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ARTICLE

Special Issue: Strategic Litigation in EU Law

Beyond EU Law Heroes: Unleashing Strategic Litigation as a Form of Participation in the Union's Democratic Life

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Abstract

This Article discusses the emerging strategic litigation practice in the European Union through the lens of participatory democracy. After situating such a practice both historically and conceptually within the specificities of the EU legal order, it explores whether and the extent to which strategic litigation, understood as an additional form of participation in the Union's democratic life, may contribute to EU participatory democracy and under which conditions. It unveils that while strategic litigation carries the potential to enhance democratic participation in the EU, it also risks—due to limited judicial literacy and unequal access to justice—empowering those already powerful. For strategic litigation to unleash its democratic potential at scale, EU courts must—as required by the "Provisions on Democratic Principles" of the Treaty of Lisbon—ensure a participatory enabling environment capable of proactively catalyzing and facilitating the ability of ordinary citizens—as well as diffuse, under-resourced and traditionally overlooked groups—to be better able to contribute to the Union's democratic life. Ultimately, no legal order worth of its name should rely on the heroism of its citizens and residents to keep its legal system in check.

Keywords: Strategic litigation; democracy; access to justice; participatory democracy; European Union; equality; Treaty of Lisbon

A. Introduction

European Union law as we know it today came into being through a series of successful yet unprecedented forms of legal mobilization that transcended the individual interest of the parties or individual case. Today we would not hesitate to qualify these instances of mobilization as "strategic litigation"[1] before the Court of Justice of the European Union ("CJEU").[2] Thus, both judicial building blocks of EU law—the *Van Gend & Loos* and *Costa v. ENEL* judgements, decided on February 5, 1963 and July 15, 1964, respectively—originated from minor disputes whose resolution went beyond the individual case.[3] By creating the conditions for private individuals as

[1]As defined by the co-editors of this Special Issue, Pola Cebulak, Marta Morvillo, and Stefan Salomon, "strategic litigation" encompasses "a legal action initiated to achieve broader social, political, or economic end." Pola Cebulak, Marta Morvillo and Stefan Salomon, *Strategic Litigation: Who Does it Empower?*, 25(6) GERMAN L.J. 800 (in this Issue).

[2]According to Article 19 of the Treaty on the European Union ("TEU"), the term "Court of Justice of the European Union" is to be understood as including "the Court of Justice, the General Court and specialized courts." Consolidated Version of the Treaty on European Union art. 19, June 6, 2016, 2016 O.J. (C 202) 27 [hereinafter TEU].

[3]*See, e.g.*, Amedeo Arena, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL*, 30 EUR. J. INT'L L. 1017 (2019); Antoine Vauchez, *The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity*, 16 EUR. L.J. 1 (2010).

well as companies to litigate to enforce their EU rights even against the resistance of their governments,[4] these protoforms of "strategic litigation" not only made their initiators "EU law heroes,"[5] but also paved the way for legal mobilization to occur in EU legal order in the first place. As former CJEU Judge Mancini wrote extra judicially, the effect generated by those seminal judgements has been "to take Community law of the hands of the politicians and bureaucrats and to give it to the people" and "to enable ordinary men and women to savor the fruits of integration."[6] The ensuing opening of the European integration process to the citizens contributed to the "widespread perception that the Court of Justice is a traditional and long-standing friend of the average European citizen."[7]

Yet, from an empirical standpoint, it is not private individuals but chiefly the Member States, the EU institutions and, to a lesser extent, economic actors that, over the years, have mobilized the Court of Justice.[8]

Multiple structural reasons have historically limited individuals' ability to rely on the Court to advance their interests. Those range from the restrictive legal standing rules before EU Courts to the costs of initiating litigation, which together have made them less open to individual actions and interventions. As a result, the EU courts have become less conducive to broad debate on issues of public interest arising in the application of European Union law.

Paradoxically the very same jurisdiction that has enabled ordinary citizens to mobilize their rights and claims directly before courts, it has grown, over time, into a rather distant body. As individuals cannot easily gain easy access to EU courts, they largely refrain to engage with them. The tendency to celebrate as "heroes" those few individuals who, despite all adversities, put their time, resources, and motivation to pursue the legal avenue to advance their own interests and goals.

Yet, as perspicuously highlighted by this Special Issue, this may be set to change. Over the last decade, we have been assisting to a surge of new cases—initiated not exclusively by the usual hero-types such as activist lawyers, but also scholars, advocacy groups as well as business associations—across a variety of policy fields. What these cases have in common is the attempt at mobilizing EU law before the CJEU as a tool for social, political, and economic transformation, and do so despite the structural difficulties inherent to any individual-led legal action. This trend suggests that new expectations might be developing vis-à-vis the CJEU, and the role it might be called upon to play "to serve the interests" of the citizens and other actors.[9] As such, these cases can be conceptualized—as proposed by this Special Issue—as the expression of the emergence of an increasing "practice of strategic litigation," which consists of a legal action, be administrative or judicial in nature, initiated to achieve broader social, political, or economic ends. By building on—and scaling up—the proto-forms of strategic litigation that have enabled EU law to develop over time, this form of legal mobilization is mutating into a more mature, and self-aware practice. Amid mounting public attention and salience surrounding its growing use, this practice of "strategic litigation" is attracting increasing scholarly attention. Yet this concept remains more

[4]Virginia Passalacqua & Francesco Costamagna, *The Law and Facts of the Preliminary Reference Procedure: A Critical Assessment of the EU Court of Justice's Source of Knowledge*, 2 EUR. L. OPEN 322 (2023).

[5]*See generally* Denys Simon, *Y a-t-il des Principes Généraux du Droit Communautaire?*, DROITS 73 (1991).

[6]G. Federico Mancini & David Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 183 (1994). *See also* G. Federico Mancini & David Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397, 413 (1995).

[7]Bruno De Witte, *Democratic Adjudication in Europe—How Can the European Court of Justice Be Responsive to the Citizens?*, *in* EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN 129, 131 (Michael Dougan, Niamh Nic Shuibhnet and Eleanor Spaventa eds., 2012).

[8]*See, e.g.*, Harm Schepel & Erhard Blankenburg, *Mobilizing the European Court of Justice*, *in* THE EUROPEAN COURT OF JUSTICE 9, 11 (Gráinne de Búrca & Joseph H.H. Weiler eds., 2001); Takis Tridimas & Gabriel Gari, *Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance 2001-2005*, 35 EUR. L. REV. 131 (2010).

[9]*See* TEU art. 13(1).

often invoked than defined.[10] The conceptual fuzziness surrounding the notion of strategic litigation should not come as a source of surprise. Not only does fundamental disagreement persist among scholars about what strategic litigation is understood to mean, but also what the broader notion of "legal mobilization" stands for and whether there should be a conceptual distinction from other uses and practices of law.[11]

The central theme posed by the Special Issue is who and how such a relatively new method of action may empower within the EU legal order. To address these questions, this Article examines the emerging strategic litigation practice through the lens of participatory democracy.[12] After conceptualizing strategic litigation as a practice of participatory democracy within the EU relevant legal framework, it explores whether and extent to which such a participatory practice may contribute to participatory democracy in the EU legal order and under which conditions. While some authors have identified the democratic contribution of strategic litigation,[13] no—or little—effort seems to have been made at approaching strategic litigation as providing an additional avenue for "participation in the democratic life of the Union."

This Article argues that the increased recourse to strategic litigation in the past decade is linked in part to a shortcoming of the broader EU participatory infrastructure and its incapacity to guarantee certain interests of its citizens and residents, perceived by them as fundamental.[14] It reveals that while strategic litigation—as a supplementary form of participation—carries the potential to enhance democratic participation in the EU, it also risks—unless this practice is rendered more accessible, inclusive, and scalable—empowering those already powerful. To prevent this from happening, it concludes by demonstrating that the Post-Lisbon Treaty framework requires the CJEU to create an enabling judicial environment, in which private individuals as well as organizations may effectively rely on the judicial route as form of participation in the democratic life of the Union.

