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Strategic litigation in EU gender equality law

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Strategic litigation in EU gender equality law

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Executive summary

Introduction

This report examines strategic litigation (SL) in the area of sex discrimination law, both at the national and at the EU level. ‘Strategic litigation’ describes the employment of litigation strategies to elicit social, legal or policy change and is often carried out by civil society organisations and/or lawyers as a form of activism. In the realm of gender equality, this approach has been used both at the Court of Justice of the European Union (CJEU) and at the national level.

Both legal and extra-legal factors contribute to the success of SL. This report aims to determine such factors, focusing on the area of sex discrimination law in the ambit of the six EU gender equality directives and including best-practice examples. The area of research includes both the national level (Chapter 2), and the EU level (Chapter 3). The main purpose of the report is to provide insights regarding the necessary steps to stimulate and support gender equality SL. It draws on questionnaires given to 31 national legal gender experts of the European Equality Law Network. It does not contain a complete systematisation of SL projects that have already taken place in the field of gender equality – mostly due to the fact that this information is not available, also because there are hardly any comprehensive studies or reports that have attempted to collect and describe SL projects on a national or European scale in the area of gender equality.

Terms and definitions

There is no coherent definition of the term ‘**strategic (or impact) litigation**’ in the literature. SL differs from classical litigation in that it tends to pursue a larger (public interest) goal, rather than a single court victory. It usually prioritises a given societal or political agenda over the immediate interests of a particular client and is often carried out by interest groups and/or socially conscious lawyers as a form of activism. Sometimes, SL efforts are embedded in a comprehensive long-term strategy, stretching over a period of multiple years. For the purpose of this report, SL will be defined as follows: strategic litigation is litigation which aims to effect change that transcends the victory in a particular case, and prioritises a specific (legal/social/political) agenda over the particular interests of a client.

It is important to distinguish SL from (socially motivated) litigation without a larger societal impetus, such as legal aid litigation: Legal aid litigation aims to improve the particular situation of the assisted individual, rather than to create societal change. SL, on the other hand, is an activity *that goes beyond litigating a particular case*. It means devising and carrying out litigation which achieves – or is meant to achieve – a *particular societal goal*.

Agents of strategic litigation

Agents of strategic litigation are organisations or individuals that carry out or support SL projects. They can be civil society organisations (CSOs) such as women’s rights organisations, institutions such as equality bodies or chambers of labour, trade unions, commercial law firms or individual lawyers. Several factors indicate whether an organisation or individual can act as an agent of strategic litigation, such as their judicial standing rights, as well as the availability of resources and expertise. If an organisation does not have direct access to court and thus cannot carry out a litigation project by itself, it still can provide important support for strategic litigation projects executed by other organisations – for instance, by conducting research, collecting data or providing initial legal advice and referring clients to other

organisations/lawyers. These organisations, while not litigating themselves, can play a vital role in SL projects – particularly in concerted, long-term litigation strategies, involving a number of organisations (often with limited resources).

Potential benefits of strategic litigation

The most obvious outcome SL strives for is *legal* or *doctrinal* change. Winning a case and obtaining a positive precedent can result either in law change, or in a more favourable legal interpretation of existing law. However, SL can produce *additional effects* such as empowering a victim of discrimination; creating mobilisation for a cause; inciting public debate on an issue; increasing popular and media awareness; generating sympathy and support for a cause; educating the public at large (including judges and lawmakers) about a certain topic; exerting political pressure, and many others. Some of these effects can also kick in when a case is lost – for instance, by fortifying a movement's identity due to outside resistance, by mobilising constituents, or by profiting from media attention.¹

At the EU level, SL can both contribute to the harmonisation of EU law, and to the creation of a civil society in Europe: Litigation is one way to enforce the correct application of EU law, even against one's own Member State. Especially in the area of sex discrimination law, litigation has given the CJEU the opportunity to clarify and develop its jurisprudence and thus, to improve and align the level of protection throughout the Member States. Moreover, transnational strategies, driven by a common agenda – such as the fight for equality – can create transnational communities based on collective interests. EU-level litigation can be a way for civil society to participate in European decision-making.

Challenges

SL is not without risks. It is important to undertake a realistic risk assessment in order to determine whether SL is the right approach – or whether an alternative course of action might be indicated. The most obvious risk of SL is the danger of losing a case and creating a negative precedent, which in turn can lead to a cementation of the status quo, or – even worse – negative law reform / doctrinal change. Moreover, SL, as any litigation, is resource intensive, requiring financial means, expert knowledge, and personnel, among other things. This makes it necessary to carefully calibrate the possible benefits of litigation against the probable costs that such an approach requires.

Chapter 2 – Strategic litigation at the national level

Chapter 2 examines the indicators allowing or deterring SL in the area of sex discrimination law at the national level. The SL indicators are organised in the following way:

	Factors	What they indicate	Issue in question
What?	Legal Standards of Non-Discrimination Law	What is the legal basis for SL efforts? (EU acquis & case law, national provisions)	Material scope of SL
Where?	Adequate Fora for SL	Where can SL take place?	Judicial structure
Who?	Agents of SL	Who can potentially carry out / support SL?	Actors of SL and their legal standing and funding
	Resources	What kind of resources are available to them?	
How / Why?	Access to Justice	Is SL attractive?	Incentives / Disincentives for SL
	Socio-Legal Culture	Is SL attractive?	

1 NeJaime, D., 'Winning Through Losing' (2011) 96 Iowa Law Review 94, 969-1011.

The first section of this Chapter, as shown in the scheme above, deals with ‘legal standards of non-discrimination law’, delineating the legal scope in which SL takes place. The second section – ‘adequate fora for strategic litigation’ – examines the existing judicial structure regarding its potential for SL approaches. The subset of the third and fourth sections looks at possible agents of SL, their legal standing and the resources available to them. The last two sections – ‘access to justice’ and ‘socio-legal culture’ – analyse possible drivers for and obstacles to SL.

Legal standards of non-discrimination law

National anti-discrimination provisions in the area of gender equality are deeply interconnected with EU law, as the Member States are obliged to transpose EU law into their national law. Without a doubt, the EU (and within its institutions, particularly the CJEU) has contributed immensely to the development of gender equality within EU Member States. The ever-growing EU gender equality *acquis* and the body of national laws that implements it expands the latitude for litigation – both in a procedural and a material legal sense – creating new possibilities for civil society participation. In fact, both the development of EU gender equality law,² as well as its enforcement,³ has heavily relied on litigation by private actors and/or civil society organisations (CSOs).

Adequate fora for strategic litigation

One of the first decisions of a SL project is the choice of forum, assessing whether a particular court is an adequate addressee for particular litigation. This means that the decisions of a court that is considered as an addressee for SL need to develop a certain impact. An important factor is a court’s ability to exercise **judicial review** – the practice of reviewing legal and/or administrative acts, and to possibly set them aside if they conflict with a higher order text (such as a constitution or EU law). Most European countries have adopted some form of judicial review. In many countries, **equality bodies** can issue decisions on sex discrimination claims, which makes them potential addressees of SL efforts. Most of these bodies, however, cannot issue legally binding decisions.

Agents of strategic litigation

In order for SL to flourish, there need to be organisations and/or individuals capable and willing to design, carry and support SL projects. This depends, *inter alia*, on the question of whether such entities have direct access to the courts (**standing rights**), or on their access to lawyers / law firms. However, even if standing rights are limited or lacking, an entity can provide meaningful support to organisations carrying out SL and thereby, back SL projects. In Europe, there are four major types of potential agents of SL: equality bodies, civil society actors (CSOs), law (legal) clinics and law firms / private lawyers.

An organisation has **legal standing rights** if it has the opportunity to be heard by a court and thus take part in the judicial decision-making process. This report contains an overview in section 2.3 of (potential) agents of SL at the national level.

There are four main ways to address the court via litigation:⁴

- 2 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 6; Börzel, ‘Participation Through Law Enforcement: The Case of the European Union’, 130.
- 3 Anagnostou and Millns, ‘Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System’, 123; Börzel, ‘Participation Through Law Enforcement: The Case of the European Union’, 133.
- 4 Kádár, ‘The Legal Standing of Equality Bodies’, 6.

- by representing a victim of discrimination at court – either directly (as a CSO / equality body / law firm / etc.), or via cooperation with a law firm / by hiring a lawyer / etc. – or by acting *on behalf* of the victim
- by litigating as a party in their own right (*actio popularis*)
- by way of a class action
- by way of joining proceedings as a third party or an *amicus curiae*.

A special case is the cooperation of an organisation (without official standing rights) with a lawyer / law firm. Since SL consists of much more than appearing at court, an organisation might still be ‘in charge’ of the SL project by determining its scope, goal and argumentation strategy, as well as carrying out most accompanying measures (such as media strategies, awareness raising, political lobbying, etc.). In such cases, it might be said that the organisation in question is still the one ‘carrying out’ the SL project, despite its lack of legal standing.

Organisations that cannot (or will not) carry out SL projects by themselves can still support SL projects carried out by other organisations. Support for SL can have many forms. In most examined countries, equality bodies, specialised CSOs, trade unions and/or chambers of labour, as well as law clinics, can provide primary legal support on (certain) sex discrimination matters. Apart from providing initial legal advice, organisations can support SL by, *inter alia*, referring clients to experienced lawyers/institutions, or providing any other kind of backing for SL projects, such as conducting legal research; publishing relevant data (e.g. statistics and reports); launching topical (media) campaigns; carrying out political/legislative lobbying; conducting consciousness-raising strategies; etc. In any case, SL will always be most successful if embedded in a comprehensive social change campaign.

Equality bodies in Europe display a variety of functions and institutional structures. Whether an equality body can carry out SL depends largely on its mandate and standing rights. Equality bodies that are designed as ‘equality tribunals’ first and foremost are, however, less likely to take on litigation tasks. Equality bodies can support SL projects by collecting (statistical) data on sex discrimination cases, administering analyses of such data, and/or conducting independent surveys on gender equality matters. Importantly, some equality bodies can participate in negotiations preceding legal drafts, issue recommendations on law and policy reforms and/or advise the government or parliament on sex discrimination issues. Trans- and international cooperation, support and exchange of best practices and resources can also be a good method to further SL activities. Networks such as EQUINET⁵ provide valuable platforms in this regard.

Civil society actors (civil society organisations, CSOs) include non-governmental organisations (NGOs) or non-profit organisations (NPOs), but also unions or employees’ chambers, depending on their particular institutional make-up. In virtually all of the examined countries, certain CSOs could potentially (or have already) engage(d) in SL, either by carrying out SL themselves or by providing important support to vitalise SL. International/transnational organisations are also importantly involved in building up SL capacities in some European countries. An example is the Soros-backed Open Society Justice Initiative:⁶ the organisation has been active in more than 120 countries, among them some European countries (especially in Eastern Europe), investing personnel and financial resources to establish advocacy structures and carry out SL projects (among other things).

A **law clinic** is usually situated at a university and is a method of practical law teaching. It provides both legal education to law students by engaging them in hands-on legal activity, and societal services by providing legal advice, legal aid and/or projects (such as SL) promoting social justice. In 17 of the examined countries, law clinics exist that (also) deal with gender equality and/or sex discrimination law.

5 EQUINET <http://equineteurope.org/2019/03/19/equality-bodies-and-equinet-promoting-equality-in-europe/>.

6 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

While very few law clinics have direct access to the courts, a lot of law clinics support participation in court cases or enable their students to do so. This usually happens in one (or more) of four ways:

- Cooperation with law firms / lawyers: Some clinics cooperate with law firms or individual lawyers who are responsible for the representation of a client, and who are actively supported by the law clinic. This model is chosen by law clinics in **Germany, Ireland, Italy, Poland** and the **UK**.
- Cooperation with CSOs and/or equality bodies: Similarly, students in law clinics can support a case brought forward by a CSO or by an equality body in **Belgium, France, Ireland, Poland, Spain** and the **UK**.
- Placement with other organisations: clinics in **Germany, Ireland** and **Slovenia** place their students with CSOs, equality bodies and other organisations (for instance, in the form of internships) where they might be able to participate in litigation (in **Germany**, however, CSOs and equality bodies do not have legal standing at court).
- Referral arrangements: clinics in the **Netherlands** and the **UK** refer clients to other organisations for representation, such as CSOs, equality bodies, trade unions or law firms.

Law clinics are also particularly interesting examples for providing support to SL. Due to their embeddedness in the academic institutional architecture, they perform (or could perform) the following support functions for SL projects:

- carrying out academic research in support of SL projects, such as data collection and analysis, researching and workshopping legal arguments, publishing topical articles or reports, etc.
- educating socially conscious students and future strategic litigators; also by providing students with internships at CSOs and equality bodies (as is the case in **Germany, Ireland** and **Slovenia**).
- Legal aid clinics can be the first point of contact for victims of discrimination in need of assistance and thus connect strategic litigators with potential clients through referrals. Legal aid and/or preliminary legal advice is provided by clinics in **Belgium, Croatia, France, Germany, Hungary, Ireland, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Spain, Sweden**⁷ and the **UK**. Clinics in the Netherlands and the UK refer victims in need of court representation to appropriate organisations.

Law firms or private lawyers can also carry out SL; this will often happen in the context of pro bono programmes. In some instances, lawyers cooperate with equality bodies, trade unions / chambers of labour or CSOs on sex discrimination cases. Certain factors can act as incentives or as deterrents for lawyers wishing to engage in SL.

Firstly, competitive or flexible remuneration schemes can encourage (strategic) litigation. Success-based fees – meaning that a lawyer only gets paid if the case is won – reduce the financial risk of litigation for victims of discrimination and/or for organisations that hire lawyers for SL projects. In **Ireland**, for instance, some law firms operate on a ‘no foal no fee’ basis, meaning that a lawyer only charges their client if the case succeeds. In a *pactum de quota litis* scheme, a lawyer gets paid a contingency fee – e.g. a quota of the damages awarded to the victim of discrimination. In **Iceland**, some lawyers (especially personal injury lawyers) may use contingency fees. Of course, such remuneration agreements will establish a particularly high incentive if punitive damages are available. However, (purely) success-based remuneration schemes are prohibited in most European countries, as a study from 2006 determined.⁸

7 Law clinics are a fairly recent phenomenon in Sweden. In 2014, the University of Gothenburg started the first law clinic in Sweden, in collaboration with non-profit organisations that offer free legal counselling. Apart from one organisation for women’s shelters, none of the organisations are working in the area of gender equality. More information available at <https://law.handels.gu.se/english/rattspraktik>.

8 Hoche Demolin Brulard Barthélémy (Firm), *Study for the European Commission on the Transparency of Costs of Civil Judicial Proceedings in the European Union. Final Report*. (Contract JLS/2006/C4/007-30-CE-0097604/00-36, 2006), 108.

Secondly, law firms increasingly provide pro bono programmes that are meant to engage in public interest law. Pro bono departments can, of course, carry out SL themselves, or cooperate with non-profit organisations. One of the biggest deterrents for the establishment of pro bono programmes are laws or bar regulations that determine binding minimum fees.

Resources

Litigation – especially as a long-term strategy – requires extensive resources, such as financial means, (experienced) personnel, time, access to knowledge and networks. These factors critically influence an organisation's or activist's ability to plan / structure / carry out SL, and determine whether entities interested in SL know where to turn to for support.

There are three main **sources of funding** for organisations and activists wanting to engage in SL: public funding (such as regular subventions by the state, tax benefits and privileges, or the possibility to apply for state funding), private funding (membership fees, donations and fundraising events), and funding via international/European organisations, grants and programmes. Public funding is often tied to certain conditions. Private funding, on the other hand, ensures independence, but is not always easy to come by. Funding by international/transnational/European organisations, programmes and grants has become increasingly important in the area of SL – particularly in Eastern Europe. A lack of funds on the part of the (potential) litigators is a **main impediment** for SL.

Another **main problem** preventing SL is a **shortage of experts and/or training resources** for CSOs and activists wanting to engage in SL. SL is still not well-known in many European countries, which means that there are few experts who have the necessary competences to help set up a SL programme or department. Transnationally operating organisations – such as the Open Society Foundation / Justice Initiative⁹ – have served as promoters and knowledge-distributors for SL in some parts of Europe. Likewise, transnational and European-wide programmes and grants can encourage SL.

Networks can provide expertise, exchange of best practice examples, and support for litigation strategies. They can establish fora where like-minded activists can meet and possibly join forces to develop a litigation strategy together. The Network of European Equality Bodies, EQUINET, was described as such a network. Apart from that, a number of loose networks, informal knowledge exchanges and personal contacts contribute to the distribution of relevant information.

