For further steps, we would need to know how individuals, groups, or companies mobilize around the results of court proceedings in other fora and how the domestic status quo changes as a result. Survey data are of limited use to capture such

phenomena. The only information surveys can offer is how groups themselves perceive the usefulness of their actions. I present here data on one survey item that captures such an assessment. CIGS asked all groups that had reported involvement in strategic litigation how satisfied they were with the outcome.[81] Answers ranged from "not well at all," at a value of 1, to "very well," at a value of 5. 517 out of 623 groups provided an answer to this question. The mean score of this variable is 3.11, the median 3—the mid-point of the scale. On average, groups are neither satisfied nor dissatisfied with case outcomes. This may be an indication of the complexity of translating courtroom results into broader change.

I ran a linear regression on this item with the same variables as in Figure III, with the addition of a dichotomous variable that reflects which source of law litigation was based on. Figure IV presents the results. Only two variables have a statistically significant effect on satisfaction. For one, groups with a larger number of staff on average report greater satisfaction with litigation outcomes. This could indicate that while the effect of staff levels on the initiation of strategic litigation was not clear-cut, getting the desired results does indeed require resources. Second, groups that report conflictual relations with national authorities on average report lower satisfaction with case outcomes. This is interesting, because these groups are also more likely to engage in litigation in the first place. The source of law, however, does not have a statistically significant effect on satisfaction with outcomes. Domestic outsiders evidently do not feel specifically empowered by European law.

## F. Conclusion

This analysis set out to take one step towards a systematic answer to the question whom strategic litigation in European law empowers. Although empowerment is a complicated concept, a necessary condition for empowerment through strategic litigation is engaging in litigation in the first place. This Article has explored the use of strategic litigation in European law on the basis of representative survey data on interest groups in eight EU member states. The findings first indicate that European law offers opportunities for all kinds of interest. Business groups, trade unions and NGOs engage in European law litigation in about equal measure. There is also no difference between types of interest in reports of satisfaction with litigation outcomes. While this does not tell the whole story about empowerment, at least the European legal stock as a whole does not seem biased towards any interest in particular. A limitation of this analysis, of course, is that the survey was only administered to interest groups. Private companies are not necessarily dependent on their interest organizations to pursue strategic litigation in European law, and my measure of business litigation therefore undercounts its occurrence. The population of companies as potential litigants is substantially larger than that of interest groups, which makes data collection on these actors significantly less feasible, but more could be done in this direction. Individuals are also not part of this analysis, but the demands of strategic litigation are mostly too large for individuals to shoulder on their own.[82]

Second, this analysis has highlighted the limited usefulness of the concept of legal opportunity structures for correlational analysis. The variables that make up this structure outnumber the amount of cases to test them on, even if the survey project were to expand to additional countries. There is, in any case, no indication that rates of strategic litigation in European law are higher in monist legal systems, or that strategic litigation is facilitated where judges have strong judicial review powers. It is conceivable that the effect of legal opportunities on the actual use of strategic litigation does not follow a correlational logic, but one of thresholds or necessary conditions. Different research designs are needed to capture such effects.

[81]The question wording was "If the proceedings have already led to rulings, how well would you say that these rulings satisfy the goals of your organization"?

[82]*But see* Hofmann, *supra* note 8, at 8.