This Article proceeds as follows. Section B addresses the preliminary question of what we mean by "strategic litigation" in the context of EU law today. It does so by situating such an emerging method of action within the specificities of the EU legal order.[15] Section C proposes an understanding of strategic litigation as a practice of participatory democracy. After qualifying the increasing practice of strategic litigation as an additional expression of "the right to participate in the democratic life of the Union"—as enshrined since the Lisbon Treaty in Article 10 TEU—it identifies how this method of action, if exercised at scale, may enhance, at least potentially, democratic participation in the Union. Section D contextualizes this form of legal mobilization within the realities of EU participatory democracy. It does so by identifying and systematizing the structural obstacles that have historically prevented not only strategic litigation but virtually all other forms of participatory democracy from becoming a reality for the citizens and residents of the EU. The last Section, Section E, discusses the conditions under which strategic litigation may become an accessible and inclusive practice, capable of contributing to participatory democracy as

[10]Kris van der Pas, *Conceptualizing Strategic Litigation*, 11 Oñati Socio-Legal Series S116 (2021) (discussing how literature review shows how each scholar perceives something strategic in the litigation within his or her own field).

[11]*See* Jeff Handmaker, *Introduction to the Legal Mobilization Special Focus*, 15 J. Hum. Rts. Prac. 1 (2023); van der Pas, *supra* note 10.

[12]*See, e.g.*, Stijn Smismans, *The Constitutional Labelling of "The Democratic Life of the EU": Representative and Participatory Democracy*, Pol. Theory & Eur. Const. 122 (Andreas Føllesdal & Lynn Dobson eds., 2005).

[13]Rachel Cichowski, The European Court and Civil Society: Litigation, Mobilization, and Governance (2007); Aidan O'Neill, *Strategic Litigation Before the European Courts*, 16 ERA Forum: J. Acad. Eur. L. 495 (2016); Tamara Ehs, *Democratisation Through Participation in Juristocracy: Strategic Litigation Before the ECJ*, *in* Perspectives for Europe: Historical Concepts & Future Challenges 119 (Markus Pausch ed., 2020).

[14]*See generally* Citizen Participation In Democratic Europe: What Next for the EU? (James Organ & Alberto Alemanno eds., 2021) [hereinafter Citizen Participation In Democratic Europe] (discussing a critique of the EU participatory opportunity infrastructure).

[15]*Id.*

required by the "Provisions on Democratic Principles" of the Treaty of Lisbon.[16] Lastly, Section F contains a few concluding remarks.

B. Situating Strategic Litigation Within the EU Legal Order

Amid growing societal and scholarly interest in law as a tool for social, political, and economic transformation, "an increasing practice of strategic litigation" is also emerging in the EU. According to the introductory article in this Special Issue,[17] what makes litigation before EU courts "strategic" depends on the outcome sought by the plaintiff(s)—which is to say, beyond the solution of the case at stake; the diversification of the actors involved—for example the growing number of NGO-complainants, activist lawyers, and academics; and the interests sought—for example both public and private interests, with industry groups advancing broader deregulation agendas. To identify the main features of this alleged and relatively new form of litigation practice, this Special Issue looks at who, how, and why and when legal proceedings are launched, and their increase in number. Yet, one may wonder: Aren't these variables the mere evolution of a litigation practice that physiologically reflects new competences entrusted to the Union, broader number of categories of interests affected and new power dynamics unleashed? Can the diversification of the stakeholders going to courts to advance a set of diffused and special interests substantiate the identification of a strategic use of litigation? And in the affirmative, how to explain that only seventy years after the creation of the EU legal order and recognition of direct effect to its provisions, a practice of strategic litigation might be emerging today?

To address these questions, this Section formulates a few preliminary considerations aimed at situating—both historically and conceptually—any attempt at mobilizing the concept of strategic litigation into the theory and practice of EU law.

There exist some well—and less—known structural and systemic features of EU law that one must consider when comprehending this notion. Those characteristics not only affect and shape the emerging practice of strategic litigation but help us contextualizing it within the broader EU participatory opportunity infrastructure,[18] which will later be explored.

First, EU law does not provide for any general *actio popularis*. This may be defined as a formal remedy that any individual can use to protect the collective interest.[19] Second, historically, the EU legal order, unlike any national order, does not grant individuals and non-privileged applicants[20] direct standing before EU Courts.[21] Under Article 263(4) TFEU, individuals may only bring

[16]TEU arts. 9–12.

[17]*See* Cebulak et al., *supra* note 1.

[18]*See, e.g.*, Michael Nentwich, *Opportunity Structures for Citizens' Participation: The Case of the European Union*, *in* POLITICAL THEORY AND THE EUROPEAN UNION: LEGITIMACY, CONSTITUTIONAL CHOICE AND CITIZENSHIP 125 (Albert Weale & Michael Nentwich eds., 1998); Alberto Alemanno, *Europe's Democracy Challenge: Citizen Participation in and Beyond Elections*, 21 GERMAN L.J. 35 (2020).

[19]The heated doctrinal debates concerning *actio popularis* as a judicial concept can be traced to the South-West Africa cases where the International Court of Justice very simply defined the concept as a "right resident in any member of a community to take legal action in vindication of a public interest." South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Judgement, 1966 I.C.J. Rep. 6, ¶ 88 (July 18).

[20]That is, everyone but the EU institutions and Member States.

[21]That is essentially due to a narrow reading of Article 263(4) TFEU by the Court of Justice. *See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 263(4), October 26, 2008, 2012 O.J. (C 326) 162 [hereinafter TFEU]. This has strictly interpreted the *locus standi* requirements set out in the Treaties for private plaintiffs to challenge the legality of EU measures directly before the EU courts, despite widespread criticism in the legal literature over the last fifty years. *See, e.g.*, Paul Craig, *Standing, Rights, and the Structure of Legal Argument*, 9 EUR. PUB. L. 493 (2003); *Editorial: What Should Replace the Constitutional Treaty?*, 44 COMMON MKT. L. REV. 561 (2007); Spyridon Flogaitis & Andreas Pottakis, *Judicial Protection Under the Constitution*, 1 EUR. CONST. L. REV. 108 (2005); Anthony Arnull, *Editorial: April Shower for Jégo-Quéré*, 29 EUR. L. REV. 287 (2004); Cornelia Koch, *Locus Standi of Private Applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy*, 30 EUR. L. REV. 511 (2005).

challenges "against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."[22] Under the first category, the CJEU employs a restrictive interpretation of "individual concern," essentially requiring the applicant to show that an EU act of general scope affects them and only them, both actually and potentially (the "*Plaumann* test").[23] This effectively precludes individuals as well as civil society organizations, including trade associations, from ever bringing direct actions.

Third, due to the inherent limited *direct* access to EU Courts, the realities of EU litigation relegate and confine individual-led litigation practice—to the point of exhausting it—to the recourse of one, indirect legal remedy. That is the preliminary reference mechanism foreseen in Article 267 TFEU.[24] This legal remedy makes the individual's access to EU Courts conditional upon the introduction of a legal action before domestic courts. This is typically the only practical way for an individual to get a case before the EU judiciary.[25] Yet under such an indirect legal remedy, the complainant has no guarantee that her case will be heard at the EU level; this is true insofar as that decision will, in turn, depend on whether and how the national court will interpret its obligation to refer—or not—the matter to the CJEU.[26] By having little control on whether and how the targeted court will be treating their supposedly strategic case—both in terms of admissibility and judging court—it might be particularly difficult—also for highly-prepared, choreographed case typical of any strategic litigation—to qualify as such. These structural conditions make strategic litigation even more difficult to pursue in the EU legal order than in a domestic legal order. Instead, the uncertainty surrounding the litigation journey of a want to be strategic litigant seems to ontologically question such a method of action from being qualified as strategic in nature. In other words, in the absence of some minimal forms of judicial agency guaranteed to the complainant, to what extent one may talk about strategic litigation in the first place?