Access to justice

Litigation ties up resources: personnel, money and time. Therefore, particularly long **durations of proceedings** may deter SL, since the prospect of committing years, or even decades to fight in court for a particular cause can discourage the use of SL in favour of other advocacy approaches.

Short time limits for advancing discrimination claims can also negatively influence the exercise of SL. The directives leave it to the Member States to set appropriate time limits, with the result that there is a great variation in time limits among the examined countries.

High costs for court proceedings of course discourage litigation, especially if at the same time, funds for potential SL agents are limited. In most of the examined countries, there is a high risk connected to litigation since the unsuccessful party not only has to bear their own court and representation fees (e.g. costs incurred by enlisting a lawyer), but also those of the winning party.

9 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

Public legal aid can both mitigate the effects of high judicial fees and provide an incentive for litigation if it effectively reduces the financial burden and/or risks of litigation. Certain systems of legal aid are more conducive to SL than others (as described in section 2.5.4) – in some countries, for instance, legal aid can also be claimed by CSOs and/or equality bodies, whereas in others it is restricted to individuals. It is, however, questionable whether the receipt of public legal aid is compatible with SL in general. After all, SL tends to prioritise a public interest agenda over the immediate interests of an individual claimant; and legal aid is usually a social service meant to provide access to justice for individuals with scarce financial means, instead of subsidising an advocacy project.

Socio-legal culture

The emergence of SL also depends on the particular social/legal environment. If the awareness of sex discrimination laws and/or SL mechanisms is low, then SL will not be an option. Similarly, if victims of discrimination prefer not to enforce their rights, because they do not trust the institutional structure, or because they fear negative repercussions – such as re-victimisation, disadvantages at their workplace or in their social environment – it might be difficult for activists or organisations to find clients for their SL attempts. Lastly, SL will not be carried out if the risks of SL (such as conservative backlash, negative precedents, costs or other unintended consequences) are – or are perceived to be – high (risk aversion), or if there are more efficient methods and approaches that achieve the same or similar results (political lobbying, media campaigns, etc.).

Chapter 3 – Strategic litigation before the Court of Justice of the European Union

As outlined above, SL before the Court of Justice of the European Union (CJEU) usually starts at the national level. Therefore, Chapter 2 also largely applies to SL involving the CJEU. Nonetheless, there are certain particularities regarding SL at the CJEU.

Access to justice before the CJEU

The EU Court system knows a range of different actions, with the preliminary reference procedure under Article 267 TFEU having produced by far the biggest amount of litigation. Under Article 267 TFEU, litigants do not have the option to *directly* address the CJEU. While they can suggest that their national court refer the case to the CJEU and even assist their court in formulating a reference question, they have no right to *request* a reference. The discretion to refer rests fully with the national court or tribunal – except in cases before the highest national court, which has an obligation to refer if it encounters an ambiguity regarding an EU law question. Of course, the determination of whether a question is unclear or not rests again with the highest court(s). In the context of sex discrimination issues, the questionnaires filled in by national experts have revealed that the national referral patterns seem to vary greatly. While in **Spain**, the courts usually follow litigants' requests for referrals, this cannot be said to be the case in **Bulgaria**, the **Czech Republic**, **Denmark**, **Hungary**, **Lithuania**, **Poland** and **Sweden**.

While the CJEU does not usually provide for *amicus curiae* briefs or other third-party interventions, there are exceptions. Third parties that can show an 'interest in the result of the case'¹⁰ and have already been involved in the national proceedings may be allowed to submit observations to the CJEU. Moreover, EU Non-Discrimination Directives explicitly hold that Member States have to allow for associations with a legitimate interest to engage, either *in support or on behalf of* a claimant, and with their approval, in non-

¹⁰ Article 40, Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210.

discrimination cases.¹¹ The CJEU has further held in *Feryn*¹² and *Asociația Accept*¹³ that the identification of an individual victim was *not* necessary, and that associations can have autonomous standing in such cases. This basically establishes that a Member State can choose to introduce an *actio popularis* (i.e. giving an organisation the opportunity to bring an action *in their own name*). In 2016, 16 Member States had made use of this possibility.¹⁴

In preliminary reference procedures, parties are granted a period of two months after notification of the order for reference to submit written observations.¹⁵ This period is extremely short, especially since interventions before the CJEU will most likely require a different argumentation strategy than before national courts. This is especially problematic if there is a lack of familiarity with EU law and/or sex discrimination law on the part of the litigants or their representatives. National experts have identified this as a problem impeding SL in **Bulgaria, Estonia, Italy, Lithuania** and **Poland**. In the **UK**, some CSOs do not dispose of expert knowledge regarding EU law provisions.

Specific functions of strategic litigation agents at the CJEU level

SL requires a high degree of expert knowledge, for instance regarding legislative and case law developments. This is particularly true for a sector that is as deeply infused with EU law requirements and standards as anti-discrimination law. Therefore, the existence of networks that gather and distribute knowledge is highly relevant in this area. Transnationally operating advocacy organisations have been essential in spreading the knowledge about landmark CJEU decisions in the area of gender equality among their members,¹⁶ even if they do not litigate themselves.

While **agents carrying out strategic litigation** will often be anchored at the national level (due to the fact that, as mentioned previously, litigation often starts at the national level), the multi-level governance structure of the European Union means that public interest activism is also fragmented and usually contains a number of different approaches and addressees. In this sense, SL will often be embedded in a larger strategy, including political, public and other campaigns and approaches.

Chapter 4 – Conclusions and recommendations

This report has pinpointed a number of factors impeding SL. These are, *inter alia*:

Lack of Research. The present study shows that SL is still widely under-researched in Europe. Out of the 31 national legal gender experts who were given questionnaires for this study, 29 stated that ‘strategic litigation’ was not a common term in their country’s legal academic discourse.

Rules on lawyer fees / pro bono practice. In a number of countries, providing legal services *pro bono* is not possible due to laws or chamber rules determining *binding* minimum fees for lawyers. The absence of flexible remuneration schemes enabling **success-based and/or contingency fees** can also deter

11 E.g. Article 7(2) of the Race Equality Directive (2000/43/EC) [2000] OJ L 180/22; Article 9(2) of the Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16, which provide that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the Directives are implemented, ‘may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive’. A similar provision exists notably in Directive 2006/54 on sex equality in employment and occupation: Article 17(2).

12 C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397 [2008].

13 C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2013:275 [2013].

14 Tymowski, J., *The Employment Equality Directive – European Implementation Assessment* (EPRS / European Parliament Research Service, 2016), 53.

15 Article 23, Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210.

16 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 203.

litigation, because it increases the risk for discrimination victims to engage (commercial) lawyers as their representatives and might decrease the motivation of law firms to engage in such litigation.

Lack of availability of suitable claims. Lack of adequate actions to address discrimination at court – either in support of a victim, or in the absence of a victim – can be an obstacle to SL. Granting standing rights to organisations (such as *actio popularis* or the ability to initiate class actions) increases the likelihood of SL, since it broadens the scope of possible action of said organisations.

Access to justice – other factors. Restrictive time limits for advancing discrimination claims, long court proceedings or high judicial fees can frustrate litigation efforts and thus, SL as well. The accessibility of legal aid also differs from country to country; particularly restrictive conditions for the receipt of legal aid can also jeopardise SL efforts.

Lack of adequate agents of strategic litigation. This report has attempted a (non-exhaustive) typology of entities that would (potentially) be able to carry out SL, including equality bodies, civil society actors, law (legal) clinics and law firms / private lawyers. However, a number of factors may prevent them from engaging in SL:

- **Expertise.** In order for SL to work, a certain expertise is needed – both with gender equality / sex discrimination law (ideally, at the national and the EU level), and with SL. Such expertise is presently (partly) lacking on the part of legal practitioners in **Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Italy, Lithuania, Poland, and Spain.**
- **Structure.** Whether SL is a feasible approach for an organisation also depends on its structure. For instance, certain equality bodies do not have the mandate to pursue SL, or do not receive funding for such activities. Another impediment to SL might be the institutional entanglement of potential agents of SL with state authorities and a consequent lack of independence. This might happen if the potential agent is part of the state institutional structure, or massively dependent on public funding.
- **Resources / Funding.** Next to the absence of necessary expertise, a major – if not the biggest – obstacle to SL is a lack of adequate financial (and personal) resources for SL projects.

Socio-legal environment. The socio-legal environment also determines whether SL will be a viable advocacy option. The following factors influence the emergence of SL:

- **Awareness.** A lack of awareness regarding the existence and usefulness of SL has negative effects on its development. Similarly, limited knowledge of discrimination laws on the part of legal practitioners and/or victims will frustrate litigation.
- **Lack of trust / fear of negative consequences.** A lack of trust in institutional structures or the fear of negative consequences (such as re-victimisation) can prevent SL, since it might make it difficult for potential strategic litigators to find potential clients for SL projects.
- **High risks / better alternatives.** SL will not be a viable route for civil society organisations if the risks connected to litigation are particularly high (such as generating backlash, high costs in the event of losing a case, etc.), or if better avenues for implementing a social change agenda exist – such as formal/informal channels of communication with (political) decision makers. The latter deterrent to SL, however, is not *per se* problematic; after all, it is up to every organisation/activist to choose their appropriate course of action, depending on their specific situation. So if they decide that other forms of intervention (apart from SL) are more promising, this might deter litigation – but this situation does not need to be amended.

Summary of recommendations

Considering the above, the following steps can be taken to support the emergence of SL in the area of sex discrimination:

Research:

- Support of research regarding SL in the area of gender equality, such as empirical/qualitative studies on the occurrence of SL, legal scholarship on the matter, etc.
- Support and funding of publications on these issues.

Legal factors:

- Support for the creation and development of pro bono departments in law firms.
- Encouraging the review of minimum fee provisions for lawyers.
- Research on the effect of success-based and/or contingency fees in the area of gender equality, and considering the introduction of litigation-friendly fee schemes.
- Encouraging the expansion of legal aid to organisations engaging in (strategic) gender equality litigation.
- Encouraging the expansion of standing rights, *actio popularis* claims and collective actions to organisations in the area of gender equality.
- Generally: encouraging the development of strong legal rights for employees / potential victims of discrimination (including the awarding of damages for discrimination that actively serves as a deterrent for future wrongdoing).

Agents of strategic litigation:

- Supporting the creation and development of expertise regarding SL in the area of gender equality; e.g. by supporting gender equality organisations / law clinics / other organisations willing to build up this expertise.
- Providing extensive resources (i.e. grants, programmes or funding) specifically for civil societal / academic organisations willing to engage in SL / willing to build up SL expertise in the area of gender equality / willing to act as multipliers in this area.
- Creation of ‘SL expertise hubs’ within Member States – i.e. organisations / networks/ academic institutes that are specifically designed
 - to build up country-specific SL expertise in the area of non-discrimination;
 - to engage in strategically disseminating this knowledge across advocacy organisations and other interested entities within their Member State;
 - to build up and maintain Europe-wide networks on this particular issue, also by connecting to already existing networks that work in related areas (such as EQUINET, ENCLE, EELN, etc.);
 - to build up and maintain communication with other organisations and networks engaging in SL in other areas, such as ILGA Europe (engaging in SL on LGBTIQ rights) or Greenpeace, in order to learn from each other’s experience;
 - to maintain close communication with the European Commission and other stakeholders to provide updates and exchange on recent developments and best practice examples.
- Supporting the creation of (SL) law clinics that (also) engage in gender equality issues.
- Supporting (transnational) exchange on SL, i.e. by providing resources/platforms/knowledge on such practices.

Socio-Legal environment:

- Support awareness-raising measures in the area of gender equality / SL.
- Encourage reducing the risks for (strategic) litigation, e.g. by erecting funds to take over litigation costs and judicial fees.

Résumé

Introduction

Le présent rapport analyse, à la fois au plan national et au plan européen, le litige stratégique dans le domaine du droit relatif à la discrimination fondée sur le sexe. Le «litige stratégique» désigne le recours à des actions en justice visant à provoquer un changement social, juridique ou politique; il est souvent initié par des organisations de la société civile et/ou des avocats qui en font une forme de militantisme. En ce qui concerne plus particulièrement l'égalité entre les hommes et les femmes, il s'agit d'une approche souvent utilisée tant à la Cour de justice de l'Union européenne (CJUE) qu'au niveau national.

L'issue favorable d'un litige à visée stratégique dépend de facteurs à la fois judiciaires et non judiciaires que le rapport ci-après ambitionne de préciser; il se concentre sur la législation en matière de discrimination fondée sur le sexe relevant du champ d'application des six directives de l'UE relatives à l'égalité hommes-femmes, et propose des exemples de bonnes pratiques. L'étude couvre à la fois le niveau national (chapitre 2) et le niveau européen (chapitre 3). Son objectif principal est de fournir des indications quant aux mesures à prendre pour encourager et soutenir des recours stratégiques en matière d'égalité des genres. Elle se fonde sur les questionnaires transmis aux 31 experts en droit de l'égalité des genres du Réseau européen d'experts juridiques dans ce domaine (*European Equality Law Network* ou EELN). L'analyse ne comporte pas de systématisation complète des projets de litiges stratégiques déjà menés dans le domaine de l'égalité hommes-femmes – essentiellement parce que l'information n'est pas disponible, mais aussi parce qu'il n'y a guère à ce jour d'analyses ou de rapports exhaustifs tentant de répertorier et de décrire ce type de projets à l'échelle nationale ou européenne.

Termes et définitions

Il n'existe pas de définition cohérente du terme «**litige stratégique**» (appelé aussi «litige d'impact») dans la littérature. Cette forme de recours diffère d'un contentieux classique du fait que l'objectif (d'intérêt public) poursuivi va au-delà d'une victoire judiciaire dans une affaire unique. Axant généralement sa priorité sur un agenda sociétal ou politique déterminé plutôt que sur l'intérêt immédiat d'un client, le litige stratégique est souvent intenté en tant que forme d'activisme par des groupes de pression et/ou des avocats socialement engagés. Les actions en justice à visée stratégique s'inscrivent parfois dans une stratégie de longue haleine s'étendant sur plusieurs années. Aux fins du présent rapport, le litige stratégique sera défini comme suit: un litige qui vise à engendrer un changement transcendant la victoire dans une affaire particulière et qui privilégie un agenda (juridique/social/politique) spécifique plutôt que l'intérêt particulier d'un client.

Il est important de distinguer le litige stratégique d'un litige (à vocation sociale) ne s'accompagnant pas d'une impulsion sociétale plus large, tel le litige avec assistance judiciaire – lequel vise à améliorer la situation particulière de la personne assistée plutôt qu'à susciter un changement sociétal. Le litige stratégique constitue pour sa part une activité *qui dépasse le règlement judiciaire d'une affaire particulière*: il implique l'élaboration et la mise en œuvre de poursuites judiciaires qui réalisent – ou visent à réaliser – un *objectif sociétal particulier*.

Acteurs du litige stratégique

Les acteurs du litige stratégique sont des organisations ou des particuliers qui exécutent ou soutiennent des projets relevant de ce type d'action. Il peut s'agir d'organisations de la société civile (OSC) telles que des organisations de défense des droits des femmes, d'institutions telles que des organismes pour la promotion de l'égalité ou des chambres du travail, de syndicats, de cabinets de droit commercial ou d'avocats indépendants. Plusieurs éléments font qu'une organisation ou un particulier peut agir ou non en qualité d'acteur dans le cadre d'un litige stratégique. Lorsqu'une organisation ne jouit pas d'un accès direct aux tribunaux et ne peut, par conséquent, mener seule un projet de litige stratégique, elle peut néanmoins apporter un soutien majeur à des projets de ce type exécutés par d'autres organisations – en effectuant des recherches, en rassemblant des données, en fournissant des premiers conseils juridiques ou encore en dirigeant ses propres clients vers d'autres organisations/avocats, par exemple. Sans être elle-même partie au contentieux, cette organisation peut jouer un rôle essentiel dans les projets concernés – en particulier lorsqu'il s'agit de stratégies judiciaires concertées et de longue haleine impliquant plusieurs organisations (aux ressources souvent limitées).

