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

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

1 INTRODUCTION

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

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

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

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

[3] Inbar Mizarhi-Borohovich, Abraham Newman, and Ido Sivan-Sevilla, 'The Civic Transformation of Data Privacy Implementation in Europe' (2023) 47(3) West European Politics 671.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (GDPR) [2016] OJ L119/1. Benjamin Greze, 'The Extra-Territorial Enforcement of the GDPR: A Genuine Issue and the Quest for Alternatives' (2019) 9(2)

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

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

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

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

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

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

[6] Mizarhi-Borohovich, Newman, and Sivan-Sevilla (n 3); Emilio Lehoucq and Sidney Tarrow, 'The Rise of a Transnational Movement to Protect Privacy' (2020) 25(2) Mobilization: An International Quarterly 161; Woojeong Jang and Abraham L Newman, 'Enforcing European Privacy Regulations from Below: Transnational Fire Alarms and the General Data Protection Regulation' (2022) 60(2) Journal of Common Market Studies 283; Federica Casarosa, 'Transnational Collective Actions for Cross-Border Data Protection Violations' (2020) 9(3) Internet Policy Review 1.

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

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

[9] Valentina Golunova and Mariolina Eliantonio, 'Civil Society Actors as Enforcers of the GDPR: What Role for the CJEU?' (2024) 15 Journal of Intellectual Property, Information Technology and E-Commerce Law 182.

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

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

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

2 LEGAL MOBILISATION, THE CJEU AND DATA PROTECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 DATA PROTECTION LEGAL MOBILISATION BEFORE THE CJEU

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 MAPPING DATA PROTECTION MOBILISATION BEFORE THE CJEU

3.1 CASE SELECTION AND METHODOLOGICAL APPROACH

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

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

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

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

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

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

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

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

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

[80] Kris van der Pas, 'Conceptualising Strategic Litigation' (2021) 11 Oñati Socio-Legal Series 116; Christine Cimini and Doug Smith, 'An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study' (2021) 35 Georgetown Immigration Law Journal 431; Sonja Buckel, Maximilian Pichl, and Carolina A Vestena, 'Legal Struggles: A Social Theory Perspective on Strategic Litigation and Legal Mobilisation' (2024) 33(1) Social & Legal Studies 21.

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

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

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

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

3.2[a] Overview

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

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

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

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

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

Table 1: Overview of CJEU data protection legal mobilisation cases

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

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

3.2[b] Actors, aims and topics of DPLM

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

Table 2: Data protection legal mobilisation actors and cases

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

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

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

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

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

security.[97]

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

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

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

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

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

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

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

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

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

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

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

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

4 A CRITIQUE OF DATA PROTECTION LEGAL MOBILISATION

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

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

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

4.1 THE PREVAILING LEGAL PROBLEM

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

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

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

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

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

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

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

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

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

4.2 THE LACK OF COLLECTIVE ACTION

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

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

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

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

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

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

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

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

[158] Smuha (n 157) 5.

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

[160] ibid.

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

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

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

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

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

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

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

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

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

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

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

4.3 THE ABSENCE OF CLAIMS BY MARGINALISED COMMUNITIES

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

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

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

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

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

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

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

5 CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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