Yet this is not the only structural feature that makes reliance on strategic litigation difficult to conceptualize in the EU legal order. Under EU law, any individual-led litigation inherently carries a strategic dimension within it, and that regardless of the intent pursued by the plaintiffs. This is because virtually all CJEU's preliminary judgements do produce *erga omnes* effects, be it on the validity or interpretation of EU law acts. As such all cases brought before EU Courts carry, albeit to a different degree depending on whether they are preliminary references or direct actions, the potential to exert some influence beyond the individual interest or case. As most of the CJEU's

[22]TFEU art. 263(4).

[23]ECJ, Case C-25/62, Plaumann & Co. v. Comm'n Eur. Econ. Cmty., ECLI:EU:C:1963:17 (July 15, 1963), para. 107, https://curia.europa.eu/juris/liste.jsf?num=C-25/62.

[24]TFEU art. 267.

[25]*See* Cichowski, *supra* note 13. While workaround litigation strategies exist, such as instances in which an individual triggers an act individually addressed to him and by which he can directly challenge a decision and invoke a plea of illegality under Art 277 TFEU, those are little known and practiced. An exception that proves the general rule is GDPR cases initiated at the national level, where a preliminary reference is almost a given because of the full harmonization of the GDPR. A similar trend may be expected in the litigation around the Digital Market Act and Digital Service Act. See, Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), PE/30/2022/REV/1, OJ L 277, 27.10.2022, p. 1–102 and Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) PE/17/2022/REV/1, OJ L 265, 12.10.2022, p. 1–66, respectively.

[26]*See* ECJ, Case C-283/81, Srl CILFIT v. Ministry of Health, EU:C:1982:335 (Oct. 6, 1982), https://curia.europa.eu/juris/liste.jsf?num=C-283/81. In *CILFIT*, the CJEU clarified that national courts are not required to refer a question to the CJEU in the following three cases: (i) When they have established that the question raised is irrelevant, (ii) when the CJEU has already interpreted the provision of EU law in question, or (iii) when the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. *Id. See also* ECJ, Case C-561/19, Consorzio Italian Mgmt. v. Rete Ferroviaria Italiana SpA, EU:C:2021:799 (Oct. 6, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-561/19.

rulings are rendered under Article 267 TFEU, this suggests that most Court's case law produces—and that regardless of the complainant's sought aims—effects that transcend the individual interest and case. From such a perspective, the emergence of a strategic litigation practice can be seen as an attempt to take full advantage of the inherently consequential nature of EU judicial decision-making.

Fourth, when it comes to the possibility for parties outside of a case to join and contribute to a pending case, the EU judicial system severely limits this possibility to "third-party intervention."[27] This is a mechanism by which an outside party with an interest in the result of a dispute becomes an actual party to the proceedings.[28] This pathway appears appropriate for both individuals and organizations provided they can show that the collective interest they represent is at play in resolving a dispute, generally in a direct action.[29] However, a second, generally less demanding opportunity for outside participation—that is amicus curiae briefs, Latin for "friends of the court"—is not foreseen under EU law.[30] An amicus is neither a party to the dispute nor is solicited by any of the main parties.[31] While amici are also interested in informing the outcome of the dispute, they are more broadly focused on shaping the jurisprudence around a specific issue, and as such may also play a strategic role in an ongoing litigation that might not otherwise pursue such a goal. Thus, for instance, for years now individual and civil society organizations have had an impact—by it through third party interventions or amicus curiae—on litigation not before the CJEU, where they are not allowed, but before the European Court of Human Rights (ECtHR).[32] By supporting enhanced human rights protection in major pending cases, they succeeded in contributing to the effective implementation of the European Convention of Human Rights (ECHR) across the members of the Council of Europe. A similar possibility is largely precluded in the EU legal order.

To sum up, these structural conditions inherent to the EU system of legal remedies do leave little margin for the emergence of a practice of strategic litigation stricto sensu. They suggest instead that, under EU law, strategic litigation—like any other form of legal mobilizations—takes place under qualitative and quantitatively different conditions than in national jurisdictions. This is however not to deny the possibility that an EU law form of strategic litigation may exist and be identified as such. Instead, it suggests that all various forms of legal mobilization—from strategic litigation, test-case litigation to cause lawyering existing in the domestic legal orders—may find expression in the EU judicial system. Yet, when they do, they may acquire different forms, meanings, and impact. Regardless of the chosen doctrinal characterization of the increasing

[27]*See, e.g.*, Olivier De Schutter, *Public Interest Litigation Before the European Court of Justice*, 13 MAASTRICHT J. EUR. & COMPAR. L. 9 (2006); MARIOLINA ELIANTONIO, CHRIS BACKES, REMCO VAN RHEE, TARU SPRONKEN, AND ANNA BERLEE, STANDING UP FOR YOUR RIGHT(S) IN EUROPE: A COMPARATIVE STUDY ON LEGAL STANDING (LOCUS STANDI) BEFORE THE EU AND MEMBER STATES' COURTS (2013); Jasper Krommendijk & 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*, 26 INT'L J. HUM. RTS. 1394 (2022).

[28]Rules of Procedure of the General Court, arts. 142–45, 2015 O.J. (L 105) 1 (EU); Rules of Procedure of the Court of Justice, arts. 129–32, 2012 O.J. (L 265) 1 (EU). The intervener is, however, limited to supporting the conclusions to one of the parties being barred from raising new grounds.

[29]In infringement actions, the strategic role that individuals or organizations may play is upstream in the process by alerting the Commission about an alleged breach. Yet due to the virtually unlimited discretion enjoyed by the Commission in opening the proceedings and bringing the case before the court, the role played by outside actors remains limited. *See, e.g.,* ECJ, Case C-247/87, Star Fruit Co. v. Comm'n, ECLI:EU:C:1989:58 (Feb. 14, 1989), para. 12, https://curia.europa.eu/juris/liste.jsf?num=C-247/87.

[30]Alberto Alemanno, *Public Participation Before the Court of Justice of the EU: Enhancing Outside Party Participation Via Amicus Curiae*, ERASMUS L. REV. (forthcoming 2025) (on file with author).

[31]Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994).

[32]*See, e.g.*, Rachel Cichowski, *The European Court of Human Rights, Amicus Curiae, and Violence Against Women*, 50 L. & SOC'Y REV. 890 (2016); NICOLE BÜRLI, THIRD-PARTY INTERVENTIONS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS (2017).

strategic litigation practice, it appears undisputed that litigation before EU Courts has been diversifying over time. This appears true both in terms of identity of the complainants and use they make of the Courts in the pursuit of broader social, political, or economic ends and beyond the interests of the immediate parties involved in the lawsuits.[33]

This is what led the editors of this Special Issue to propose both a contextual, as opposed to a narrow, and normatively open understanding of strategic litigation under EU law.

The emerging practice of strategic litigation must be understood in contextual terms insofar as this type of litigation is part of a broader repertoire of legal mobilization strategies and in specific social institutional and economic settings within the Union. Not only litigation alone might not suffice to advance individuals' claims, but other channels of participation may fall short of attaining individuals' demand if deprived of the litigation avenue. Typically, the average plaintiff in the EU may consider litigating her case only after having considered alternative, and less demanding courses of action, such as administrative complaints before the EU institutions, including petitions to the EU Parliament, complaints to the EU Commission and EU Ombudsman, which may also strategically advance her broader social, political, or economic objective. Yet today the strategic litigation avenue suddenly appears more heuristically available to the average private individual and organization, and therefore—as revealed by available empirical observations[34]—more actionable than in the past. Moreover, a contextual understanding of strategic litigation enables us to also include into its other forms of indirect and outside participation into pending litigation, such as third-party interventions and amicus curiae briefs. These refer to situations in which the strategic dimension of the legal initiative extends its function to that of an expertise-provider. This suggests a broad understanding of this new wave of strategic litigation in the EU legal order, which encompasses both administrative and judicial methods of action, and their strategic combination.