Bénéfices potentiels du litige stratégique

Le résultat recherché lors d'une démarche de litige stratégique est, de toute évidence, un changement *juridique* ou *doctrinal*. Gagner une affaire en justice et obtenir un précédent positif peut donner lieu à une modification de la législation ou à une interprétation juridique plus favorable de la législation en vigueur. Mais l'action à visée stratégique peut produire des *effets supplémentaires* tels que l'autonomisation des victimes de discrimination; la mobilisation en faveur d'une cause; l'incitation à débattre publiquement d'une problématique; une sensibilisation populaire et médiatique accrue; l'éveil d'une sympathie et d'un soutien envers une cause; l'éducation du grand public (y compris les magistrats et les législateurs) sur un sujet déterminé; l'exercice d'une pression politique; et bien d'autres encore. Certains de ces effets peuvent également se produire lorsqu'une affaire est perdue – renforcement de l'identité d'un mouvement en raison de la résistance extérieure qu'il suscite, mobilisation des parties prenantes ou attention médiatique accrue, par exemple.¹

Au niveau de l'UE, le litige stratégique peut contribuer, d'une part, à l'harmonisation du droit de l'Union et, d'autre part, à l'édification d'une société civile en Europe. Il constitue l'une des façons de faire appliquer correctement le droit européen, y compris à l'encontre de son propre État membre. En matière de discrimination fondée sur le sexe plus particulièrement, ce type d'action a donné l'occasion à la CJUE de clarifier et de développer sa jurisprudence et, en conséquence, de relever et d'aligner le degré de protection dans l'ensemble des pays de l'Union. Des stratégies transnationales impulsées par un agenda commun – la lutte en faveur de l'égalité, par exemple – peuvent créer en outre des communautés transnationales fondées sur l'intérêt collectif. Le contentieux au niveau de l'UE peut être un moyen pour la société civile de participer au processus décisionnel européen.

Défis

L'action en justice à visée stratégique n'est pas sans risque. Il est donc important de procéder à une évaluation réaliste des risques afin d'établir si cette forme de recours est la bonne option ou si une voie alternative serait plus indiquée. Le risque le plus évident du litige stratégique est une issue défavorable et l'établissement partant d'un précédent négatif susceptible à son tour de sceller une situation de statu quo ou – pire encore – de conduire à une réforme législative/évolution doctrinale négative. De plus, comme tout recours, l'action à visée stratégique requiert d'importantes ressources, c'est-à-dire des moyens

1 NeJaime, D., «Winning Through Losing» (2011), Iowa Law Review, vol. 96, p. 969-1011.

financiers, des savoirs spécialisés et du personnel, entre autres. Il s'avère dès lors impératif de peser les bénéfices potentiels de l'approche envisagée par rapport au coût probable qu'elle va représenter.

Chapitre 2 – Litige stratégique au niveau national

Le deuxième chapitre du rapport se penche sur les indicateurs qui autorisent ou dissuadent l'engagement au niveau national d'un litige stratégique dans le domaine du droit relatif à la discrimination fondée sur le sexe. Ces indicateurs sont structurés comme suit:

	Facteurs	Ce qu'ils indiquent	Aspect en cause
Quoi?	Normes juridiques du droit antidiscrimination	Quelle est la base juridique sur laquelle fonder un litige stratégique? (acquis & jurisprudence de l'UE, dispositions nationales)	Champ d'application matériel du litige stratégique
Où?	Forums appropriés pour les litiges stratégiques	Où un litige stratégique peut-il intervenir?	Structure judiciaire
Qui?	Acteurs du litige stratégique	Qui peut potentiellement mener/soutenir un litige stratégique?	Acteurs du litige ainsi que leur qualité d'agir en justice et leur financement
	Ressources	De quel type de ressources les acteurs disposent-ils?	
Comment/ Pourquoi	Accès à la justice	Le litige stratégique présente-t-il un attrait?	Éléments d'incitation / de dissuasion quant à l'engagement d'un litige stratégique
	Culture socio-juridique	Le litige stratégique présente-t-il un attrait?	

Comme le montre le schéma ci-dessus, la première section de ce chapitre porte sur les «normes juridiques du droit antidiscrimination» et s'attache donc à délimiter le cadre juridique dans lequel s'inscrit le litige stratégique. La deuxième section – intitulée «Forums appropriés pour les actions à visée stratégique» – examine la structure judiciaire existante sous l'angle de son potentiel en termes d'approches axées sur cette forme de recours. Les troisième et quatrième sections concernent conjointement les acteurs possibles de ces recours, leur droit d'ester en justice et les ressources dont ils disposent. Les deux dernières sections – «Accès à la justice» et «Culture socio-juridique» – analysent les moteurs et freins éventuels en matière d'actions en justice à visée stratégique.

Normes juridiques du droit antidiscrimination

Les dispositions nationales de non-discrimination dans le domaine de l'égalité hommes-femmes sont étroitement liées au droit de l'UE, étant donné que les États membres sont tenus de transposer ce droit dans leur ordre juridique interne. Il ne fait aucun doute que l'UE (et, parmi ses institutions, la CJUE en particulier) a très largement contribué au développement de l'égalité entre hommes et femmes au sein des États membres. L'acquis européen grandissant relatif à cette égalité, de même que le corpus législatif national qui en assure l'application, ont conféré davantage de latitude en matière de litiges – au sens juridique tant procédural que matériel – et créé de nouvelles possibilités de participation pour la société civile. En réalité, tant le développement du droit de l'UE dans le domaine de l'égalité hommes-femmes² que sa mise en application³ se sont largement appuyés sur les actions en justice intentées par des acteurs privés et/ou des organisations de la société civile (OSC).

2 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, p. 6; Börzel, «Participation Through Law Enforcement: The Case of the European Union», p. 130.

3 Anagnostou & Millns, «Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System», p. 123; Börzel, «Participation Through Law Enforcement: The Case of the European Union», p. 133.

Forums appropriés pour les litiges stratégiques

L'une des premières décisions à prendre dans le cadre d'un projet de litige stratégique concerne le choix du forum – démarche qui consiste à évaluer si une juridiction particulière est la mieux placée pour être saisie de l'affaire en question. En d'autres termes, les décisions de la juridiction envisagée doivent avoir un certain impact. Il est notamment important de prendre en compte sa capacité d'exercer un **contrôle juridictionnel** – pratique consistant à examiner la légalité d'actes législatifs et/ou administratifs et, le cas échéant, à les mettre de côté s'ils sont contraires à un texte de rang supérieur (constitution ou législation de l'UE, par exemple). La plupart des pays européens ont adopté une forme ou une autre de contrôle juridictionnel. Dans de nombreux pays, les **organismes pour la promotion de l'égalité de traitement** sont habilités à statuer dans des affaires de discrimination fondée sur le sexe, ce qui en fait les destinataires potentiels d'actions à visée stratégique. La plupart de ces organismes ne sont cependant pas habilités à rendre des décisions juridiquement contraignantes.

Acteurs des litiges stratégiques

Il faut, pour que les actions en justice à visée stratégique se multiplient, que des organisations et/ou des particuliers soient capables et résolus de concevoir, d'exécuter et de soutenir des projets de ce type – ce qui dépend entre autres de la possibilité pour ces entités d'avoir un accès direct aux juridictions (**droit d'ester en justice**) ou d'avoir accès à des avocats/cabinets juridiques. Ceci étant dit, même si son habilitation à ester en justice est limitée, voire inexistante, une entité peut apporter un soutien précieux aux organisations qui mettent des litiges stratégiques en œuvre, et appuyer ainsi ce type de projets. Il existe en Europe quatre grands groupes d'acteurs potentiels: les organismes pour la promotion de l'égalité, les organisations de la société civile (OSC), les cliniques juridiques (légal) et les cabinets juridiques / avocats de pratique privée.

Une organisation est **habilitée à ester en justice** lorsqu'elle a la possibilité d'être entendue par une juridiction et de participer ainsi au processus décisionnel judiciaire. Le présent rapport propose à la section 2.3 un aperçu des acteurs (potentiels) d'un litige stratégique au niveau national.

Quatre procédures contentieuses principales permettent de saisir la justice:⁴

- représenter une victime de discrimination devant les tribunaux – soit directement (en qualité d'OSC / d'organisme pour l'égalité / de cabinet juridique / etc.) soit en collaboration avec un cabinet juridique / en engageant un avocat / etc. – ou agir *pour le compte* de la victime;
- intenter des poursuites en tant que partie à part entière (*actio popularis*);
- intenter un recours collectif;
- prendre part à une procédure en qualité de tiers ou d'*amicus curiae*.

La collaboration d'une organisation (sans habilitation officielle) avec un avocat / un cabinet juridique constitue une situation particulière: étant donné que le litige stratégique va largement au-delà d'une comparution en justice, une organisation peut rester «en charge» du projet concerné en définissant la portée, l'objectif et la stratégie argumentaire de celui-ci ainsi qu'en exécutant la plupart des mesures d'accompagnement (stratégie médiatique, actions de sensibilisation, lobby politique, etc.). On peut considérer dans ce cas que l'organisation en question reste celle qui «exécute» le projet de litige stratégique bien qu'elle ne soit pas habilitée à ester en justice.

Les organisations qui ne peuvent (ou ne veulent) pas mener seules de projets en matière de litige stratégique peuvent néanmoins soutenir les projets menés dans ce domaine par d'autres organisations. Ce soutien peut se concrétiser sous des formes très diverses. Dans la plupart des pays couverts par l'étude, les organismes pour l'égalité, les OSC spécialisées, les syndicats et/ou chambres du travail ainsi que les

4 Kádár, «The Legal Standing of Equality Bodies», p. 6.

cliniques juridiques peuvent fournir une aide juridique primaire dans (certaines) affaires de discrimination fondée sur le sexe. Outre l'apport de premiers conseils juridiques, les organisations peuvent notamment soutenir des litiges stratégiques en orientant les clients vers des avocats/institutions spécialisé(e)s ou en fournissant tout autre type d'appui aux projets: réalisation d'études juridiques; publication de données pertinentes (statistiques et rapports, par exemple); lancement de campagnes (médias) thématiques; exercice d'activités de lobbying politique/législatif; mise en œuvre de stratégies de sensibilisation; etc. Le litige stratégique aura toujours davantage de chances de réussir s'il s'inscrit dans une campagne globale de changement social.

Les organismes pour la promotion de l'égalité présentent en Europe un large éventail de fonctions et de structures institutionnelles. Leur capacité d'engager un litige stratégique dépend largement de leur mandat et de leur droit d'ester en justice. Les organismes pour l'égalité essentiellement conçus comme des «tribunaux pour l'égalité» sont toutefois moins susceptibles de s'engager dans une démarche contentieuse. Ils peuvent soutenir des projets relevant de litiges stratégiques en rassemblant des données (statistiques) concernant des affaires de discrimination fondée sur le sexe, en réalisant les analyses des dites données et/ou en menant des études indépendantes sur des questions d'égalité entre hommes et femmes. Il est important de souligner que certains organismes pour l'égalité peuvent prendre part aux négociations préalables à l'élaboration de projets législatifs, formuler des recommandations concernant des réformes législatives et politiques, et/ou conseiller le gouvernement ou le parlement sur les questions de discrimination fondée sur le sexe. La coopération transnationale et internationale, le soutien et l'échange de bonnes pratiques et de ressources sont autant de méthodes permettant aussi de promouvoir valablement les activités liées aux litiges stratégiques. Des réseaux tels qu'EQUINET⁵ offrent de précieuses plateformes à cet égard.

Les acteurs de la société civile (organisations de la société civile ou OSC) comprennent des organisations non gouvernementales (ONG) et des organisations à but non lucratif (OBNL), mais également des syndicats ou des chambres du travail, selon leur structure institutionnelle propre. Dans la quasi-totalité des pays couverts par l'analyse, certaines OSC pourraient potentiellement s'engager (ou se sont déjà engagées) dans des actions à visée stratégique, soit en les menant elles-mêmes soit en donnant une impulsion majeure à leur dynamique. Des organisations internationales/transnationales sont elles aussi largement impliquées dans le renforcement des capacités de plusieurs pays européens en matière de litige stratégique. On peut citer ici l'exemple de l'Open Society Justice Initiative⁶ qui, soutenue par Soros, agit dans plus de 120 pays, parmi lesquels plusieurs pays européens (en Europe orientale plus particulièrement) où elle investit dans des ressources humaines et financières pour mettre en place des structures de plaidoyer et mener (entre autres) des projets relevant de litiges stratégiques.

La clinique juridique, généralement basée dans une université, est une méthode d'enseignement pratique du droit. Elle assure à la fois une formation juridique aux étudiants en droit en les faisant participer à une activité concrète, et des services sociétaux en proposant des conseils juridiques, une assistance juridique et/ou des projets (litiges stratégiques notamment) favorisant la justice sociale. Dans 17 pays analysés, il existe des cliniques juridiques qui traitent (également) du droit relatif à l'égalité des genres et/ou à la discrimination fondée sur le sexe. Si rares sont les cliniques juridiques qui jouissent d'un accès direct aux tribunaux, nombreuses sont celles qui soutiennent la participation à des procédures judiciaires ou qui permettent à leurs étudiants de le faire – une démarche qui se concrétise généralement de l'une (ou plusieurs) des manières suivantes:

- une collaboration avec des cabinets juridiques / des avocats: certaines cliniques collaborent avec des cabinets juridiques ou des avocats indépendants chargés de représenter un client et leur apportent

5 EQUINET <http://equineteurope.org/2019/03/19/equality-bodies-and-equinet-promoting-equality-in-europe/>.

6 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

- un soutien actif. Ce modèle est privilégié par les cliniques juridiques en **Allemagne**, en **Irlande**, en **Italie**, en **Pologne** et au **Royaume-Uni**;
- une collaboration avec des OSC et/ou des organismes pour l'égalité: de même, les étudiants peuvent, dans le cadre des cliniques juridiques, soutenir une affaire présentée par une OSC ou un organisme pour l'égalité en **Belgique**, en **France**, en **Irlande**, en **Pologne**, en **Espagne** et au **Royaume-Uni**;
 - un placement dans d'autres organisations: les cliniques d'**Allemagne**, d'**Irlande** et de **Slovénie** placent leurs étudiants dans des OSC, des organismes pour l'égalité et d'autres organisations (sous la forme de stages, par exemple) où ils sont susceptibles de pouvoir participer à des procédures contentieuses (en **Allemagne** toutefois, les OSC et les organismes pour l'égalité ne sont pas habilités à ester en justice);
 - des modalités de réorientation: aux **Pays-Bas** et au **Royaume-Uni**, des cliniques réorientent leurs clients vers d'autres organisations aptes à les représenter (OSC, organismes pour l'égalité, syndicats ou cabinets juridiques notamment).

Les cliniques juridiques offrent également des exemples particulièrement intéressants en ce qui concerne le soutien aux actions à visée stratégique. Faisant partie intégrante de l'architecture académique institutionnelle, elles assurent (ou pourraient assurer) les fonctions d'appui suivantes aux projets dans ce domaine:

- procéder à des recherches académiques à l'appui de ces projets: collecte et analyse de données, étude et élaboration d'arguments juridiques, publication d'articles ou rapports thématiques, etc.;
- former des étudiants ayant une conscience sociale et de futurs «plaideurs stratégiques»; et proposer aux étudiants des stages auprès d'OSC et d'organismes pour l'égalité (comme c'est le cas en **Allemagne**, en **Irlande** et en **Slovénie**);
- constituer le premier point de contact pour les victimes de discrimination en quête d'une assistance et mettre ainsi en relation des avocats plaidant dans des litiges stratégiques et d'éventuels clients. Une aide juridique et/ou un premier conseil juridique sont fournis par des cliniques en **Allemagne**, en **Belgique**, en **Croatie**, en **Espagne**, en **France**, en **Hongrie**, en **Irlande**, en **Lettonie**, en **Lituanie**, à **Malte**, en **Norvège**, aux **Pays-Bas**, en **Pologne**, au **Royaume-Uni** et en **Suède**.⁷ Aux Pays-Bas et au Royaume-Uni, les cliniques orientent les victimes requérant une représentation en justice vers des organisations qualifiées à cette fin.

Des cabinets juridiques ou des avocats privés peuvent également engager une action à visée stratégique – démarche qui intervient souvent dans le cadre de programmes pro bono. Dans certains cas, les avocats coopèrent avec des organismes pour l'égalité, des syndicats / chambres de travail ou des OSC dans des affaires de discrimination fondée sur le sexe. Une série de facteurs peuvent agir comme moteurs ou comme freins lorsque des avocats souhaitent s'engager dans des litiges stratégiques.