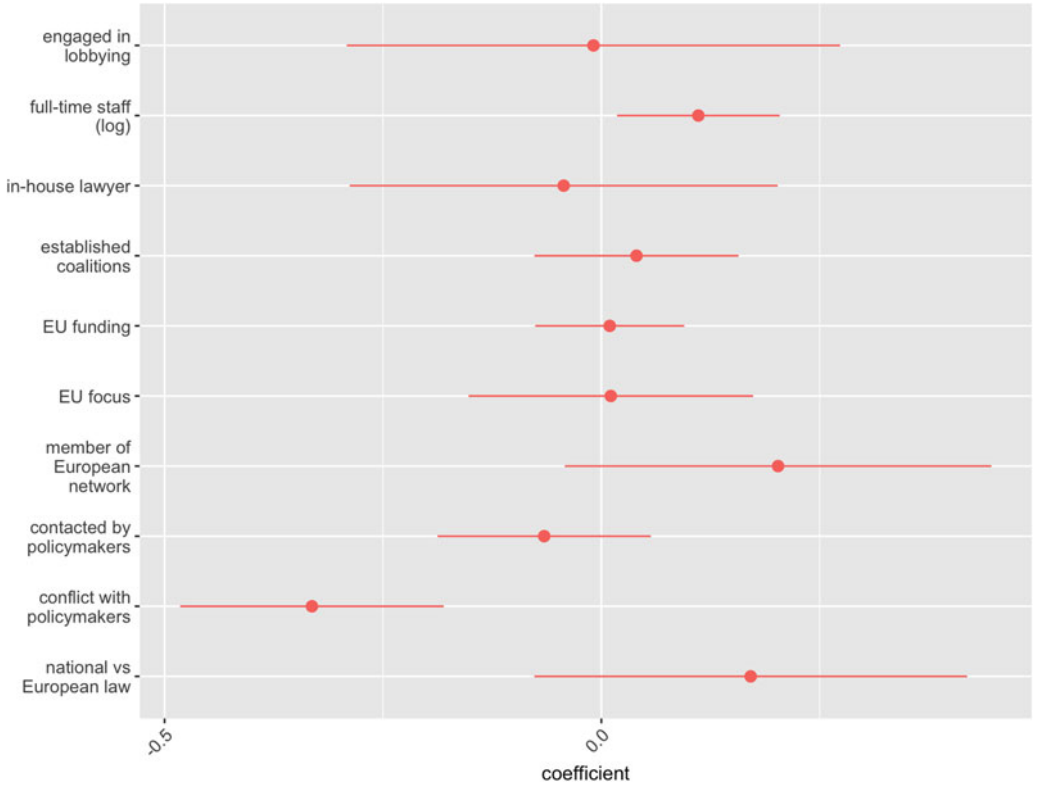


**Figure 4.** Satisfaction with strategic litigation outcomes

Third, the analysis has shown that group characteristics have systematic effects on the propensity to engage in strategic litigation. Overall, this analysis replicates findings from a previous study, despite the addition of newer data from three countries.[83] This underscores the robustness of the earlier findings. Resources, measured in number of paid staff, increase the propensity to engage in strategic litigation based on domestic law. I did not find this effect for strategic litigation in European law. However, groups with greater resources report greater satisfaction with litigation outcomes. Although the initiation of strategic litigation may not have a uniform resource threshold, greater resources appear to lead to better outcomes. This might also be a reflection of the fact that achieving objectives requires action beyond the courtroom. Access to in-house legal expertise, too, increases the likelihood of groups turning to the courts. I also found a positive effect for coalition-building. Coalitions may serve to alleviate some resource constraints and can provide information or expertise. Moreover, groups that are frequently contacted by policymakers are also more likely to engage in strategic litigation—this course of action is evidently not the purview of groups that lack access to domestic decision-making structures. An alternative—or complimentary—reading of the last two results is that highly active groups in general are likely to include strategic litigation in their action repertoire. This reading is supported by the positive effect of my control variable that asked whether groups were involved in advocacy or lobbying. This points to a baseline finding: the more active a group is, all else equal, the more likely it is to try their hand at strategic litigation. Easy access to legal expertise increases this propensity. One finding, however, lends credence to the political disadvantage theory. Groups that

[83]Hofmann & Naurin, *supra* note 12.

report conflictual relations with domestic authorities are more likely to report having engaged in strategic litigation than those with cooperative relations. It is therefore not structural lack of access to policy-making venues that drives groups to the courts, but a more contingent lack of an open ear. This is all the more true for strategic litigation in European law. The analysis clearly supports the assumption that European law is particularly attractive to those groups that have run out of options for direct domestic influence. At the same time, these groups are also more likely to be dissatisfied with outcomes. European law is an opportunity, but evidently not a panacea. Finally, strategic litigants in European law tend to be groups with a strong interest in EU policies. Specialist sources of law require distinct awareness and expertise.

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