Strategic litigation must also be understood as normatively open in the EU legal order, as it is not a prerogative of public interest actors. Rather this form of litigation may also be mobilized strategically to advance more private agendas. This is at least certainly the case in the three areas of EU law examined by this Special Issue, that is mobility, environment, and data protection.

C. Strategic Litigation as a Form of Participation in the Democratic Life of the Union

When examined against the proposed conceptualization, the increasing strategic litigation practice appears first and foremost a form of democratic *participation* in the EU. Through it, individuals are enabled to mobilize their rights—including those sidelined by others—in the EU transnational space.[35] As recognized in the literature:

> Litigation may not be the form of participation that most advocates of democracy have in mind. However, in a liberal democracy subject to the rule of law, litigation to defend one's right or to challenge democratic malfeasance is every bit as legitimate as a form of *participation* as voting or marching in protest.[36]

In normative theory, participatory democracy entails the multiplication of opportunities for citizens' participation beyond elections.[37] This entails acquiring some forms of control over those who decide for us, and, more broadly, having a say on those decisions. Therefore, the rationale

[33] *See* Cebulak et al., *supra* note 1.

[34] While it remains difficult to prove the occurrence of a generalized increase in all policy fields, strategic litigation has increased in a variety of them, ranging from risk regulation to climate as well as civil and political rights. *See* Cebulak et al., *supra* note 1.

[35] *See, e.g.*, Citizen Participation In Democratic Europe, *supra* note 14, at 121.

[36] R. Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 Compar. Pol. Stud. 101, 123 (2006).

[37] *See, e.g.*, Donatella della Porta, Can Democracy Be Saved? 187 (2013).

pursued by democratic participation transcends the idea of participation as defense ("*uti singuli*"), typical of administrative law, and stands closer to the idea of participation as collaboration ("*uti cives*").[38] As such, it hints to an additional, complementary yet autonomous rationale of participation, that of democratic input and control beyond elections that EU citizens and residents are called upon to play to contribute to the democratic functioning of the EU.[39]

As a result of this broader interpretation of citizen participation, participatory democracy can no longer be equated with participation as a defense and as "participation collaboration"—according to the traditional administrative law conceptions—but must be understood as pursuing an additional, complementary rationale, that of "participation as democracy."[40] As such, it must include a wide range of channels for the people enabling them to play a role in the policy—and possibly judicial—process by means of an effective access to the process and voice within it.[41]

The conception of citizenship encapsulated in participatory democratic theory is that citizens are not like consumers.[42] Rather they are entitled to participate, be it through decision-making or judicial-making about their collective life and interact with authority structures that make such a participation possible.[43] Thus, through strategic litigation, an individual is not seen as passive audience, who depends on her representatives to speak on her behalf or hoping to receive some feedback. Instead, a citizen or resident may seize the courtroom directly and herself crafts a strategy that will enable her to defend or advance her cause, based on clearly defined and predictable procedural rights. As such, through the clarification of new rules and procedures, every singly judicial decision prompted by strategic litigation may produce some general consequences for the balance of power in any political system, including that of the EU.[44] As recognized in the literature, sometimes its impact is direct, when providing protection to a group of people or interests that were not previously guaranteed in its decision. In these circumstances, the impact is both specific and retrospective. In other circumstances, strategic litigation can also have a more indirect impact, in which case the ruling is general and prospective in nature. In the light of the above, strategic litigation may potentially have a more long-term impact on public inclusion in any legal system, including in the EU legal order, than any other form of participation.

Since the ratification of the Lisbon Treaty, participation has acquired a new role and meaning in the EU legal order.[45] While participatory practices always existed in the history of the Union to legitimize EU policymaking[46]—the "Provisions on Democratic Principles" of the Treaty of Lisbon[47]—by giving "expression to the principle of democracy in the EU legal order"[48]—recognized for the first-time participation as an *autonomous*, democratic principle on which the Union is founded.[49]

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[38]Sabino Cassese, *La Partecipazione dei Private alle Decisioni Pubbliche: Saggio di Diritto Comparato*, 1 Rivista Trimestrale di Diritto Pubblico 13 (2007).

[39]*Id.*

[40]*Id.*

[41]Torbjörn Larsson, *How Open Can a Government Be? The Swedish Experience*, *in* Openness and Transparency in the European Union 39 (Verlee Deckmyn & Ian Thomson eds., 1998).

[42]John S. Dryzek, *Theory, Evidence, and the Tasks of Deliberation*, *in* Deliberation, Participation and Democracy: Can the People Govern? 237 (Shawn W. Rosenberg ed., 2007).

[43]*See* TEU art. 10(3) (conferring the right to "[e]very citizen" to participate in the democratic life of the Union).

[44]Rachel A. Cichowski & Alec Stone Sweet, Participation, Representative Democracy and the Courts (2003).

[45]For a detailed, historical reconstruction of the EU participatory practices and rationale, see Joana Mendes, Participation in European Union Rulemaking: A Rights-Based Approach (2011). *See also* Joana Mendes, *Participation and Participation Rights in EU Law and Governance*, *in* Legal Challenges in EU Administrative Law 257 (Herwig C.H. Hofmann & Alexander H. Türk eds., 2009).

[46]*Id.*

[47]TEU arts. 9–12.

[48]Koen Lenaerts, *The Principle of Democracy in the Case Law of the CJEU*, 62 Int'l & Compar. L.Q. 271, 275 (2013).

[49]Alberto Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, 39 Eur. L. Rev. 72 (2014).

This outcome, crystallized in Article 10(3) TEU, originates in an earlier, two-decade effort, initiated by the Maastricht Treaty, to define the democratic nature of the EU legal order, particularly its own specific democratic model. One of the answers to such a long quest for a more democratically legitimate Union has been to enhance citizen participation through broader access to the EU.[50] The assumption being that citizen participation could make up for EU citizens' inability to signify—under the current arrangements—their desire for change in the EU political agenda and, more broadly, close the gap between power and electoral accountability in the Union.[51] Since then, the Union derives its democratic legitimacy not only from representative democracy—which remains its founding democratic principle—but also from participatory democracy.[52] Under the former, citizens take part in the political process through their elective representatives—Parliament and the governments gathering in the Council of the European Union (the Council)—whereas under the latter, citizens participate directly via a multitude of channels of participation.[53] Those include:[54] Requests for access to documents of the EU institutions;[55] petitions to Parliament;[56] public consultations by the Commission;[57] complaints to the European Ombudsman;[58] complaints to the Commission;[59] European Citizens' Initiative;[60] and EU legal remedies before national and EU Courts, as well as outside-the-Court participatory mechanisms such as third-party interventions, as well as amicus curiae briefs, which however lack any formal recognition.

It is through all these participatory channels that private individuals and organizations are entitled "to *participate* in the democratic life of the Union."[61] As such, through their actions and omissions, individuals provide an additional source of legitimacy for the Union.[62]

[50]Jürgen Habermas, *Three Normative Models of Democracy*, 1 Constellations 1 (1994); Stijn Smismans, *New Modes of Governance and the Participatory Myth*, 31 W. Eur. Pol. 874 (2008); Beate Kohler-Koch, *Governing with European Civil Society*, *in* De-Mystification of Participatory Democracy 13 (Beate Kohler-Koch et al. eds., 2013). On whether participation results in increased democratic legitimacy, see Acar Kutay, *Limits of Participatory Democracy in European Governance*, 21 Eur. L.J. 803 (2015).

[51]Paul Craig, EU Administrative Law 297–98 (2d ed. 2012); Cornelia Moser, How Open is 'Open as Possible'? Three Different Approaches to Transparency and Openness in Regulating Access to EU Documents 5–6 (2001).

[52]*See* TEU art. 10.