Premièrement, des régimes de rémunération compétitive ou flexible peuvent encourager les actions en justice (à visée stratégique). Les honoraires basés le résultat obtenu – à savoir que l'avocat n'est payé que s'il gagne l'affaire – limitent le risque financier que représentent les poursuites pour les victimes de discrimination et/ou pour les organisations qui engagent des avocats dans le cadre d'un projet de litige stratégique. Ainsi en **Irlande**, certains cabinets juridiques fonctionnent selon le principe «rien n'est obtenu, rien n'est dû», autrement dit l'avocat ne réclame de paiement au client que s'il obtient gain de cause. Dans un régime *pactum de quota litis*, l'avocat perçoit des honoraires conditionnels – c'est-à-dire une part de l'indemnisation allouée à la victime de discrimination. En **Islande**, certains avocats (et en particulier ceux qui se spécialisent dans les plaintes pour blessure corporelle) peuvent recourir aux honoraires conditionnels. Il va de soi que ces accords de rémunération constituent une incitation majeure lorsque des dommages-intérêts punitifs peuvent être obtenus. Une étude réalisée en 2006 a toutefois

7 Les cliniques juridiques sont un phénomène assez récent en Suède. En 2014, l'Université de Göteborg a initié la première en collaboration avec des organisations à but non lucratif proposant des conseils juridiques gratuits. Hormis une organisation spécialisée dans les refuges pour femmes, aucune organisation n'exerce son activité dans le domaine de l'égalité des genres. Pour de plus amples informations, voir sur <https://law.handels.gu.se/english/rattspraktik>.

établi⁸ que les régimes de rémunération (strictement) basés sur le résultat sont interdits dans la plupart des pays européens.

Deuxièmement, les cabinets juridiques proposent un nombre croissant de programmes pro bono en vue de s'engager dans des projets de défense de l'intérêt public. Les départements concernés peuvent, bien entendu, engager eux-mêmes des actions à visée stratégique ou coopérer avec des organisations sans but lucratif. L'un des principaux obstacles à la mise en place de programmes pro bono réside dans les actes législatifs ou règlements de barreaux fixant des honoraires minima obligatoires.

Ressources

Les poursuites judiciaires – et une stratégie à long terme en particulier – exigent des ressources importantes: des moyens financiers, du personnel (expérimenté), du temps, un accès aux connaissances et des réseaux – autant d'éléments qui ont une influence déterminante sur la capacité d'une organisation ou d'un activiste de planifier / structurer / mettre en œuvre un litige stratégique, et qui font que les entités intéressées par ce type d'action savent ou non où s'adresser pour obtenir de l'aide.

Il existe trois grandes **sources de financement** pour les organisations et les activistes désireux d'engager des actions à visée stratégique: le financement public (subventions ordinaires de la part de l'État, avantages et privilèges fiscaux ou possibilité de faire une demande de financement public, par exemple), le financement privé (cotisations de membres, dons et collectes de fonds notamment) et le financement via des organismes, subventions et programmes internationaux/européens. Le financement public est souvent assujéti à certaines conditions. Le financement privé garantit pour sa part une certaine indépendance, mais il n'est pas toujours facile à obtenir. Le financement par des organismes, subventions et programmes internationaux/transnationaux/européens acquiert une importance croissante en matière de litiges stratégiques – en Europe orientale tout particulièrement. La pénurie de fonds du côté des plaideurs (potentiels) constitue une **entrave majeure** à la conduite de litiges stratégiques.

Un autre **obstacle important** à l'engagement d'actions à visée stratégique est la **pénurie d'experts et/ou de ressources de formation** pour les OSC et les activistes désireux d'agir dans ce sens. Le litige stratégique reste mal connu dans bon nombre de pays européens, ce qui implique que peu d'experts ont les compétences requises pour aider à la mise en place d'un programme ou d'un département spécifique dans ce domaine. Les organisations ayant une activité transnationale – telle l'Open Society Foundation / Justice Initiative⁹ – ont contribué à promouvoir les litiges stratégiques et à diffuser les connaissances y afférentes dans certaines régions d'Europe. De même, des subventions et programmes transnationaux et paneuropéens peuvent favoriser la démarche de litige stratégique.

Les réseaux peuvent apporter une expertise, favoriser l'échange d'exemples de bonnes pratiques et soutenir des stratégies procédurales. Ils peuvent mettre en place des forums permettant à des activistes partageant une même vision de se rencontrer, voire d'unir leurs forces pour développer ensemble une stratégie de litige. Le réseau européen des organismes de promotion de l'égalité, EQUINET, a été décrit comme un réseau de ce type. Il convient d'ajouter qu'une série de réseaux moins structurés, des échanges informels de connaissances et des contacts personnels contribuent à la diffusion d'informations pertinentes.

8 Cabinet Hoche Demolin Brulard Barthélémy, *Study for the European Commission on the Transparency of Costs of Civil Judicial Proceedings in the European Union – Final Report* (Contrat JLS/2006/C4/007-30-CE-0097604/00-36, 2006), p. 108.

9 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

Accès à la justice

Les poursuites en justice mobilisent des ressources: du personnel, de l'argent et du temps. **Des procédures particulièrement longues** risquent donc d'avoir un effet dissuasif sur les litiges stratégiques car la perspective de consacrer des années, voire des décennies, à combattre une cause particulière en justice peut conduire à renoncer à ce type de procédure en faveur d'autres approches de la défense des droits.

Les délais très courts imposés pour le dépôt des plaintes pour discrimination peuvent également avoir une incidence négative sur le recours aux actions à visée stratégique. Les directives laissent les États membres libres de fixer les délais appropriés – avec pour conséquence qu'il existe une grande diversité à cet égard entre les États membres étudiés.

Le coût élevé des procédures judiciaires décourage de toute évidence l'action en justice, surtout si, dans le même temps, les fonds dont disposent des acteurs potentiels sont limités. Dans la plupart des pays couverts par l'analyse, l'engagement de poursuites comporte un risque majeur dans la mesure où la partie déboutée doit non seulement prendre en charge ses propres frais de représentation et de justice (notamment les frais liés à l'engagement d'un avocat), mais également ceux de la partie ayant obtenu gain de cause.

L'aide judiciaire publique peut à la fois atténuer les effets de frais judiciaires élevés et constituer une incitation à engager des poursuites à condition d'en réduire effectivement la charge financière et/ou les risques. Certains systèmes d'assistance judiciaire incitent davantage que d'autres à l'engagement d'actions à visée stratégique (comme le décrit la section 2.5.4): c'est ainsi que, dans certains pays, cette aide peut également être réclamée par des OSC et/ou des organismes pour l'égalité, tandis que, dans d'autres, elle est réservée aux particuliers. On peut se demander toutefois si le bénéfice d'une aide judiciaire publique est compatible avec le litige stratégique de façon générale. Ces derniers tendent en effet à faire passer l'intérêt public avant l'intérêt immédiat d'un plaignant particulier; or l'aide judiciaire est habituellement un service social destiné à donner accès à la justice à des personnes ayant peu de moyens financiers plutôt qu'à subventionner un projet de défense de droits.

Culture socio-juridique

L'émergence d'actions en justice à visée stratégique est également liée à l'environnement social/juridique concerné. Si la sensibilisation à l'égard de la législation interdisant la discrimination fondée sur le sexe est faible et/ou si les mécanismes de litiges stratégiques sont peu développés, ces derniers ne sont pas une option. De même, si les victimes de discrimination préfèrent ne pas faire appliquer leurs droits parce qu'elles n'ont pas confiance dans la structure institutionnelle, ou parce qu'elles craignent des répercussions négatives (revictimisation, traitement défavorable sur le lieu de travail ou dans leur environnement social), il peut s'avérer difficile pour des activistes ou des organisations de trouver des clients pour tenter des litiges stratégiques. Enfin, ceux-ci ne seront pas initiés si les risques inhérents (regain de conservatisme, précédents défavorables, coûts ou autres conséquences imprévues) sont – ou sont perçus comme étant – élevés (aversion au risque), ou s'il existe des méthodes et approches plus efficaces qui parviennent aux mêmes résultats ou à des résultats similaires (lobbying politique, campagnes médiatiques, etc.).

Chapitre 3 – Les litiges stratégiques devant la Cour de justice de l'Union européenne

Comme indiqué plus haut, une action à visée stratégique devant la Cour de justice de l'Union européenne (CJUE) débute généralement au niveau national. Le chapitre 2 s'applique donc largement aussi aux actions de ce type qui impliquent la CJUE. Ceci étant dit, certaines spécificités sont propres aux procédures de la Cour de justice de l'Union.

Accès à la justice devant la CJUE

Le système de la Cour de l'UE connaît un large éventail d'actions différentes – la procédure de renvoi préjudiciel visée à l'article 267 TFUE ayant donné lieu au nombre de litiges le plus élevé, et de loin. Aux termes de cet article, les parties n'ont pas la possibilité de saisir *directement* la CJUE. Elles peuvent suggérer que leur juridiction nationale renvoie l'affaire devant cette Cour, voire même aider ladite juridiction à formuler une question préjudicielle, mais elles n'ont pas le droit de requérir le renvoi. La décision de ce renvoi est laissée à la totale discrétion de l'instance nationale – hormis dans les affaires devant la juridiction nationale suprême, laquelle est tenue de procéder au renvoi si elle se heurte à une ambiguïté sur un point de droit de l'UE. C'est aussi, bien entendu, à la juridiction suprême qu'il appartient de déterminer si un point est obscur ou non. En ce qui concerne les problèmes de discrimination fondée sur le sexe, il ressort des questionnaires complétés par les experts nationaux que les tendances en matière de renvoi varient fortement d'un pays à l'autre. Alors qu'en **Espagne** les tribunaux suivent généralement les requêtes de renvoi que leur adressent les parties, il n'en va guère de même en **Bulgarie**, au **Danemark**, en **Hongrie**, en **Lituanie**, en **Pologne**, en **République tchèque** et en **Suède**.

Si la CJUE ne prévoit généralement pas de mémoire d'*amicus curiae* ou autre intervention de tiers, certaines exceptions doivent néanmoins être signalées. Les tiers qui «peuvent justifier d'un intérêt à la solution du litige»¹⁰ et qui ont déjà été impliqués dans les procédures nationales peuvent être autorisés à déposer des observations à la CJUE. De surcroît, les directives de l'UE relatives à la non-discrimination affirment explicitement que les États membres doivent veiller à ce que les associations qui y ont un intérêt légitime puissent, *pour le compte ou à l'appui* du plaignant, et avec son approbation, participer aux affaires de non-discrimination.¹¹ La CJUE a estimé de plus dans les affaires *Feryn*¹² et *Asociația Accept*¹³ que l'identification d'une victime individuelle n'est *pas* requise et que des associations peuvent avoir un droit autonome d'ester en justice dans ce type d'affaires. Elle établit essentiellement ainsi qu'un État membre peut décider d'introduire une *actio popularis* (autrement dit, donner à une organisation la possibilité d'engager des poursuites *en son propre nom*). Seize États membres ont fait usage de cette possibilité en 2016.¹⁴

La procédure de renvoi préjudiciel accorde aux parties une période de deux mois à compter de la notification de la décision de renvoi pour déposer leurs observations écrites.¹⁵ Cette période est extrêmement courte, étant donné surtout que les interventions devant la CJUE requièrent très probablement une autre stratégie argumentaire que celle adoptée devant les juridictions nationales. Ce problème se pose plus particulièrement lorsque les parties ou leurs représentants sont peu familiarisés avec le droit de l'UE et/ou la législation relative à la discrimination fondée sur le sexe. Il s'agit, selon les experts nationaux, d'une entrave aux actions à visée stratégique en **Bulgarie**, en **Estonie**, en **Italie**, en **Lituanie** et en **Pologne**. Au **Royaume-Uni**, certaines OSC n'ont pas une connaissance approfondie des dispositions du droit de l'UE.

10 Article 40, Protocole (n° 3) sur le statut de la CJUE [2010] JO C 83/210.

11 Ainsi l'article 7, paragraphe 2, de la directive sur l'égalité raciale (2000/43/CE) [2000] JO L 180/22, et l'article 9, paragraphe 2, de la directive sur l'égalité dans le domaine de l'emploi (2000/78/CE) [2000] JO L 303/16, prévoient que les associations, les organisations ou autres personnes morales qui ont un intérêt légitime à assurer que les dispositions des directives soient respectées «puissent, pour le compte ou à l'appui du plaignant, avec son approbation, engager toute procédure judiciaire et/ou administrative prévue pour faire respecter les obligations découlant de la présente directive». Une disposition analogue figure notamment dans la directive 2006/54 relative à l'égalité entre hommes et femmes en matière d'emploi et de travail (article 17, paragraphe 2).

12 C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding c. Firma Feryn NV* ECLI:EU:C:2008:397 [2008].

13 C-81/12, *Asociația Accept c. Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2013:275 [2013].

14 Tymowski, J., *The Employment Equality Directive – European Implementation Assessment* (EPRS / Service de recherche du Parlement européen, 2016), p. 53.

15 Article 23, Protocole (n° 3) sur le statut de la CJUE [2010] JO C 83/210.

Fonctions spécifiques des acteurs des litiges stratégiques au niveau de la CJUE

L'action en justice à visée stratégique exige des connaissances très approfondies concernant notamment les développements législatifs et jurisprudentiels. Tel est particulièrement le cas dans un domaine aussi fortement imprégné des exigences et normes juridiques de l'UE que le droit en matière de non-discrimination. L'existence de réseaux rassemblant et diffusant les connaissances à cet égard s'avère donc ici extrêmement importante. Des organisations de défense des droits exerçant une activité transnationale ont joué un rôle essentiel pour faire connaître les décisions historiques de la CJEU concernant l'égalité des genres à leurs membres,¹⁶ même s'ils n'engagent pas eux-mêmes d'action en justice.

Si les **acteurs d'un litige stratégique** restent généralement ancrés au niveau national (étant donné que, comme déjà indiqué, les poursuites débutent le plus souvent à cet échelon), la structure de gouvernance multiniveaux de l'Union européenne fait que l'activisme en faveur de l'intérêt public se trouve également fragmenté et comporte habituellement diverses approches et destinataires. En ce sens, le litige stratégique va fréquemment s'inscrire dans une stratégie plus large (campagnes et approches politiques, publiques et autres).

Chapitre 4 – Conclusions et recommandations

Le rapport ci-après recense un certain nombre de facteurs qui entravent les actions en justice à visée stratégique, parmi lesquels:

Le manque de recherche. L'étude montre que la recherche consacrée aux litiges stratégiques reste largement insuffisante en Europe. Parmi les 31 experts juridiques nationaux qui y ont participé en répondant au questionnaire, 29 ont déclaré que «litige stratégique» n'est pas un terme courant du discours juridique académique dans leur pays.

Les règles en matière d'honoraires d'avocats / la pratique du pro bono. La fourniture de services juridiques à titre gracieux n'est pas possible dans plusieurs pays parce que la législation ou les règlements de chambres fixent des honoraires minima *obligatoires* pour les avocats. L'absence de régimes de rémunération flexible autorisant **des honoraires basés sur les résultats et/ou des honoraires conditionnels** peut également dissuader l'engagement de poursuites car elle accroît le risque que comporte pour les victimes de discrimination le recours à un avocat (d'affaires) pour les représenter et peut diminuer la motivation des cabinets juridiques de s'occuper de ce type de contentieux.

La non-disponibilité de recours adéquats. Le manque de procédures adéquates pour porter une affaire de discrimination en justice – que ce soit en soutien d'une victime ou en l'absence d'une victime – peut entraver les litiges stratégiques. L'habilitation d'organisations (capacité d'engager une *actio popularis* ou d'initier des actions collectives, par exemple) augmente la probabilité d'une démarche de litige stratégique car elle élargit le champ d'action ouvert à ces organisations.

L'accès à la justice – Autres facteurs. La durée limitée du délai imparti pour introduire un recours pour discrimination, la durée des procédures judiciaires et le niveau élevé des frais de justice sont autant d'éléments susceptibles de dissuader l'engagement de poursuites, y compris de litiges stratégiques. L'accessibilité de l'aide juridique varie, elle aussi, d'un pays à l'autre; et des conditions particulièrement restrictives pour l'obtention de cette aide vont également à l'encontre d'actions à visée stratégique.