[53]*See* Annette Schrauwen, *European Union Citizenship in the Treaty of Lisbon: Any Change at All?*, 15 Maastricht J. Eur. & Compar. L. 55 (2008); Samantha Besson & André Utzinger, *Introduction: Future Challenges of European Citizenship—Facing a Wide-Open Pandora's Box*, 13 Eur. L.J. 573, 587 (2007).

[54]While several participatory mechanisms are formally attached to EU citizenship—such as the right to make petitions to the European Parliament, to complain to the European Ombudsman and to register an ECI—their use is not exclusive to EU citizens. Therefore, citizens, and not necessarily EU citizens, are given the right to participate in the Union democratic life. *See* Schrauwen, *supra* note 53, at 51.

[55]Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC).

[56]While its formal recognition dates back the Treaty of Maastricht and is associated with the EU citizenship—Article 24 TFEU, and no recognition in the TEU—petitions were already accepted as a custom by Common Assembly of the ECSC and the European Parliament well before 1992. There was just one petition, in 1958, in the first five years of activity; just a few petitions, fewer than 10, in the 10 years from 1964 to 1974; and, finally, a progressive increase in the four years from 1975 to 1978. *See* Franco Piodi, The Citizen's Appeal to the European Parliament—Petitions 1958-1979 (2009).

[57]TEU art. 11(3).

[58]TFEU arts. 20(2)(d), 24.

[59]*Id.*, at art. 24 ("Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 TEU in one of the languages mentioned in Article 55(1) TEU and have an answer in the same language.") *See also* TEU art. 41.

[60]TEU art. 11(4); TFEU art. 24. This is the most recent EU participatory mechanism, which in turn represents the first transnational participatory democracy instrument—allowing at least 7 EU citizens coming from seven different Member States to suggest new policy initiatives in any field where the EU has power to propose legislation—such as the environment, agriculture, energy, transport or trade—after collecting one million signatures.

[61]TEU art. 10(3) (providing that "every citizen shall have the right to participate in the democratic life of the Union" and that "decisions shall be taken as openly and as closely as possible to the citizen").

[62]Schrauwen, *supra* note 53; Besson & Utzinger, *supra* note 53, at 586; Alex Warleigh, *On the Path to Legitimacy? A Critical Deliberativist Perspective on the Right to the Citizens' Initiative*, *in* Governance and Civil Society in the European Union: Normative Perspectives 64 (Carlo Ruzza & Vincent Della Sala eds., 2007).

This was confirmed by Advocate General Bobek when he noticed that the right to participate in the democratic life of the Union finds normative expression not only in one specific avenue of participation, such as the European Citizens' Initiative (ECI), but also in other "pre-existing channels of interactions between the citizens and the EU institutions."[63] Moreover, the EU Commission—in one of the first institutional yet unqualified references to the concept of strategic litigation in EU law[64]—acknowledged that *participation* includes the use of litigation and other forms of engagement with public authorities.

As such, strategic litigation can be seen also in the EU legal order as a form of bottom-up participation meant to provide avenues for institutional change. This form of legal mobilization may entail some change in the rules and procedures that govern a policy arena or their substantive meaning. As those institutional changes may occur from below, the court may provide a more responsive institutional reaction than do decision-makers who are the expression of representative democracy.[65] Far from replacing the role played by legislative and executive decision-making processes, strategic litigation complements and enhances these processes by further expanding the social and institutional space to voices issues of concern.

When seen from this perspective, the emerging practice of strategic litigation seems to acquire a richer meaning. Besides its inherently instrumental nature in pursuit of its broader ends, this practice also aspires and contributes to empower not all EU citizens but also its residents[66] to proactively contribute to the Union's democratic life. In particular, by enabling minorities to have their voices heard—be they sexual, gendered, ethnic minorities or third-country nationals—this practice carries the potential to enhance democratic participation in the EU.[67] As such, it can be seen as another attempt by EU citizens and residents to mobilize their interests within the EU legal order, in an attempt at trying to fill the gap left by a policymaking process they may not follow or be part of. This practice may allow individuals and organizations to see their interests taken into account through an additional democratic route such as litigation. If exercised at scale, a strategic litigation practice could suddenly become "as an arena for marginalized interests to escape the hegemony and capture of domestic institutions by regressive majorities or elites."[68] This practice may therefore allow individuals and organizations to have their interests be taken on board through an additional democratic route such as litigation. By returning power to individuals sidelined from democracy by others or simply channeling to the Court claims and arguments that would otherwise be put aside, strategic litigation may contribute to restore the balance of power in EU democracy. Ultimately, strategic litigation It can empower individuals and groups that tend to be excluded from day-to-day policymaking, as well as non-EU citizens.

Yet, as any other form of participation, its inherent democratic potential depends on the resources—person, power, expertise, and funding—and ultimately level of access required to get heard in the first place.

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[63]*See* ECJ, Case C-418/18 P, Puppinck v. Comm'n, ECLI:EU:C:2019:1113 (Dec. 19, 2019), para 64, https://curia.europa.eu/juris/liste.jsf?num=C-418/18P.

[64]*European Commission, Effective Legal Protection and Access to Justice. 2023 Annual Report on the Application of the EU Charter of Fundamental Rights*, at 42, COM (2023) 786 final (Dec. 4, 2023). That document details:

> [T]here could be more cases brought to the courts where the Charter is applied to strengthen the legal protection of an affected individual. This highlights the need to ensure that legal professionals receive regular training on fundamental rights and effective legal protection and to enable civil society organizations and human rights defenders to bring strategic litigation cases at national and EU level. *Id.*

[65]*See generally* George Lovell, Legislative Deferrals (2003).

[66]For some authors, democracy demands the inclusion of non-citizens and provision of reason for exclusion. *See, e.g.*, Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 Pol. Theory 37 (2008). *See also* Tendayi Bloom, Noncitizenism: Recognising Noncitizen Capabilities in a World of Citizens (2018).

[67]For this argument as applied to previous, protoforms of strategic litigation, see Lisa Conant, Justice Contained: Law and Politics in the European Union (2002).

[68]Damian Chalmers, *Gauging the Cumbersomeness of EU Law*, 62 Current Legal Probs. 405, 428 (2009).

Therefore, to determine whether and how strategic litigation may contribute to participatory democracy in the EU, the next Section examines the realities of the EU participatory opportunity infrastructure, with a special focus on it judicial means.

D. The Obstacles to Strategic Litigation as a Form of Democratic Participation in the EU Legal Order

Having conceptualized strategic litigation as a form of participation, this Section identifies the obstacles preventing this practice from unleashing its full democratic potential. In post-Lisbon Europe, citizen participation has been elevated—through its rich toolbox—to become one of the foundations of EU democracy. This relies on a model in which participation complements, at least in principle, representative democracy.[69] However, as epitomized by the dire state of individual access to EU justice, these mechanisms' ability to help citizens to contribute to the Union's democratic life appears limited and that is despite their potential for democratic empowerment. In other words, if one measures each mechanism's ambitions against the reality of participatory democracy today, it finds no major Copernican revolution in how citizens participate to the Union's democratic life beyond elections, as highlighted by the limited and difficult individual access to justice. This is the case due to a variety of structural factors surrounding the use of the EU participatory toolbox, which prevents it from unleashing its democratic, participatory function, even more so through legal mobilization forms such as strategic litigation. Besides the legal technicalities governing individual access to EU legal remedies—e.g. locus standi, legal costs, etc.—the obstacles faced by individuals keen on embracing strategic litigation as a privileged form of participation to the Union's democratic life largely overlap with those preventing private individuals from taking full advantage of any other participatory tools.

Indeed, individual access to EU legal remedies is the exception not the norm, and that despite the proclaimed complete nature of the EU system of legal remedies.[70]

The most relevant structural obstacles to unleashing the participatory potential of EU available channels of participation, including and especially strategic litigation, are low EU participatory and judicial literacy (D.I.), and unequal access to EU participation and judicial system (D.II.).