La pénurie d'acteurs aptes à intervenir dans un litige stratégique. Le présent rapport a tenté d'établir une typologie (non-exhaustive) des entités (potentiellement) en mesure de mener une action à

16 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, p. 203.

visée stratégique, y compris des organismes pour l'égalité, des acteurs de la société civile, des cliniques juridiques (légal) et des cabinets juridiques /avocats privés. Il n'en reste pas moins qu'une série de facteurs peuvent faire obstacle à leur engagement d'une action de ce type:

- **L'expertise.** L'aboutissement favorable d'un litige stratégique requiert une certaine expertise – à la fois en matière d'égalité des genres / de discrimination fondée sur le sexe (idéalement au niveau national et de l'UE) et en matière d'action à visée stratégique. Cette expertise fait aujourd'hui (partiellement) défaut au niveau des praticiens du droit en **Allemagne**, en **Autriche**, en **Bulgarie**, au **Danemark** en **Espagne**, en **Estonie**, en **Finlande**, en **Italie**, en **Lituanie**, en **Pologne** et en **République tchèque**.
- **La structure.** Que le litige stratégique soit ou non une approche réaliste pour une organisation dépend également de sa propre structure. Ainsi par exemple, certains organismes pour l'égalité ne disposent pas du mandat requis pour engager une action à visée stratégique, ou ne bénéficient pas d'un financement pour ce type d'activité. Un autre obstacle peut résider dans une imbrication institutionnelle des acteurs de litiges stratégiques dans les pouvoirs publics, et le manque d'indépendance qui en résulte: tel peut être le cas si l'acteur potentiel fait partie de la structure institutionnelle ou dépend massivement de fonds publics.
- **Les ressources / le financement.** Tout comme l'absence de l'expertise requise, le manque de ressources financières (et humaines) suffisantes peut constituer un obstacle majeur – voire l'obstacle principal – à des projets de litiges stratégiques.

L'environnement socio-juridique. L'environnement socio-juridique détermine lui aussi la capacité d'un litige stratégique de constituer une option viable de défense des droits. Les facteurs suivants conditionnent l'émergence d'actions à visée stratégique:

- **La sensibilisation.** Une prise de conscience insuffisante quant à l'existence et à l'utilité de cette forme d'action a une incidence négative sur son développement. De même, une connaissance limitée de la législation en matière de discrimination de la part des praticiens du droit et/ou des victimes freine l'engagement de litiges.
- **Le manque de confiance / la crainte de répercussions négatives.** Une confiance insuffisante dans les structures institutionnelles ou la crainte de répercussions négatives (revictimisation, par exemple) peut empêcher l'engagement de litiges stratégiques en raison de la difficulté éprouvée par les plaideurs potentiels de trouver des clients disposés à prendre part à ce type de projets.
- **Les risques élevés / l'existence de meilleures alternatives.** L'action à visée stratégique n'est pas une option viable pour des organisations de la société civile lorsque les risques inhérents sont particulièrement grands (regain de conservatisme, coût élevé au cas où l'affaire est perdue, etc.) ou lorsqu'il existe de meilleures façons de réaliser le changement social recherché – canaux formels/informels de communication avec les décideurs (politiques), par exemple. Ce dernier facteur de dissuasion n'est cependant pas problématique en soi: après tout, il appartient à chaque organisation/activiste de choisir la manière d'agir qui lui convient le mieux, compte tenu de sa situation spécifique. S'il/si elle estime dès lors que d'autres formes d'intervention (en dehors du litige stratégique) s'avèrent plus prometteuses, il/elle peut être amené(e) à renoncer à l'engagement d'une action en justice – mais il n'y a pas lieu de changer cette situation.

Récapitulatif des recommandations

À la lumière de ce qui précède, les mesures suivantes peuvent être prises pour favoriser l'émergence d'actions à visée stratégique en matière de discrimination fondée sur le sexe:

Recherche:

- Soutien de la recherche concernant les litiges stratégiques dans le domaine de l'égalité des genres: études empiriques/qualitatives sur la survenance de ce type de litige, doctrine juridique en la matière, etc.
- Soutien et financement de publications sur ces questions.

Facteurs juridiques:

- Appui à la création et au développement de départements pro bono au sein des cabinets juridiques;
- Encouragement à la révision des dispositions relatives aux honoraires minima pour les avocats.
- Analyse de l'incidence des honoraires basés sur les résultats et/ou des honoraires conditionnels dans le domaine de l'égalité des genres, et étude de l'introduction éventuelle de régimes d'honoraires susceptibles de favoriser l'engagement de litiges.
- Incitation à l'élargissement de l'aide juridique aux organisations qui engagent des litiges (stratégiques) en matière d'égalité hommes-femmes.
- Incitation à l'élargissement de l'habilitation à ester en justice, des recours de type *actio popularis* et des actions collectives aux organisations dans le domaine de l'égalité hommes-femmes.
- De manière générale: encouragement au développement de droits solides pour les salariés / victimes potentielles de discrimination (y compris l'octroi de dommages-intérêts pour discrimination qui dissuadent réellement toute infraction future).

Acteurs des litiges stratégiques:

- Soutien à la création et au développement d'une expertise en matière de litiges stratégiques dans le domaine de l'égalité des genres: appui à des organisations axées sur l'égalité hommes-femmes / cabinets juridiques / autres organisations désireuses d'acquérir cette expertise.
- Apport de ressources importantes (subventions, programmes ou financements) spécialement destinées à des organisations civiles sociétales / académiques qui souhaitent engager des actions à visée stratégique / acquérir une expertise en rapport avec ces litiges dans le domaine de l'égalité des genres / agir en tant que multiplicateurs dans ce domaine.
- Création de « pôles d'expertise en matière de litiges stratégiques » au sein des États membres – à savoir des organismes / réseaux/ instituts académiques spécifiquement conçus pour
 - constituer une expertise propre à chaque pays en matière de litiges stratégiques dans le domaine de la non-discrimination;
 - participer à la diffusion stratégique de ces connaissances auprès de l'ensemble des organisations de défense des droits et d'autres entités intéressées au sein de leur État membre;
 - constituer et maintenir des réseaux paneuropéens spécialisés dans cette problématique en mettant notamment en relation les réseaux déjà existants qui œuvrent dans des domaines connexes (EQUINET, ENCLE, EELN, etc.);
 - établir et maintenir la communication avec d'autres organisations et réseaux initiant des litiges stratégiques dans d'autres domaines tels que ILGA Europe (droits des personnes LGBTIQ) ou Greenpeace, afin de tirer parti des expériences respectives;
 - entretenir une étroite communication avec la Commission européenne et d'autres parties prenantes afin d'assurer des mises à jour et des échanges concernant les évolutions récentes et exemples de bonnes pratiques.
- Soutien à la création de cliniques juridiques (spécialisées en litiges stratégiques) qui s'intéressent (également) aux questions d'égalité des genres.
- Appui aux échanges (transnationaux) concernant les litiges stratégiques par l'apport de ressources/ plateformes/connaissances en lien avec ces pratiques.

Environnement socio-juridique:

- Soutien de mesures de sensibilisation dans le domaine de l'égalité des genres / des litiges stratégiques.
- Encouragement à une réduction des risques liés aux litiges (stratégiques) en constituant, par exemple, des fonds destinés à prendre en charge le coût des contentieux et les frais de justice.

Zusammenfassung

Einleitung

Gegenstand dieses Berichts ist die strategische Prozessführung im Bereich des Geschlechtergleichstellungsrechts, sowohl auf nationaler als auch auf Unionsebene. *Strategische Prozessführung* bezeichnet den Einsatz von Prozessstrategien mit dem Ziel, gesellschaftliche, rechtliche oder politische Veränderungen herbeizuführen, und wird häufig von zivilgesellschaftlichen Organisationen (ZGOs) und/oder Anwälten als eine Form von Aktivismus angewendet. Im Bereich der Geschlechtergleichstellung kam diese Vorgehensweise sowohl vor dem Europäischen Gerichtshof (EuGH) als auch auf nationaler Ebene bereits zum Einsatz.

Sowohl rechtliche als auch außerrechtliche Faktoren tragen zum Erfolg strategischer Prozessführung bei. Ziel des vorliegenden Berichts ist es, diese Faktoren zu ermitteln; dabei konzentriert er sich auf die Rechtsvorschriften zu geschlechtsbezogener Diskriminierung, die in den Anwendungsbereich der sechs Unionsrichtlinien zur Geschlechtergleichstellung fallen, und liefert auch Beispiele für bewährte Verfahren. Die Untersuchungen beziehen sich sowohl auf die nationale Ebene (Kapitel 2) als auch auf die Unionsebene (Kapitel 3). Hauptzweck des Berichts ist es, Hinweise zu liefern, welche Schritte notwendig sind, um strategische Prozessführung im Bereich der Geschlechtergleichstellung anzuregen und zu unterstützen. Er stützt sich auf eine Befragung der 31 nationalen Gender-Expertinnen und -experten des European Equality Law Network (Europäisches Netzwerk für Gleichstellungsrecht). Der Bericht enthält keine vollständige Systematisierung von Projekten strategischer Projektführung, die im Bereich Geschlechtergleichstellung bereits umgesetzt wurden – hauptsächlich, weil diese Informationen nicht verfügbar sind, aber auch, weil es kaum umfassende Studien oder Berichte gibt, in denen versucht wurde, derartige Projekte auf nationaler oder europäischer Ebene zu erfassen und zu beschreiben.

Begriffe und Definitionen

In der Literatur existiert keine einheitliche Definition des Begriffs **strategische Prozessführung**. Von der klassischen Prozessführung unterscheidet sich strategische Prozessführung dadurch, dass es ihr um weitreichendere (im öffentlichen Interesse liegende) Ziele geht und nicht so sehr darum, einzelne Fälle zu gewinnen. Sie räumt in der Regel bestimmten gesellschaftlichen bzw. politischen Zielen Vorrang vor den unmittelbaren Interessen eines einzelnen Mandanten ein und wird häufig von Interessengruppen und/oder sozial orientierten Juristen als eine Form des Aktivismus eingesetzt. Zuweilen sind strategische Prozesse in eine umfassende, langfristige Strategie eingebettet, die sich über einen Zeitraum von mehreren Jahren erstreckt. Für die Zwecke dieses Berichts wird strategische Prozessführung wie folgt definiert: Strategische Prozessführung ist eine Prozessführung, die darauf abzielt, Veränderungen zu bewirken, die über den Einzelfall hinausgehen, und die einer bestimmten (rechtlichen/gesellschaftlichen/politischen) Agenda Vorrang vor den individuellen Interessen eines Mandanten einräumt.

Es ist wichtig, strategische Prozessführung von einer (sozial motivierten) Prozessführung ohne weitergehenden gesellschaftlichen Anspruch wie z.B. der von Rechtshilfevereinen praktizierten zu unterscheiden: Rechtshilfevereine zielen mit ihrer Prozessführung darauf ab, die konkrete Situation der unterstützten Person zu verbessern, nicht jedoch darauf, gesellschaftliche Veränderungen herbeizuführen. Strategische Prozessführung hingegen ist eine Vorgehensweise, *die über die Prozessführung in einem Einzelfall hinausgeht*. Es geht darum, Rechtsstreite zu konzipieren und umzusetzen, mit denen ein *bestimmtes gesellschaftliches Ziel* erreicht wird – oder erreicht werden soll.

Akteure strategischer Prozessführung

Akteure strategischer Prozessführung sind Organisationen oder Einzelpersonen, die entsprechende Projekte umsetzen oder unterstützen. Dabei kann es sich um ZGOs (z. B. Frauenrechtsorganisationen), um Institutionen (z. B. Gleichstellungsbehörden oder Arbeitnehmerkammern), um Gewerkschaften, Anwaltskanzleien oder auch um Einzelanwälte handeln. Verschiedene Faktoren geben Aufschluss darüber, ob eine Organisation oder Einzelperson Akteur strategischer Prozessführung sein kann, darunter ihr rechtliches *standing* sowie das Vorhandensein von Ressourcen und Expertise. Hat eine Organisation keinen direkten Zugang zu den Gerichten und kann Prozesse daher nicht selbst führen, so kann sie dennoch wichtige Unterstützung für strategische Prozesse leisten, die von anderen Organisationen geführt werden – beispielsweise durch Forschung, Datenerhebung, juristische Erstberatung und Weiterleitung von Klienten an andere Organisationen/Anwälte. Ohne selbst zu prozessieren, können solche Organisationen eine wichtige Rolle in strategischen Prozessen spielen – vor allem, wenn es sich um konzertierte, langfristige Prozessstrategien handelt, an denen mehrere Organisationen (mit häufig begrenzten Ressourcen) beteiligt sind.

Potenzielle Vorteile strategischer Prozessführung

Das offensichtlichste Ziel strategischer Prozessführung ist es, Änderungen des *Rechts* bzw. der *Rechtsdoktrin* zu bewirken. Ein Verfahren zu gewinnen und einen positiven Präzedenzfall zu schaffen, kann entweder zu einer Gesetzesänderung oder zu einer vorteilhafteren Auslegung des bestehenden Rechts führen. Strategische Prozessführung kann jedoch *zusätzliche Effekte* haben, z. B. Diskriminierungsoffer stärken, für eine Sache mobilisieren, eine öffentliche Debatte anstoßen, Öffentlichkeit und Medien sensibilisieren, Sympathie und Unterstützung für eine Sache gewinnen, die breite Öffentlichkeit (einschließlich Richter und Gesetzgeber) über ein bestimmtes Thema aufklären, politischen Druck ausüben und vieles andere mehr. Einige dieser Effekte können auch dann eintreten, wenn ein Fall verloren geht – zum Beispiel durch Stärkung der Identität einer Bewegung aufgrund äußeren Widerstands, Mobilisierung von Interessengruppen oder eine höhere mediale Aufmerksamkeit.¹

Auf Unionsebene kann strategische Prozessführung sowohl zur Harmonisierung des Unionsrechts als auch zur Schaffung einer europäischen Zivilgesellschaft beitragen: Rechtsstreite sind eine Möglichkeit, die korrekte Anwendung des Unionsrechts durchzusetzen, auch gegen den eigenen Mitgliedstaat. Speziell im Bereich der geschlechtsbezogenen Diskriminierung haben Rechtsstreite dem EuGH die Möglichkeit gegeben, seine Rechtsprechung zu verdeutlichen und weiterzuentwickeln und somit das Schutzniveau in allen Mitgliedstaaten zu verbessern und anzugleichen. Darüber hinaus können transnationale Strategien, die eine gemeinsame Agenda verfolgen – etwa den Kampf für Gleichstellung – zur Entstehung transnationaler Communitys führen, die auf kollektiven Interessen basieren. Auf Unionsebene geführte Rechtsstreite eröffnen der Zivilgesellschaft die Möglichkeit, an der europäischen Entscheidungsfindung teilzunehmen.

Risiken

Strategische Prozessführung ist nicht frei von Risiken. Es ist wichtig, eine realistische Risikobewertung vorzunehmen, um zu entscheiden, ob diese Art der Prozessführung der richtige Ansatz ist – oder ob eine andere Vorgehensweise vielleicht geeigneter wäre. Das offensichtlichste Risiko strategischer Prozessführung besteht darin, ein Verfahren zu verlieren und einen negativen Präzedenzfall zu schaffen, der wiederum zu einer Zementierung des Status quo oder – schlimmer noch – zu einer negativen Rechtsreform / Änderung der Rechtsdoktrin führen kann. Darüber hinaus ist strategische Prozessführung, wie jede Art der Prozessführung, ressourcenintensiv und erfordert unter anderem finanzielle Mittel,

1 NeJaime, D., „Winning Through Losing“ (2011), 96 Iowa Law Review 94, S. 969-1011.

Fachwissen und Personal. Es ist daher notwendig, den möglichen Nutzen eines Prozesses sorgfältig gegen die voraussichtlichen Kosten abzuwägen, mit denen ein solches Vorgehen verbunden ist.

Kapitel 2 – Strategische Prozessführung auf nationaler Ebene

Kapitel 2 des Berichts untersucht die Indikatoren, die strategische Prozessführung im Bereich geschlechtsbezogener Diskriminierung auf nationaler Ebene ermöglichen bzw. verhindern. Diese Indikatoren sind wie folgt strukturiert:

	Faktoren	Was sie aussagen:	Worum es geht
Was?	Rechtliche Standards des Antidiskriminierungsrechts	Was ist die rechtliche Grundlage für strategische Prozesse? (Besitzstand & Rechtsprechung der Union, nationale Vorschriften)	Sachlicher Geltungsbereich strategischer Prozesse
Wo?	Geeignete Foren für strategische Prozessführung	Wo können strategische Prozesse geführt werden?	Justizstruktur
Wer?	Akteure strategischer Prozessführung	Wer kann strategische Prozessführung potenziell betreiben/unterstützen?	Akteure strategischer Prozessführung sowie deren rechtliches <i>standing</i> und Finanzierung
	Ressourcen	Über welche Ressourcen verfügen die Akteure?	
Wie / Warum?	Zugang zur Justiz	Ist strategische Prozessführung attraktiv?	Anreize / Negativanreize für strategische Prozessführung
	Rechtlich-soziale Kultur	Ist strategische Prozessführung attraktiv?	

Im ersten Abschnitt dieses Kapitels geht es, wie in dem obigen Schema dargestellt, um *Rechtliche Standards des Antidiskriminierungsrechts*, d.h. um eine Beschreibung des rechtlichen Rahmens, in dem strategische Prozessführung stattfindet. Der zweite Abschnitt – *Geeignete Foren für strategische Prozessführung* – untersucht die bestehende Justizstruktur in Hinblick auf ihr Potenzial für strategische Prozessführung. Der dritte und der vierte Abschnitt befassen sich mit potenziellen Akteuren strategischer Prozessführung, deren rechtliches *standing* und den ihnen zur Verfügung stehenden Ressourcen. In den letzten beiden Abschnitten – *Zugang zur Justiz* und *Rechtlich-soziale Kultur* – werden mögliche Triebkräfte bzw. Hindernisse für strategische Prozessführung untersucht.

Rechtliche Standards des Antidiskriminierungsrechts

Die nationalen Antidiskriminierungsbestimmungen im Bereich der Geschlechtergleichstellung sind eng mit dem Unionsrecht verbunden, da die Mitgliedstaaten verpflichtet sind, die unionsrechtlichen Bestimmungen in ihr nationales Recht umzusetzen. Zweifellos hat die EU (und innerhalb ihrer Institutionen insbesondere der EuGH) einen immensen Beitrag zur Entwicklung der Geschlechtergleichstellung in den EU-Mitgliedstaaten geleistet. Der wachsende unionsrechtliche Besitzstand im Bereich der Geschlechtergleichstellung und der Bestand an nationalen Gesetzen, die diesen umsetzen, erweitert den Raum für Rechtsstreite – sowohl in verfahrensrechtlicher als auch in materiellrechtlicher Hinsicht – und schafft neue Möglichkeiten für eine Beteiligung der Zivilgesellschaft. Tatsächlich hat sich sowohl die Entwicklung des Unionsrechts im Bereich Geschlechtergleichstellung² als auch seine Durchsetzung³ stark auf Klagen privater Akteure und/oder zivilgesellschaftlicher Organisationen gestützt.

2 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, S. 6; Börzel, „Participation Through Law Enforcement: The Case of the European Union“, S. 130.

3 Anagnostou u. Millns, „Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System“, S. 123; Börzel, „Participation Through Law Enforcement: The Case of the European Union“, S. 133.

Geeignete Foren für strategische Prozessführung

Eine der ersten Entscheidungen, die im Hinblick auf einen strategischen Prozess zu treffen ist, ist die Wahl des Forums – die Frage also, ob ein bestimmtes Gericht ein angemessener Adressat für ein bestimmtes Verfahren ist. Anders ausgedrückt: Die Entscheidungen des Gerichts, vor dem ein strategischer Prozess geführt werden soll, müssen eine gewisse Wirkung entfalten. Ein wichtiger Faktor ist die Befugnis zur **gerichtlichen Kontrolle**, d.h. die Möglichkeit des Gerichts, Rechts- und/oder Verwaltungsentscheidungen zu überprüfen und gegebenenfalls aufzuheben, wenn sie einem übergeordneten Text (etwa einer Verfassung oder dem Unionsrecht) widersprechen. Die meisten europäischen Länder haben irgendeine Form der gerichtlichen Kontrolle etabliert. In vielen Ländern können **Gleichbehandlungsstellen** über Beschwerden wegen geschlechtsbezogener Diskriminierung entscheiden, was sie zu potenziellen Adressaten strategischer Streitvorhaben macht. Die meisten dieser Stellen können jedoch keine rechtsverbindlichen Entscheidungen treffen.

Akteure strategischer Prozessführung

Damit strategische Prozessführung gedeiht, braucht es Organisationen und/oder Einzelpersonen, die in der Lage und bereit sind, strategische Prozesse zu entwickeln, durchzuführen und zu unterstützen, was u.a. davon abhängt, ob diese Instanzen direkten Zugang zu den Gerichten (**rechtliches standing**) oder Zugang zu Anwälten / Anwaltskanzleien haben. Doch selbst wenn sie nur über ein beschränktes oder auch gar kein rechtliches *standing* verfügen, können sie Organisationen, die strategische Prozesse führen, wertvolle Unterstützung leisten und solchen Projekten damit den Rücken stärken. In Europa gibt es vier maßgebliche Gruppen potenzieller Akteure strategischer Prozessführung: Gleichbehandlungsstellen, ZGOs, Law (Legal) Clinics und Anwaltskanzleien / Privatanwälte.

Eine Organisation hat **rechtliches standing**, wenn sie die Möglichkeit hat, von einem Gericht angehört zu werden und somit am gerichtlichen Entscheidungsprozess teilzunehmen. Der Bericht enthält in Abschnitt 2.3 einen Überblick über (potenzielle) Akteure strategischer Prozessführung auf nationaler Ebene.

Es gibt im Wesentlichen vier Möglichkeiten, um einen Fall vor Gericht zu bringen:⁴

- ein Diskriminierungsopfer vor Gericht vertreten – entweder direkt (als ZGO / Gleichbehandlungsstelle / Anwaltskanzlei usw.) oder über die Zusammenarbeit mit einer Anwaltskanzlei / durch Beauftragung eines Anwalts usw. – oder *im Namen* des Opfers handeln
- als eigenständige Prozesspartei klagen (Popularklage)
- im Zuge einer Sammelklage
- durch Beitritt zu einem Verfahren als Drittpartei oder *Amicus Curiae*

Ein Sonderfall ist die Zusammenarbeit einer Organisation (ohne offizielles *standing*) mit einem Anwalt / einer Anwaltskanzlei. Da strategische Prozessführung viel mehr umfasst, als vor Gericht aufzutreten, kann die betreffende Organisation weiterhin die Federführung des strategischen Prozesses haben, indem sie dessen Reichweite, Ziel und Argumentationsstrategie bestimmt und einen Großteil der begleitenden Maßnahmen (Medienstrategien, Bewusstseinsbildung, politisches Lobbying usw.) umsetzt. Man kann sagen, dass in einem solchen Fall die betreffende Organisation trotzdem diejenige ist, die das Projekt *umsetzt*, obwohl sie kein rechtliches *standing* hat.

Organisationen, die selbst keine strategischen Prozesse führen können (oder wollen), können jedoch die strategische Prozessführung anderer Organisationen unterstützen. Diese Unterstützung kann vielerlei Formen annehmen. In den meisten untersuchten Ländern können Gleichbehandlungsstellen,

4 Kádár, „The Legal Standing of Equality Bodies“, S. 6.

spezialisierte ZGOs, Gewerkschaften und/oder Arbeitnehmerkammern sowie Law Clinics grundlegende rechtliche Unterstützung in (bestimmten) Fragen geschlechtsbezogener Diskriminierung leisten. Neben juristischer Erstberatung können Organisationen strategische Prozesse u.a. auch dadurch unterstützen, dass sie Klienten an erfahrene Anwälte/Einrichtungen weiterleiten oder den Projekten anderweitig den Rücken stärken, indem sie z.B. juristische Studien durchführen, einschlägige Daten (Statistiken, Berichte usw.) veröffentlichen, thematische (Medien-)Kampagnen durchführen, politische/legislative Lobbyarbeit betreiben, Strategien zur Bewusstseinsbildung umsetzen usw. Auf jeden Fall wird strategische Prozessführung immer dann am erfolgreichsten sein, wenn sie Teil einer umfassenden Kampagne für sozialen Wandel ist.

Gleichbehandlungsstellen in Europa weisen eine Vielzahl von Funktionen und institutionellen Strukturen auf. Ob eine Gleichbehandlungsstelle strategische Prozesse führen kann, hängt weitgehend von ihrem Mandat und ihrem rechtlichen *standing* ab. Bei Gleichbehandlungsstellen, die in erster Linie als *Schiedsgerichte für Gleichbehandlungsfragen* konzipiert sind, ist es weniger wahrscheinlich, dass sie im Rahmen eines Rechtsstreits Aufgaben übernehmen. Gleichbehandlungsstellen können strategische Prozessführung unterstützen, indem sie (statistische) Daten über Fälle geschlechtsbezogener Diskriminierung sammeln, diese analysieren und/oder unabhängige Untersuchungen zu Fragen der Geschlechtergleichstellung durchführen. Nicht zuletzt können manche Gleichbehandlungsstellen an Verhandlungen zur Vorbereitung von Gesetzentwürfen teilnehmen, Empfehlungen für gesetzliche und politische Reformen aussprechen und/oder die Regierung bzw. das Parlament in Fragen der Geschlechterdiskriminierung beraten. Trans- und internationale Zusammenarbeit, Unterstützung sowie Austausch von bewährten Verfahren und Ressourcen sind ebenfalls probate Mittel, um Aktivitäten strategischer Prozessführung zu fördern. Netzwerke wie EQUINET⁵ bieten in dieser Hinsicht wertvolle Plattformen.

Zu den **zivilgesellschaftlichen Akteuren** (ZGOs) gehören Nichtregierungsorganisationen (NGOs) und gemeinnützige Organisationen (Non-Profit-Organisationen, kurz: NPOs), aber auch Gewerkschaften und Arbeitnehmerkammern, abhängig von ihrer jeweiligen institutionellen Struktur. In praktisch allen untersuchten Ländern könnten sich bestimmte ZGOs potenziell im Rahmen strategischer Prozessführung engagieren (oder haben dies bereits getan), indem sie strategische Prozesse entweder selbst führen oder wichtige Unterstützung für solche Prozesse leisten und sie damit stärken. In einigen europäischen Ländern sind auch internationale/transnationale Organisationen in erheblichem Maße daran beteiligt, Kapazitäten für strategische Prozessführung aufzubauen. Beispielhaft sei hier die von George Soros unterstützte Open Society Justice Initiative genannt.⁶ Diese Organisation ist in mehr als 120 Ländern, darunter einigen europäischen Ländern (insbesondere in Osteuropa), aktiv und stellt sowohl personelle als auch finanzielle Ressourcen zur Verfügung, um Advocacy-Strukturen aufzubauen und (unter anderem) Projekte strategischer Prozessführung umzusetzen.

Law Clinics sind in der Regel an einer Universität angesiedelt und stellen ein Mittel praxisnaher Juristenausbildung dar. Sie verschaffen einerseits Jurastudierenden die Möglichkeit, ihre im Studium erworbenen theoretischen Kenntnisse praktisch anzuwenden, und bieten andererseits gesellschaftliche Dienstleistungen in Form von Rechtsberatung, Rechtshilfe und/oder Projekten (z.B. strategische Prozesse), die soziale Gerechtigkeit fördern. In 17 der untersuchten Länder gibt es Law Clinics, die sich (auch) mit Geschlechtergleichstellung und/oder den Vorschriften über geschlechtsbezogene Diskriminierung befassen. Nur sehr wenige Law Clinics haben direkten Zugang zu den Gerichten; viele unterstützen jedoch die Teilnahme an Gerichtsverfahren oder ermöglichen ihren Studierenden eine solche Teilnahme. Dies geschieht in der Regel auf eine (oder mehrere) von vier Arten:

- Zusammenarbeit mit Anwaltskanzleien / Anwälten: Manche Law Clinics kooperieren mit Anwaltskanzleien oder Einzelanwälten, die die Vertretung eines Klienten übernehmen und von der

5 EQUINET <http://equineteurope.org/2019/03/19/equality-bodies-and-equinet-promoting-equality-in-europe/>.

6 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

- Law Clinic aktiv unterstützt werden; dieses Modell wird von Law Clinics in **Deutschland, Irland, Italien, Polen** und dem **Vereinigten Königreich** bevorzugt.
- Zusammenarbeit mit ZGOs und/oder Gleichbehandlungsstellen: In **Belgien, Frankreich, Irland, Polen, Spanien** und im **Vereinigten Königreich** können Studierende in Law Clinics auch Verfahren unterstützen, die von ZGOs oder Gleichbehandlungsstellen angestrengt wurden.
 - Vermittlung an andere Organisationen: Law Clinics in **Deutschland, Irland** und **Slowenien** vermitteln ihre Studierenden an ZGOs, Gleichbehandlungsstellen und andere Einrichtungen (etwa im Rahmen von Praktika), wo sie gegebenenfalls an Prozessen teilnehmen können (in **Deutschland** haben ZGOs und Gleichbehandlungsstellen jedoch bei Gericht kein rechtliches *standing*).
 - Verweisungsvereinbarungen: Law Clinics in den **Niederlanden** und im **Vereinigten Königreich** verweisen Klienten zur Vertretung an andere Einrichtungen wie z. B. ZGOs, Gleichbehandlungsstellen, Gewerkschaften oder Anwaltskanzleien.

Law Clinics sind auch besonders interessante Beispiele, was die Unterstützung strategischer Prozessführung betrifft. Aufgrund ihrer Einbettung in die akademische institutionelle Struktur erfüllen sie für Projekte strategischer Prozessführung folgende unterstützende Funktionen (bzw. könnten diese erfüllen):

- Durchführung wissenschaftlicher Forschung zur Unterstützung solcher Projekte (z. B. Datenerhebung und -analyse, Recherche und Ausarbeitung juristischer Argumente, Veröffentlichung thematischer Artikel oder Berichte usw.)
- Ausbildung von sozialverantwortlichen Studierenden und künftigen strategischen Prozessanwälten, auch durch Vermittlung von Praktika bei ZGOs und Gleichbehandlungsstellen an Studierende (z. B. in **Deutschland, Irland** und **Slowenien**)
- Erste Anlaufstelle für Diskriminierungsoffer sein, die Hilfe benötigen, und auf diese Weise Anwälte, die strategische Prozesse führen, mit potenziellen Mandanten in Verbindung bringen. Rechtshilfe und/oder juristische Erstberatung wird von Law Clinics in **Belgien, Deutschland, Frankreich, Irland, Kroatien, Lettland, Litauen, Malta, den Niederlanden, Norwegen, Polen, Schweden,⁷ Spanien, Ungarn** und dem **Vereinigten Königreich** angeboten. Law Clinics in den Niederlanden und im Vereinigten Königreich verweisen Betroffene, die eine gerichtliche Vertretung benötigen, an geeignete Organisationen.

Auch Anwaltskanzleien oder Privatanwälte können strategische Prozessführung betreiben; dies geschieht häufig im Rahmen von Pro-bono-Programmen. Zuweilen arbeiten Rechtsanwälte in Verfahren wegen geschlechtsbezogener Diskriminierung mit Gleichbehandlungsstellen, Gewerkschaften / Arbeitnehmerkammern oder ZGOs zusammen. Bestimmte Faktoren können für Anwälte, die einen strategischen Prozess führen wollen, ein Anreiz sein oder eher abschreckend wirken.

Erstens können wettbewerbliche oder flexible Vergütungssysteme (strategische) Prozesse begünstigen. Erfolgsabhängige Honorare – der Anwalt wird nur dann bezahlt, wenn er den Fall gewinnt – verringern das finanzielle Risiko eines Prozesses für Diskriminierungsoffer und/oder für Organisationen, die Anwälte für strategische Prozesse engagieren. In **Irland** arbeiten manche Anwaltskanzleien beispielsweise nach dem Grundsatz *no win, no fee*, was bedeutet, dass der Anwalt seinem Klienten nur dann ein Honorar in Rechnung stellt, wenn er den Fall gewinnt. Bei einem *pactum de quota litis* erhält der Anwalt ein Erfolgshonorar (*contingency fee*), das in einem Anteil an der dem Diskriminierungsoffer zugesprochenen Entschädigung besteht. In **Island** arbeiten manche Anwälte (insbesondere Fachanwälte für Personenschäden) mit solchen Erfolgshonoraren. Derartige Vergütungsvereinbarungen bieten naturgemäß dann einen besonders hohen

⁷ In Schweden sind Law Clinics ein relativ neues Phänomen. 2014 eröffnete die Universität Göteborg die erste Einrichtung dieser Art, in Zusammenarbeit mit gemeinnützigen Organisationen, die kostenlose Rechtsberatung anbieten. Abgesehen von einer Organisation für Frauenhäuser arbeitet keine dieser Organisationen im Bereich Geschlechtergleichstellung. Weitere Informationen unter <https://law.handels.gu.se/english/rattspraktik>.

Anreiz, wenn die Aussicht auf Strafschadenersatz besteht. Eine Studie aus dem Jahr 2006 ergab jedoch, dass (rein) erfolgsbasierte Vergütungsregelungen in den meisten europäischen Ländern verboten sind.⁸

Zweitens bieten Anwaltskanzleien zunehmend Pro-bono-Programme an, um sich in Projekten zur Verteidigung öffentlicher Interessen zu engagieren. Pro-bono-Abteilungen können strategische Prozesse natürlich selbst führen oder aber mit gemeinnützigen Organisationen zusammenarbeiten. Eines der größten Hindernisse für die Etablierung von Pro-bono-Programmen sind Gesetze oder berufsrechtliche Vorschriften für Rechtsanwälte, die verbindliche Mindestgebühren festlegen.