I. Low EU Participatory and Judicial Literacy

Most of the participatory channels currently foreseen by the EU legal order—including the EU system of legal remedies—remain largely unknown to EU citizens and its residents.[71] Although a growing number of Europeans declare to be aware of the term *"citizenship of the European Union"* and know what it means, only 37% feel well informed about their overall EU rights.[72] It is therefore no surprise that only a few hundred individuals and organizations do engage directly with the EU institutions and bodies, on a yearly basis, through the available participatory

[69]Since the Lisbon Treaty, the Union derives its democratic legitimacy not only from representative democracy, which remains its founding democratic principle, see BVerfGE, 2 BvE 2/08, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html, but also from participatory democracy. *See, e.g.*, Kutay, *supra* note 50, at 814.

[70]ECJ, Case C-294/83, Parti Écologiste v. Eur. Parl., ECLI:EU:C:1986:166 (April 23, 1986), para. 23, https://curia.europa.eu/juris/liste.jsf?num=C-294/83 [hereinafter *"Les Verts"*]. *See also* Alberto Alemanno, *What Has Been and What Is Left Thirty Years After Les Verts/Parliament*, *in* The Past and Future of European Union Law: The Classics of EC Law Revisited on the Occasion of the 50th Year of the Treaty of Rome 351 (Miguel Poiares Maduro & Loïc Azoulai eds., 2010).

[71] *See Standard Eurobarometer 89 – Spring 2018*, Eur. Union (June 2018), https://europa.eu/eurobarometer/surveys/detail/2180.

[72]*Eurobarometer Report Summary EU Citizenship and Democracy*, Eur. Union (July 2020), https://europa.eu/eurobarometer/surveys/detail/2260.

channels.[73] When it comes to EU Courts, only a few dozen directly engage with the EU Courts,[74] and a few more in an indirect way through preliminary references. Existing locus standi requirements combined with the costs of court proceedings' regime typically chill private individuals and organizations to even consider bringing a strategic litigation.[75] While EU avenues of participation are supposedly open, and designed, to reach to a wide spectrum of respondents—and in the case of judicial avenues guarantee everyone access to justice—the truth is that participation levels tend to stay in the low figures.

This outcome appears even more surprising insofar as virtually all EU participatory participation avenues—whether administrative or judicial—have moved online since the early 2000s. In other words, although the advent of digital means has greatly facilitated participation by individual members of the public and all types of interest representatives, this has not necessarily translated into a higher uptake, through an increased rate of participation and improvement of the opportunity structure of the EU policy process.[76] When it comes to judicial remedies, while the EU Courts has also been undergoing a similar process of digitalization of its judicial practices, this has not altered the conditions under which individuals and other non-privileged applicants may get standing before the Luxembourg-based courts, and more broadly how they can participate to ongoing proceedings, such as via amicus curiae briefs.[77]

Moreover, the overall openness of the EU Courts remains limited and prevent citizens from even following public hearings of relevant cases remotely.[78] Unlike most supreme national and international courts, streaming of public hearing is not guaranteed in Luxembourg. This situation of limited public knowledge reflects, and is part of, a broader phenomenon of low EU literacy within the continent. A recent Eurobarometer study conducted among the European youth suggests that a majority, 55%, of respondents say they do not understand much, or anything, about the EU.[79] Literacy is not only modest within the general population but also among civil society organizations. The composition of civil society that engages at EU level, including before EU courts, is largely dictated by which groups the Commission chooses to fund and set up in the first place.[80] In these circumstances, access to Court remains a prerogative of either highly literate or well-funded plaintiffs capable to meet the level of professionalization required for any ordinary citizen or organization to file a legal remedy before the Luxembourg courts. Overall, the combination of these structural conditions surrounding EU participatory and judicial literacy favor the spread of strategic litigation within the EU legal order.

II. Unequal Access to EU Participation and Judicial System

The other major structural issue curbing the use of virtually all existing EU participatory mechanisms has to do with their unequal access. This situation appears particularly dire when it comes to access to justice. By famously claiming that the EU has a "complete system of legal

[73] *See* ALBERTO ALEMANNO, TOWARDS A PERMANENT CITIZENS' PARTICIPATORY MECHANISM IN THE EU (2022) (available at https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)735927) (presenting a study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee to examine the EU participatory system).

[74] *See, e.g.*, Schepel & Blankenburg, *supra* note 8; Tridimas & Gari, *supra* note 8.

[75] LAURENT PECH, THE CONCEPT OF CHILLING EFFECT: ITS UNTAPPED POTENTIAL TO BETTER PROTECT DEMOCRACY, THE RULE OF LAW, AND FUNDAMENTAL RIGHTS IN THE EU (2021).

[76] *See, e.g.*, Christine Quittkat, *The European Commission's Online Consultations: A Success Story?*, 49 J. COMMON MKT. STUD. 653, 654 (2011).

[77] Alberto Alemanno & Oana Stefan, *Openness at the Court of Justice of the European Union: Toppling a Taboo*, 51 COMMON MKT. L. REV. 97 (2014).

[78] *Id.*

[79] *European Parliament Youth Survey, Key Findings, Flash Barometer,* EUR. UNION (June 2018), https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/youth-survey-2021.

[80] R. Sánchez Salgado, *Giving a European Dimension to Civil Society Organization*, 3 J. CIV. SOC'Y 253 (2007).

remedies,"[81] the CJEU continues to assume that everyone seeking to enforce her/his rights before EU Court enjoys access to it, *quid non*.

Based on decades of participatory practices and well-established case law, the EU institutions—including the CJEU—operate on the working assumption that each party affected by a given action or inaction is equally able and likely to contribute or react to it at the EU level,[82] be it through administrative or legal actions.

Yet, today, the EU, when offering its participatory opportunities to the public, can no longer assume that all stakeholders benefit from the same opportunities of information, access and influence, and ultimately work in a level playing field. Given the structural disparities of access and resources, participation to and engagement with the EU has become a prerogative of those who are not only epistemically, but also financially, better placed and, therefore, can afford to contribute to the technocratic, highly technical, and generally resource-intensive forms of participation.

This is epitomized by the current access to justice in the EU, whose litigation before the CJEU has become a highly selective endeavor with high epistemic and financial barriers. The *Inuit*[83] and *Telefónica*[84] lines of reasoning encourage private parties to challenge the EU Law before the national courts to seek a preliminary ruling from the EU Court of Justice, at least when the case concerns the act entails implementing measures from the part of the EU Member States. However, the highly restrictive *Plaumann* test on locus standi for the purposes of Article 263(4) TFEU appears unlikely to be reconsidered, and alternative workaround litigation strategies appear difficult for the average citizen (or civil society organization) to be brought to EU Courts. The latter appears true mainly due to a litigators' market which is dominated by 'Big law' firms that are more interested in creating a portfolio of corporate clients than in pioneering new instances of public interest litigation.

The current unequal access to the judicial system—as well as other notable moments of EU policy making—has major consequences damaging the democratic and legitimation potential of participation.

First, due to such unequal access to—and limited representativeness of stakeholders' participation in—both policy-making and judicial-making, the EU institutions may be more or less exposed to different types of substantive interests. Many observers within the CJEU highlight the need for additional perspectives and information as they resolve disputes.[85]

As such, the ensuing policy and judicial making process risk of being biased in their evaluations, due to the selective responsiveness to those interests that were represented over those that were not. Absent robust, inclusive, and representative forms of public engagement and access to court, policies themselves and rulings may reveal being flawed, based on mistaken assumptions about their context, users, and preferences. As stated more than two decades ago, "[T]he richness of social, cultural, and scientific knowledge is not taken into account by the European legislative system, despite the organization of sophisticated consultation prior to the announcement of

[81] *"Les Verts"*, Case C-294/83 at para. 23.

[82] *See, e.g.*, Quittkat, *supra* note 76, at 655.