Ressourcen

Rechtsstreite – vor allem solche, die als langfristige Strategie angelegt sind – erfordern umfangreiche Ressourcen: finanzielle Mittel, (erfahrenes) Personal, Zeit, Zugang zu Wissen und Netzwerken. Diese Faktoren beeinflussen maßgeblich die Fähigkeit von Organisationen oder Aktivisten, strategische Prozesse zu planen / zu strukturieren / durchzuführen, und entscheiden darüber, ob diejenigen, die an dieser Art von Prozessführung interessiert sind, wissen, wo sie Unterstützung finden können.

Es gibt drei wichtige **Finanzierungsquellen** für Organisationen und Aktivisten, die strategische Prozesse führen wollen: öffentliche Mittel (z.B. reguläre staatliche Zuschüsse, steuerliche Vorteile und Vergünstigungen oder die Möglichkeit, staatliche Mittel zu beantragen), private Mittel (Mitgliedsbeiträge, Spenden und Fundraising-Veranstaltungen) und die Finanzierung über internationale/europäische Organisationen, Zuschüsse und Programme. Die öffentliche Finanzierung ist häufig an bestimmte Bedingungen geknüpft. Private Finanzierung hingegen sichert die Unabhängigkeit, ist aber nicht immer leicht zu bekommen. Die Finanzierung durch internationale/transnationale/europäische Organisationen, Programme und Zuschüsse hat im Bereich der strategischen Prozessführung zunehmend an Bedeutung gewonnen – vor allem in Osteuropa. Mangelnde finanzielle Mittel auf Seiten der (potenziellen) Kläger ist ein **Haupthindernis** für strategische Prozessführung.

Ein weiteres **zentrales Problem**, das strategische Prozessführung verhindert, ist ein **Mangel an Experten und/oder Schulungsmitteln** für ZGOs und Aktivisten, die solche Prozesse führen wollen. In vielen europäischen Ländern ist strategische Prozessführung noch immer kaum bekannt, das heißt, es gibt nur wenige Experten, die über das notwendige Know-how verfügen, um beim Aufbau eines Programms oder einer Abteilung für strategische Prozessführung zu helfen. Transnational tätige Organisationen – z.B. die Open Society Foundation / Justice Initiative⁹ – haben in manchen Teilen Europas als Förderer und Wissensverbreiter für strategische Prozessführung gewirkt. Auch transnationale und europaweite Programme und Zuschüsse können strategische Prozessführung fördern.

Netzwerke können Expertise beisteuern, den Austausch von Best-Practice-Beispielen fördern und Prozessstrategien unterstützen. Sie können Foren einrichten, in denen sich gleichgesinnte Aktivisten treffen und gegebenenfalls ihre Kräfte bündeln, um gemeinsam Prozessstrategien zu entwickeln. Das Europäische Netzwerk der Gleichbehandlungsstellen EQUINET wurde als ein solches Netzwerk beschrieben. Erwähnt sei auch, dass einige lose Netzwerke, informelle Formen des Wissensaustauschs und persönliche Kontakte zur Verbreitung relevanter Informationen beitragen.

8 Hoche Demolin Brulard Barthélémy (Kanzlei), *Study for the European Commission on the Transparency of Costs of Civil Judicial Proceedings in the European Union – Final Report*, (Contract JLS/2006/C4/007-30-CE-0097604/00-36, 2006), S. 108.

9 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

Zugang zur Justiz

Das Führen eines Prozesses bindet Ressourcen – Ressourcen in Form von Personal, Geld und Zeit. Sehr lange **Verfahrensdauern** können strategische Prozessführung daher verhindern, da die Aussicht, jahre- oder sogar jahrzehntelang vor Gericht für eine Sache zu kämpfen, gegebenenfalls dazu führt, dass die Option eines strategischen Prozesses zugunsten anderer Advocacy-Ansätze aufgegeben wird.

Kurze Fristen für die Einreichung von Diskriminierungsklagen können den Einsatz strategischer Prozessführung ebenfalls negativ beeinflussen. Die Richtlinien überlassen es den Mitgliedstaaten, angemessene Fristen zu setzen – mit dem Ergebnis, dass die Fristen in den untersuchten Ländern sehr unterschiedlich sind.

Hohe Prozesskosten schrecken natürlich davon ab, vor Gericht zu ziehen, vor allem wenn die finanziellen Mittel potenzieller Akteure gleichzeitig begrenzt sind. In den meisten der untersuchten Länder sind Gerichtsverfahren mit einem hohen Risiko verbunden, da die unterlegene Partei nicht nur ihre eigenen Gerichts- und Anwaltskosten, sondern auch die der obsiegenden Partei zu tragen hat.

Staatliche Prozesskostenhilfe kann sowohl die Auswirkungen hoher Gerichtskosten abfedern als auch einen Anreiz dafür schaffen, vor Gericht zu ziehen, sofern sie die finanzielle Belastung und/oder die Risiken eines Prozesses wirksam verringert. Bestimmte Systeme der Prozesskostenhilfe sind für strategische Prozessführung günstiger als andere (siehe Abschnitt 2.5.4): In einigen Ländern können zum Beispiel auch ZGOs und/oder Gleichbehandlungsstellen Prozesskostenhilfe in Anspruch nehmen, in anderen Ländern dagegen nur Einzelpersonen. Es fragt sich jedoch, ob der Bezug staatlicher Prozesskostenhilfe generell mit strategischer Prozessführung vereinbar ist. Schließlich steht bei der strategischen Prozessführung das öffentliche Interesse in der Regel über den unmittelbaren Interessen eines einzelnen Klägers; und Prozesskostenhilfe ist normalerweise eine soziale Leistung, die Menschen mit geringen finanziellen Mitteln den Zugang zur Justiz ermöglichen, nicht jedoch Advocacy-Projekte bezuschussen soll.

Rechtlich-soziale Kultur

Ob strategische Prozessführung sich entwickelt, hängt auch vom jeweiligen sozialen/rechtlichen Umfeld ab. Wenn die Vorschriften über Geschlechterdiskriminierung und/oder die Mechanismen strategischer Prozessführung kaum bekannt sind, ist letztere keine Option. Ebenso wenn Diskriminierungsoffer darauf verzichten, ihre Rechte durchzusetzen, weil sie kein Vertrauen in die institutionellen Strukturen haben oder negative Auswirkungen (Reviktimisierung, Nachteile am Arbeitsplatz oder im sozialen Umfeld usw.) befürchten – unter solchen Voraussetzungen kann es für Aktivisten oder Organisationen schwierig sein, Klienten zu finden, die sich auf einen strategischen Prozess einlassen. Schließlich wird strategische Prozessführung auch dann keine Option sein, wenn die damit verbundenen Risiken (z.B. konservative Gegenreaktionen, negative Präzedenzfälle, Kosten oder andere unbeabsichtigte Folgen) hoch sind – oder als hoch empfunden werden – (Risikoaversion) oder wenn es wirksamere Methoden und Ansätze gibt, mit denen gleiche oder ähnliche Resultate erzielt werden (politische Lobbyarbeit, Medienkampagnen usw.).

Kapitel 3 – Strategische Prozessführung vor dem Europäischen Gerichtshof

Wie bereits erwähnt, beginnen strategische Prozesse vor dem Europäischen Gerichtshof (EuGH) in der Regel auf der nationalen Ebene. Kapitel 2 gilt daher im Wesentlichen auch für strategische Prozesse, an denen der EuGH beteiligt ist. Dennoch weist strategische Prozessführung beim EuGH gewisse Besonderheiten auf.

Zugang zur Justiz vor dem EuGH

Das System des EuGH kennt eine Reihe unterschiedlicher Verfahren, wobei das Vorabentscheidungsverfahren nach Artikel 267 AEUV bei weitem die meisten Rechtssachen hervorgebracht hat. Nach Artikel 267 AEUV haben die Prozessparteien keine Möglichkeit, sich *direkt* an den EuGH zu wenden. Sie können ihrem nationalen Gericht zwar vorschlagen, ihren Fall an den EuGH zu verweisen, und das Gericht bei der Formulierung der Vorlagefrage sogar unterstützen; sie sind aber nicht berechtigt, eine Vorlage zur Vorabentscheidung zu verlangen. Es liegt voll und ganz im Ermessen des nationalen Gerichts, den Fall an den EuGH zu verweisen – außer in Fällen, die vor dem höchsten nationalen Gericht verhandelt werden: Dieses ist verpflichtet, den EuGH anzurufen, wenn es in einer Frage des Unionsrechts auf Unklarheiten stößt. Natürlich liegt die Entscheidung darüber, ob ein Punkt unklar ist oder nicht, ebenfalls beim höchsten Gericht. Was Verfahren wegen geschlechtsbezogener Diskriminierung betrifft, so geht aus den von den nationalen Expertinnen und Experten beantworteten Fragebögen hervor, dass es, was die Anrufung des EuGH betrifft, von Land zu Land sehr unterschiedliche Tendenzen gibt. Während in **Spanien** die Gerichte in der Regel den Verweisungsanträgen der Prozessparteien folgen, ist dies in **Bulgarien, Dänemark, Litauen, Polen, Schweden**, der **Tschechischen Republik** und **Ungarn** offenbar nicht der Fall.

Normalerweise sieht der EuGH keine Amicus-Curiae-Briefe oder sonstige Interventionen Dritter vor. Es gibt jedoch Ausnahmen: Dritte, die ein „berechtigtes Interesse am Ausgang eines bei dem Gerichtshof anhängigen Rechtsstreits glaubhaft machen können“¹⁰ und bereits an dem auf einzelstaatlicher Ebene geführten Verfahren beteiligt waren, können dem EuGH eine Stellungnahme vorlegen. Darüber hinaus sehen die Antidiskriminierungsrichtlinien der EU ausdrücklich vor, dass die Mitgliedstaaten sicherstellen müssen, dass Verbände mit einem rechtmäßigen Interesse sich entweder *zur Unterstützung oder im Namen* der beschwerten Person, und mit deren Zustimmung, an Nichtdiskriminierungsverfahren beteiligen können.¹¹ In *Feryn*¹² und *Asociația Accept*¹³ stellte der EuGH außerdem fest, dass es *nicht* erforderlich ist, eine Person als Opfer zu identifizieren, und dass Verbände in solchen Fällen ein eigenes Rechtsschutzinteresse haben können. Damit wird im Wesentlichen festgestellt, dass Mitgliedstaaten beschließen können, eine Popularklage einzuführen (d.h. einer Organisation die Möglichkeit zu geben, *im eigenen Namen* zu klagen). Im Jahr 2016 haben 16 Mitgliedstaaten von dieser Möglichkeit Gebrauch gemacht.¹⁴

Im Vorabentscheidungsverfahren wird den Parteien eine Frist von zwei Monaten nach Zustellung des Vorlagebeschlusses eingeräumt, um sich schriftlich zu äußern.¹⁵ Diese Frist ist extrem kurz, zumal Interventionen vor dem EuGH höchstwahrscheinlich eine andere Argumentationsstrategie erfordern als vor nationalen Gerichten. Dies ist vor allem dann problematisch, wenn die Prozessparteien oder ihre Vertreter mit dem Unionsrecht und/oder den unionsrechtlichen Vorschriften über geschlechtsbezogene Diskriminierung nicht vertraut sind. Nach Ansicht der nationalen Expertinnen und Experten ist dies ein Problem, das in **Bulgarien, Estland, Italien, Litauen** und **Polen** strategische Prozessführung behindert. Im **Vereinigten Königreich** mangelt es einigen ZGOs an fundierten Kenntnissen der unionsrechtlichen Bestimmungen.

¹⁰ Artikel 40, Protokoll (Nr. 3) über die Satzung des EuGH [2010] ABl. C 83/210.

¹¹ Art. 7 Abs. 2 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse (2000/43/EG) [2000] ABl. L 180/22, und Art. 9 Abs. 2 der Richtlinie über die Gleichbehandlung in Beschäftigung und Beruf (2000/78/EG) [2000] ABl. L 303/16, sehen vor, dass Verbände, Organisationen oder andere juristische Personen, die ein rechtmäßiges Interesse daran haben, für die Umsetzung der Richtlinien zu sorgen, „sich entweder im Namen der beschwerten Person oder zu deren Unterstützung und mit deren Einwilligung an den in dieser Richtlinie zur Durchsetzung der Ansprüche vorgesehenen Gerichts- und/oder Verwaltungsverfahren beteiligen können“. Eine ähnliche Bestimmung ist bemerkenswerterweise in der Richtlinie 2006/54/EG über die Gleichbehandlung von Männern und Frauen in Beschäftigung und Beruf enthalten (Art. 17 Abs. 2).

¹² C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding / Firma Feryn NV*, ECLI:EU:C:2008:397 [2008].

¹³ C-81/12, *Asociația Accept / Consiliul Național pentru Combaterea Discriminării*, ECLI:EU:C:2013:275 [2013].

¹⁴ Tymowski, J., *The Employment Equality Directive – European Implementation Assessment*, (EPRS / European Parliament Research Service, 2016), S. 53.

¹⁵ Artikel 23, Protokoll (Nr. 3) über die Satzung des EuGH [2010] ABl. C 83/210.

Spezifische Funktionen der Akteure strategischer Prozessführung auf der Ebene des EuGH

Strategische Prozessführung erfordert ein hohes Maß an Fachwissen, beispielsweise was Entwicklungen in der Gesetzgebung und der Rechtsprechung betrifft. Dies gilt ganz besonders für ein Gebiet, das so stark von den Vorgaben und Maßstäben des Unionsrechts geprägt ist wie das Antidiskriminierungsrecht. Die Existenz von Netzwerken, die Wissen sammeln und verbreiten, ist in diesem Bereich daher von größter Bedeutung. Transnational tätige Advocacy-Organisationen haben wesentlich dazu beigetragen, das Wissen über richtungsweisende EuGH-Entscheidungen im Bereich der Geschlechtergleichstellung unter ihren Mitgliedern zu verbreiten,¹⁶ auch dann, wenn sie selbst keine Prozesse führen.

Während die **Akteure strategischer Prozessführung** häufig auf nationaler Ebene verankert sind (weil Rechtsstreite, wie bereits erwähnt, oft auf nationaler Ebene beginnen), führt die mehrstufige Governance-Struktur der Europäischen Union dazu, dass der auf die Verteidigung des Allgemeininteresses gerichtete Aktivismus gleichfalls fragmentiert ist und in der Regel eine Reihe unterschiedlicher Ansätze und Adressaten umfasst. In diesem Sinne wird strategische Prozessführung häufig in eine umfassendere Strategie eingebettet sein, die politische, öffentliche und andere Kampagnen und Ansätze umfasst.

Kapitel 4 – Schlussfolgerungen und Empfehlungen

Der Bericht benennt eine Reihe von Faktoren, die strategische Prozessführung behindern. Dabei handelt es sich unter anderem um folgende:

Mangelnde Forschung. Aus der Studie ergibt sich, dass strategische Prozessführung in Europa noch immer kaum erforscht ist. Von den 31 nationalen Rechtsexpertinnen und -experten, die mithilfe von Fragebögen an der Studie teilgenommen haben, gaben 29 an, dass *strategische Prozessführung* im juristischen akademischen Diskurs ihres jeweiligen Landes kein gängiger Begriff ist.

Vorschriften für Anwaltshonorare / Pro-bono-Praxis. In einigen Ländern ist die Erbringung von Pro-bono-Rechtsdienstleistungen aufgrund von Gesetzen oder Kammervorschriften, die *verbindliche* Mindesthonorare für Rechtsanwälte festlegen, nicht möglich. Auch das Fehlen flexibler Vergütungsregelungen, die **erfolgsbasierte Honorare und/oder Erfolgshonorare (*contingency fees*)** zulassen, kann Rechtsstreite verhindern, da das Risiko für Diskriminierungsopfer, (kommerzielle) Anwälte mit ihrer Vertretung zu beauftragen, dadurch steigt und die Motivation von Anwaltskanzleien, derartige Verfahren zu übernehmen, möglicherweise sinkt.

Mangel an geeigneten Wegen zur Geltendmachung von Ansprüchen. Der Mangel an geeigneten Möglichkeiten, um gerichtlich gegen Diskriminierung vorzugehen – entweder zur Unterstützung eines Opfers oder in Ermangelung eines solchen –, kann strategische Prozessführung behindern. Wenn Organisationen rechtliches *standing* gewährt wird (z. B. die Möglichkeit, Popularklagen oder Sammelklagen anzustrengen), steigt die Wahrscheinlichkeit strategischer Prozesse, da sich der Handlungsspielraum dieser Organisationen erweitert.