[83] ECJ, Case T-18/10, Inuit Tapiriit Kanatami v. Parliament, ECLI:EU:T:2011:41 (Sept. 6, 2011), https://curia.europa.eu/juris/liste.jsf?num=T-18/10; ECJ, Case T-526/10, Inuit Tapiriit Kanatami v. Commission, ECLI:EU:T:2013:215 (Apr. 25, 2013), https://curia.europa.eu/juris/liste.jsf?num=T-526/10; ECJ, Case C-583/11 P, Inuit Tapiriit Kanatami v. Parl., ECLI:EU:C:2013:625 (Oct. 3, 2013), https://curia.europa.eu/juris/liste.jsf?num=C-583/11; ECJ, Case C-398/13 P, Inuit Tapiriit Kanatami v. Eur. Comm'n., ECLI:EU:C:2015:535 (Sept. 3, 2015), https://curia.europa.eu/juris/liste.jsf?num=C-398/13.

[84] ECJ, Case C-274/12 P, Telefónica SA v. Comm'n, ECLI:EU:C:2013:852 (Dec. 19, 2013), para. 27, https://curia.europa.eu/juris/liste.jsf?num=C-274/12.

[85] We conducted an interview with a source at the CJEU who voiced this sentiment, though requested to remain anonymous. There is similar skepticism about the value of outside parties before other international tribunals as well. *See, e.g.*, Marco Slotboom, *Participation of NGOs Before the WTO and EC Tribunals: Which Court Is the Better Friend?*, 5 World Trade Rev. 69 (2006).

legislation."[86] This appears even more true at the judicial level where well-resourced players predominantly activate the CJEU but whose judgements affect everyone.

Second, in the absence of recognition of effective participatory rights, the exercise of public authority by the EU institutions, notably the Commission's unbounded discretion, may negatively affect the legal sphere of those individuals who were not placed in a position to participate.[87] As discussed, this can't be immediately rectified by the possibility of a legal action given the strict locus standi requirements and high costs entailed in such an endeavor.

Third, and last, in these circumstances characterized by systemic access asymmetries, the democratic meaning of participation—as ensuring equal opportunities of receiving attention and, therefore, gaining access to the policy *and* judicial processes[88]—appears to be ultimately structurally compromised.[89] This outcome defies and counters all rationales generally adduced in support of participatory practices, and in the case of strategic litigation, questions its democratic potential. In these circumstances, how can participation—be it via courts or policymakers—continue to be assumed as always resulting in increased democratic legitimacy? Today's misalignment between the EU participatory practices and the principle of political equality does not only constrain the legitimation potential of participation. It disallows it to the point of de-legitimizing both EU policymaking, and overall decision-making and, given the limited access to it, EU judicial making.

As stated, the risk is that "by engaging citizens or their representatives in governance . . . the participatory democracy discourse might be used to make socially unacceptable policies legitimate."[90] Ultimately, even policies that have been adopted through impeccable democratic procedures may be perceived as forms of arbitrary domination, unless they are accompanied by a "public forum that allows all those who have preferred alternative outcomes to see for themselves that their views have been argued and reasons given for setting them aside."[91] The same may be stated in relation to EU judicial making.

E. Assessing the Practice Strategic Litigation Practice Against EU Participatory Democracy

After unveiling the realities of participatory democracy as exercised through strategic litigation, this Section assesses whether the CJEU's judicial practice aligns with the openness, equality, and participatory imperatives stemming from the Treaty. Once strategic litigation is understood as giving expression to the right of participation in the Union's democratic life, this practice can, and must, be examined under the "Provisions on Democratic Principles" of the Treaty of Lisbon.[92] As discussed, all these provisions are based on an understanding that the participation of affected parties, including to judicial decision-making, might be a further avenue to realize the overarching value of democracy as enshrined in Article 2 TEU. The most relevant provisions are: Article 1 TEU, which states that "decisions are taken *as openly as possible and as closely as possible* to the citizen";[93] Article 9 TEU, which states that "[i]n all its activities, the Union shall observe the

[86]Governance in the European Union 4 (Olivier De Schutter, Notis Lebessis & John Beattie Paterson eds., 2001).

[87]Joana Mendes, *Participation and the Role of Law After Lisbon: A Legal View on Article 11 TEU*, 48 Common Mkt. L. Rev. 1849 (2011).

[88]TEU art. 9(1) ("In all its activities, the Union shall observe the principle of the equality of its citizens, who *shall receive equal attention* from its institutions, bodies, offices and agencies." (emphasis added)).

[89]On the principle of political equality and its implications for participation, see, for example, Aina Gallego, Unequal Political Participation Worldwide (2014).

[90]Kutay, *supra* note 50, at 816.

[91]Philip Pettit, Republicanism: A Theory of Freedom and Government (1997).

[92]TEU arts. 9–12.

[93]TEU art. 1 (emphasis added). *See also* TFEU art. 15(1) ("In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work *as openly as possible*." (emphasis added)).

principle of the equality of its citizens, who shall receive *equal attention from its institutions*, bodies, offices and agencies";[94] Article 10(3) TEU, which states that "[e]very citizen shall have the *right to participate* in the democratic life of the Union;[95] Article 11(1) TEU, which states that "[t]he institutions shall, by appropriate means, give citizens and representative associations the *opportunity to make known* and publicly exchange their views in all areas of Union action";[96] and, Article 13(1) TEU, which states that "[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, *serve* its interests, those of *its citizens* and those of the Member States."[97]

None of these provisions expressly mention the Court, and their drafters might not have the CJEU in mind during the *travaux préparatoires* [*preparatory work*]. Yet, being the CJEU part of the "institutional framework" of the Union, it is undisputable that virtually all these legal requirements do also apply to the Court. It follows that CJEU is therefore bound to them, albeit within the boundaries of its own treaty-enshrined procedures, conditions, and objectives.

What each of these "Provisions on Democratic Principles" entails for EU Courts remains largely unchartered territory at the time of writing. While none of these Treaty Articles can and should be interpreted as requiring these courts to reflect citizens' preferences in their rulings in the same way as representative, majoritarian institutions must do,[98] they impose on the CJEU the duty to be *responsive* to private individuals and organizations.[99] For this to happen, they require the Luxembourg court to be open—Article 1 TEU—and pay equal attention—Article 9 TEU—to all stakeholders in an effort to ensure their participation to its judicial making—Article 10—thus ultimately serving "citizens' interests—Article 13. The recognition of their applicability to the CJEU is highly consequential for the role this institution is called upon to play in the Union's democratic life.

When these provisions are extended to a judicial entity such as the CJEU, their combined normative meaning, often referred to as *democratic adjudication*,[100] conveys the idea that adjudication can, and should, itself be a democratic practice, which in turn contributes to the Union's democratic life. Not only the Court's output, but also its throughput, that is the *how* a Court has come to do its work, may reflect democratic ideals about interactions among litigants and between government and citizenry. A combined reading of these provisions suggests, at a very minimal level, that the Court of Justice is required to inject greater self-awareness about how it exercises its duties of *dicere legem*. This reading may in turn be transformational for how the Court sees itself in the light of the role it is increasingly expected to play in the Union's democratic life. From this perspective, some old questions might suddenly appear novel when approached from such a different, new angle: Is the Court sufficiently open to private individuals knocking at its door to participate to the Union's democratic life? In so doing, is it ensuring equal attention to all stakeholders? Is the Court fully cognizant of the participatory dimension embedded in a growing number of strategic legal actions when interpreting the locus standi requirements—be it in direct actions or third-party interventions? Ultimately, is it sufficiently responsive to citizens and residents' interests and demands?

[94]TEU art. 9 (emphasis added).

[95]*Id.*, at 10(3) (emphasis added).

[96]*Id.*, at 11(1) (emphasis added).

[97]*Id.*, at 13(1) (emphasis added).

[98]The principle of judicial independence requires the courts to be unaccountable for their judicial decisions. Yet they are required to be responsive to arguments and transparent in their access and reasoning. *See* Joseph H.H. Weiler, *Epilogue: Judging the Judges: Apology and Critique*, *in* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 235 (Maurice Adams et al. eds., 2013).

[99]TEU art. 13(1).

[100]Keith D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary*, 38 ATL. L. REV. 708 (2000) (theorizing and defending this notion).

Due to their self-reflexive and largely unstructured nature, these questions may appear far not only from the current academic discourse surrounding the Court, but also from its day-to-day judicial making. Yet, to address these questions is not only a practical imperative, amid the emergence of an increasing practice of strategic litigation, but also a legal obligation for the Court, under the post-Lisbon framework.

The principle of openness—as enshrined in Articles 1 TEU and 15(1) TFEU—that of equality—as enshrined in Article 9 TEU, and that of participation—as recognized by Article 10(3) TEU—do not only sanction the rather passive right of every citizen to open and equal access and participation to the Union, but also require a more pro-active institutional duty from *all* the EU institutions to ensure that from happening. The latter duty is clearly expressed in positive, and prescriptive terms, by Article 13 TEU when it requires all EU institutions, including the CJEU, to serve the interests of its citizens. In other words, as argued elsewhere, EU democracy should be the result of a system of procedures striving for the equal advancement of the interests of all citizens through the creation of a participatory opportunity structure that is materially, not formally, open to everyone.[101]

What exactly this may entail for the CJEU remains a largely open question. Yet the proposed reading of the "Provisions on Democratic Principles" to the EU judicial system hints to the existence of an obligation on the CJEU to ensure a participatory enabling environment as a pre-condition for the exercise of its democratic adjudicatory function. As argued above, once one starts looking at the increasing practice of strategic litigation before EU courts through the lens of participatory democracy, such a reading of primary law may lend support to a new understanding of the EU system of legal remedies and its contribution to the exercise of the right to participate in the Union's democratic life. This may lead EU courts to not only reconsider their interpretation of the locus standi of non-privileged applicants under Article 230(4) TFEU—which may suddenly be approached from a different perspective—but also to undertake other less contentious reforms capable of fostering an enabling participatory judicial environment. Thus, for instance, the CJEU could, and arguably should, accept amicus curiae participation, be it in preliminary references and direct actions. This opening to amici could be based on a combined reading of Article 24 CJEU Statute[102] with Article 11 TEU—notably the duty to give citizens and representative associations the possibility to make known their views, which applies to all EU institutions, including the CJEU. While the recognition of amicus curiae briefs won't per se boost strategic litigation, it would contribute to give voice in the most high-profile cases to many of those who are currently unable to reach the EU Courts in the first place. Likewise, a combined reading of Article 21 of the Statute—"The hearing in court shall be public"—with Article 1 TEU—"decisions should be taken as openly as possible"—may lead the CJEU to authorize the streaming of all *public* hearings, thus increasing overall judicial literacy. Despite being public, attendance to a hearing and access to the information herewith exchanged presupposes today the physical presence, and therefore a trip to Luxembourg.

These illustrations demonstrate how EU courts may enable—through the adoption of a series of modest, yet structural and power-shifting, reforms—their judicial process to overcome the existing obstacles to the incipient practice of strategic litigation. This is what the "Provisions on Democratic Principles" contained in the Treaty require the CJEU to ensure that it is ultimately able to serve the interests of all individuals and organizations.

[101] Alberto Alemanno, *Leveling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality*, 26 EUR. L.J. 114, 114–35 (2020).

[102] TFEU art. 24 ("The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply *all information which the Court considers necessary for the proceedings*." (emphasis added)).

F. Conclusions

Over the last decade, we have been assisting to the emergence of a wave of new cases brought before EU courts across a variety of policy fields and whose objective transcend the individual interest of the parties. If their genesis can be traced to some proto forms of strategic litigation—which have historically paved the way for EU law to be invocable before courts—this practice might be on the verge of maturing into a more inclusive, generalized, and potentially scalable, method of action in the EU legal order.

To apprehend who and how strategic litigation empowers under EU law, this Article proposed an understanding of such a phenomenon as a form of *participation* in the democratic life of the Union. Once it is approached through the participatory lens, the democratic potential brought forward by a strategic litigation practice in the Union emerges quite distinctively. First, the surge of this method of action—when interpreted both in contextual and normatively open terms—can be seen as an effort by private individuals or organizations to mobilize their interests within the EU legal order, in an attempt at trying to fill the gap left by a policymaking process they may not follow or be part of. Second, by allowing individuals and organizations to see their interests considered through an additional democratic route such as litigation, this practice complements and enriches the existing EU participatory opportunity infrastructure. Third, strategic litigation can empower individuals and groups that tend to be excluded from day-to-day policymaking, as epitomized by non-EU citizens, by channeling claims and arguments that could not be put forward anywhere else but the court. More specifically, by enabling minorities to have their voices heard—be they sexual, gendered, ethnic minorities or third-country nationals—this practice may return power to individuals who would otherwise be sidelined from EU democracy. Fourth, by holding the EU institutions and Member States accountable, strategic litigation may contribute to restore the balance of power in EU democracy, thus ensuring its proper functioning and adherence to the rule of law. In sum, strategic litigation carries the potential to enhance democratic participation in the EU and, like any other existing course of action foreseen in the EU legal order, to provide an additional source of legitimacy not only for the Union as a whole[103] but also its judicial system.

Yet, several structural circumstances conditions the full realization of the democratic and legitimating potential of strategic litigation. The activation and operation of this practice is constrained—as it is the case for other participatory channels—by the low literacy level surrounding its existence, the amount of resources needed—be they person, power, expertise, and funding—and, ultimately, the procedural requirements to satisfy to gain access to it. When compared to other avenues participation available to individuals and organizations in the EU, strategic litigation stands out today as an even less open and more unequal practice. This situation may not only severely limit this practice's inherently democratic potential from being fully unleashed, but also tarnish it to the point of empowering those who already powerful, when mobilizing their rights, in the EU legal order.

However, there is no reason why strategic litigation should remain confined to producing disempowering, as opposed to its inherently empowering, effects in the EU legal order.

As demonstrated above, the CJEU is subject to and bound by—like any other EU institutions since the Lisbon Treaty—the "Provisions on Democratic Principles." While these provisions don't impose on the court to reflect citizens' preferences in their rulings in the same way as representative institutions must do, they require the EU judicial system to be *responsive* to private individuals and organizations.[104] This translates into the obligation for the Luxembourg-based court to be open—Article 1 TEU—and pay equal attention—Article 9 TEU—to *all* stakeholders

[103]Schrauwen, *supra* note 53; Besson & Utzinger, *supra* note 53, at 586; Alex Warleigh, *On the Path to Legitimacy? A Critical Deliberativist Perspective on the Right to the Citizens' Initiative*, *in* Governance & Civil Society in the European Union: Normative Perspectives 64 (Carlo Ruzza & Vincent della Sala eds., 2007).

[104]TEU art. 13(1).

in an effort to ensure their participation to its judicial making—Article 10—thus ultimately serving "citizens' interests"—Article 13.

It is submitted that the application of these provisions to the CJEU may unleash a renewed vision of the role this institution must play in ensuring the operationalization of the democratic principle through participation through judicial making. The call for a new approach aimed at re-imagining the access to legal remedies as a privileged participatory opportunity structure capable of pro-actively catalyzing and facilitating the ability of ordinary citizens—as well as diffuse, under-resourced, and traditionally overlooked groups—to be better able to contribute to the Union's democratic life.

Should it ever prosper, this new judicial understanding of EU participatory democracy could set strategic litigation free from its largely stereotyped EU law hero model—which has historically characterized and confined its emergence—and let this practice evolve into a more inclusive, collective, and scalable reality in the EU.

Ultimately, no legal order should rely on the heroism of its people to keep its legal system in check.

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