Zugang zur Justiz – Sonstige Faktoren. Restriktive Fristen für das Einreichen von Diskriminierungsklagen, lange Gerichtsverfahren und hohe Gerichtskosten können das Anstrengen eines Prozesses, und somit auch strategische Prozessführung, zum Scheitern bringen. Auch der Zugang zu Prozesskostenhilfe ist von Land zu Land unterschiedlich; besonders restriktive Bedingungen für die Gewährung von Prozesskostenhilfe können Bestrebungen, strategische Prozesse zu führen, ebenfalls gefährden.

16 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, S. 203.

Mangel an geeigneten Akteuren strategischer Prozessführung. In dem vorliegenden Bericht wurde versucht, eine (nicht abschließende) Typologie von Instanzen zu erstellen, die (potenziell) in der Lage wären, strategische Prozessführung zu betreiben, darunter Gleichbehandlungsstellen, zivilgesellschaftliche Akteure, Law Clinics und Anwaltskanzleien / Privatanwälte. Eine Reihe von Faktoren kann diese Instanzen jedoch davon abhalten, solche Prozesse zu führen:

- **Expertise.** Damit strategische Prozessführung Wirkung entfaltet, ist eine gewisse Expertise erforderlich – sowohl was die gesetzlichen Vorschriften über Geschlechtergleichstellung / geschlechtsbezogene Diskriminierung (idealerweise auf nationaler und auf Unionsebene) als auch was strategische Prozessführung selbst betrifft. Auf der Ebene der Rechtspraktiker in **Bulgarien, Dänemark, Deutschland, Estland, Finnland, Italien, Litauen, Österreich, Polen, Spanien** und der **Tschechischen Republik** fehlt diese Expertise derzeit (teilweise).
- **Struktur.** Ob strategische Prozessführung für eine Organisation ein praktikabler Ansatz ist oder nicht, hängt auch von deren Struktur ab. Bestimmte Gleichbehandlungsstellen verfügen beispielsweise nicht über das erforderliche Mandat, um strategische Prozessführung zu betreiben, oder erhalten für derartige Aktivitäten keine Mittel. Ein weiteres Hindernis kann die institutionelle Verflechtung potenzieller Akteure strategischer Prozessführung mit staatlichen Behörden und der daraus resultierende Mangel an Unabhängigkeit sein. Dies könnte eintreten, wenn der potenzielle Akteur Teil des staatlichen Institutionengefüges ist oder in erheblichem Maße von öffentlicher Finanzierung abhängt.
- **Ressourcen / Finanzierung.** Ein großes – wenn nicht sogar das größte – Hindernis für strategische Prozessführung ist, neben dem Fehlen der nötigen Expertise, der Mangel an ausreichenden finanziellen (und personellen) Ressourcen für die Umsetzung entsprechender Projekte.

Rechtlich-soziales Umfeld. Das rechtlich-soziale Umfeld entscheidet mit darüber, ob strategische Prozessführung eine praktikable Option der Advocacy-Arbeit ist. Folgende Faktoren haben Einfluss darauf, ob sich strategische Prozessführung entwickelt:

- **Bewusstsein.** Mangelndes Bewusstsein über die Existenz und Nützlichkeit strategischer Prozessführung hat negative Auswirkungen auf deren Entwicklung. Auch beschränkte Kenntnisse der Antidiskriminierungsvorschriften auf Seiten der Rechtspraktiker und/oder Opfer behindern diese Art der Prozessführung.
- **Mangelndes Vertrauen / Angst vor negativen Folgen.** Mangelndes Vertrauen in die institutionellen Strukturen oder die Angst vor negativen Folgen (z.B. Reviktimisierung) kann strategische Prozessführung verhindern, da potenzielle Prozessanwälte dadurch Schwierigkeiten haben können, Mandanten für strategische Prozesse zu finden.
- **Hohe Risiken / bessere Alternativen.** Strategische Prozessführung ist für zivilgesellschaftliche Organisationen keine gangbare Option, wenn die damit verbundenen Risiken sehr hoch sind (Erzeugung von Gegenreaktionen, hohe Kosten im Fall eines Unterliegens vor Gericht usw.) oder wenn es bessere Möglichkeiten gibt, die angestrebten gesellschaftlichen Veränderungen herbeizuführen – z.B. formelle/informelle Kommunikationskanäle mit (politischen) Entscheidungsträgern. Letzterer Hinderungsgrund stellt jedoch *per se* kein Problem dar; schließlich bleibt es jeder Organisation/ jedem Aktivisten selbst überlassen, abhängig von ihrer/seiner spezifischen Situation die geeignetste Vorgehensweise zu wählen. Wenn er/sie also der Meinung ist, dass andere Formen der Intervention erfolgversprechender sind, kann dies einen strategischen Prozess verhindern – diese Situation bedarf aber keiner Änderung.

Zusammenfassung der Empfehlungen

In Anbetracht des Vorstehenden können folgende Maßnahmen ergriffen werden, um die Entwicklung strategischer Prozessführung im Bereich der Geschlechterdiskriminierung zu fördern:

Forschung:

- Förderung der Erforschung strategischer Prozessführung im Bereich der Geschlechtergleichstellung mithilfe empirischer/qualitativer Studien über das Vorkommen strategischer Prozessführung, das einschlägige Schrifttum usw.
- Förderung und Finanzierung von Publikationen zu diesen Themen.

Rechtliche Faktoren:

- Förderung des Aufbaus und der Entwicklung von Pro-bono-Abteilungen in Anwaltskanzleien.
- Unterstützung der Überprüfung von Mindesthonorarbestimmungen für Anwälte.
- Analyse der Auswirkungen von erfolgsbasierten Honoraren und/oder Erfolgshonoraren (*contingency fees*) im Bereich der Geschlechtergleichstellung sowie Erwägung der Einführung klagefreundlicher Honorarregelungen.
- Unterstützung der Ausweitung von Prozesskostenhilfe auf Organisationen, die (strategische) Prozesse im Bereich Geschlechtergleichstellung führen.
- Förderung der Ausweitung von Prozessführungsbefugnissen (*standing*), Popularklagen und Sammelklagen auf Organisationen im Bereich der Geschlechtergleichstellung.
- Generell: Förderung der Entwicklung starker Rechte für Beschäftigte / potenzielle Diskriminierungsopfer (einschließlich der Gewährung eines Schadenersatzes für Diskriminierung, der eine wirksame Abschreckung darstellt).

Akteure strategischer Prozessführung:

- Förderung des Aufbaus und der Entwicklung von Fachwissen über strategische Prozessführung im Bereich Geschlechtergleichstellung, z. B. durch Unterstützung von Gleichstellungsorganisationen / Law Clinics / anderen Einrichtungen, die sich dieses Fachwissen aneignen wollen.
- Bereitstellung umfangreicher Ressourcen (Zuschüsse, Programme oder Finanzierung) speziell für ZGOs / wissenschaftliche Einrichtungen, die gewillt sind, strategische Prozessführung zu betreiben / Fachwissen über strategische Prozessführung im Bereich Geschlechtergleichstellung aufzubauen / als Multiplikatoren in diesem Bereich zu wirken.
- Einrichtung von *Kompetenzzentren für strategische Prozessführung* innerhalb der Mitgliedstaaten; dabei handelt es sich um Organisationen / Netzwerke / wissenschaftliche Einrichtungen, die speziell darauf ausgerichtet sind,
 - länderspezifisches Fachwissen über strategische Prozessführung im Bereich Antidiskriminierung aufzubauen;
 - sich an der strategischen Verbreitung dieses Wissens unter Advocacy-Organisationen und anderen interessierten Instanzen in ihrem jeweiligen Land zu beteiligen;
 - europaweite Netzwerke zu diesem speziellen Thema aufzubauen und zu pflegen, auch durch Verbindung mit bereits bestehenden Netzwerken, die in verwandten Bereichen arbeiten (EQUINET, ENCLE, EELN usw.);
 - mit Organisationen und Netzwerken, die strategische Prozessführung in anderen Bereichen einsetzen – z.B. ILGA Europe (Verteidigung von LGBTIQ-Rechten) oder Greenpeace –, einen Austausch aufzubauen und zu pflegen, um von den Erfahrungen der jeweils anderen zu lernen;
 - eine enge Kommunikation mit der Europäischen Kommission und anderen maßgeblichen Akteuren zu pflegen, um Updates und einen Austausch über aktuelle Entwicklungen und Best-Practice-Beispiele zu gewährleisten.
- Förderung der Einrichtung von (auf strategische Prozessführung spezialisierten) Law Clinics, die sich (auch) mit Fragen der Geschlechtergleichstellung befassen.
- Förderung des (transnationalen) Austauschs über strategische Prozessführung durch Bereitstellung von Ressourcen/Plattformen/Wissen zu dieser Vorgehensweise.

Rechtlich-soziales Umfeld:

- Förderung von Sensibilisierungsmaßnahmen im Bereich Geschlechtergleichstellung / strategische Prozessführung.
- Unterstützung einer Verringerung der mit (strategischen) Prozessen verbundenen Risiken, etwa durch Einrichtung von Fonds zur Übernahme von Prozesskosten und Gerichtsgebühren.

Chapter 1

1.1 Purpose, structure and methodology of this report

This report deals with strategic litigation in the area of sex discrimination law, both at the national and at the EU level. ‘Strategic litigation’ means developing comprehensive litigation strategies with the aim of generating social change by striving for favourable precedents.¹ It differs from classical litigation, since it tends to transcend the interests of a single litigant (usually prioritising policy goals over individual victories), and is often carried out by interest groups and/or activist lawyers as a form of activism. The most obvious outcome that strategic litigation strives for is legal change, for instance, by winning a case and obtaining a positive precedent. However, strategic litigation can produce *additional effects* apart from winning a case, such as creating mobilisation for a cause, generating sympathetic publicity, educating the public at large (including judges and lawmakers) about a certain topic, garnering media attention, exerting political pressure, among many others.²

This approach has been used by civil society organisations and individual lawyers to advance equality between the genders, before national courts as well as before the Court of Justice of the European Union (CJEU). While ‘strategic litigation’ is still somewhat under-researched as an academic subject, the awareness around it is steadily growing. For example, the European Network of Equality Bodies (EQUINET) has recently published a handbook on strategic litigation.³

Purpose of the report. This report aims to determine factors enabling and impeding strategic litigation, focusing on the area of sex discrimination law in the ambit of the six EU Gender Equality Directives (see below) and including best-practice examples. The area of research includes both the national, and the EU level. The main purpose of the report is to provide insights into further steps to stimulate and support gender equality strategic litigation in this field.

Structure of the report. In order to do so, this report first introduces the concept of strategic litigation and outlines the debates around this concept, including the advantages, risks and consequences of using strategic litigation. It will also provide a short overview of gender equality litigation in Europe. In Chapters 2 and 3, this report will provide a study based on interviews with national legal experts of the European Equality Law Network: experts from 31 countries (28 EU Member States plus Liechtenstein, Iceland and Norway) were given a questionnaire regarding practices and preconditions for strategic litigation within their national contexts.⁴ Their answers are the foundation for an analysis of factors that enable or discourage strategic litigation in Europe. Throughout the report, examples of (strategic) litigation will be given.

1 Marshall, A-M., and Hale, D., ‘Cause Lawyering’ (2014) 10th Annual Review of Law and Social Science 301, 302-305.

2 Andersen shows this by tracing the impact of LGBT rights court decisions – positive and negative – in U.S. society. Andersen, E., ‘Transformative Events in the LGBTQ Rights Movement’ (2017) 5th Indiana Journal of Law and Social Equality 441.

3 Morris, F. and others, ‘Strategic Litigation. An Equinet Handbook’ (2017) Equinet.

4 The questionnaire is attached to this report, in Annex 1.

This report will cover litigation arising under, or touching upon, the EU gender equality acquis and/or national implementation (including over-implementation) of EU law, especially regarding the material scope of the Gender Equality Directives.⁵

Methodology and analytical framework. The purpose of this report is an evaluation of the occurrence of strategic litigation within Member States and at the EU level – and particularly to provide an answer to the question of *why* such litigation occurs – or *why it does not* occur. An analysis of the legal, judicial and socio-cultural systems – both within Member States, and at the EU level – regarding their *suitability* for strategic litigation will therefore provide a useful analytical frame for the present report, pinpointing factors enabling and/or discouraging the emergence and development of strategic litigation.⁶ Alter and Vargas have analysed that the use of litigation strategies for policy change depends on a number of variables.⁷ For one, there needs to be a legal basis that litigants can build their strategies on.⁸ The EU acquis provides a strong material basis for gender equality litigation both at a national and a European level. A number of doctrines developed by the CJEU have contributed to the enforcement of EU rights by private individuals also before their national courts – particularly the doctrines of ‘supremacy’ and ‘direct effect’, or the principle of ‘harmonious interpretation’ of EU law (‘indirect effect’).⁹ Moreover, the CJEU ruled that, in order to ensure the full effectiveness of the protection of individuals’ rights, they were also entitled to receive damages in the case of an established breach of Union law.¹⁰ These doctrines form a solid baseline for strategic litigation both at the national and the EU level.

Apart from this, both legal and extra-legal factors contribute to the success of strategic litigation.¹¹ As a precondition for strategic litigation, the legal system needs to provide *opportunities for legal intervention* for activist actors. Gesine Fuchs writes:

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- 5 These are: Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6/24; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348/1; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37; Directive 2006/54/EC of the EP and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68/13; Directive 2010/41/EU of the EP and the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180/1; and Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, [2019] OJ L 188/79.
 - 6 This is in line with academic scholarship on this issue, particularly on contributions analysing civil activism using a ‘political opportunity structure’. See, e.g. Fuchs, G., ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries’ (2013) 28 Canadian Journal of Law and Society.
 - 7 Alter, K. and Vargas, J., ‘Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy’ (2000) 33 Comparative Political Studies 452, 457.
 - 8 Ibid, 409.
 - 9 Craig, P. and de Búrca, G., *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011), 202.
 - 10 Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* ECLI:EU:C:1991:428 [1991] ECR I-5357, paras 28-46; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Factortame)* ECLI:EU:C:1996:79 [1996] ECR I-1029, paras 15-23; Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* ECLI:EU:C:1996:375 [1996] ECR I-4845, paras 20-29; Case C-224/01, *Gerhard Köbler v Republik Österreich* ECLI:EU:C:2003:513 [2003] ECR I-10239, paras 30-59, and others.
 - 11 Fuchs, ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries’; Fuchs, G., ‘Strategische Prozessführung, Tarifverhandlungen und Antidiskriminierungsbehörden – verschiedene Wege zur Lohnungleichheit?’ (2010) 2 *Femina Politica*, 103-106; Della Porta, D. and Caiani, M., ‘Europeanization from below? Social movements and Europe’ (2007) 12 *Mobilization: An International Quarterly* 1, 15.; Jacquot, S. and Vitale, T., ‘Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women’s Groups at the European Level’ (2014) 21 *Journal of European Public Policy* 587; Alter and Vargas, ‘Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy’; Börzel, T., ‘Participation Through Law Enforcement: The Case of the European Union’ (2006) 39 *Comparative Political Studies* 128, 130-132; Cichowski, R., *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007), 171-206.

‘... by analogy to political opportunity structures, socio-legal scholars have developed the concept of legal opportunity structures (LOS), which are mainly defined in relation to the judicial arena.’¹²

In other words: both legal and non-legal factors influence the viability of strategic litigation in Europe. This report will provide a review of these factors in Chapters 2 and 3, and a set of recommendations for the support of strategic litigation based on this review in Chapter 4.

This report relies on questionnaires filled in by legal gender experts from 31 countries (28 EU Member States plus Liechtenstein, Iceland and Norway). The experts are part of the European Equality Law Network.¹³ They received a total of 16 questions (including sub-questions) in writing, regarding practices and preconditions for strategic litigation within their national contexts. The questionnaire is attached to this report.¹⁴ Parts of this report are also based on the (as yet unpublished) dissertation of the author.¹⁵ Due to the subject matter, this report draws both on legal and social scientific literature.

Empirical challenges. This report does not contain an exhaustive systematisation of strategic litigation projects that have actually taken place in the field of gender equality – mostly due to the fact that this information is not available. There are hardly any comprehensive studies or reports that have attempted to collect and describe strategic litigation projects on a national or European scale in the area of gender equality.¹⁶ Such information is especially hard to come by considering the following facts:

- *The term ‘strategic litigation’ is not congruent with court decisions producing (social/legal/political) impact.* While such decisions *can* be the product of strategic litigation, there are a number of landmark high court rulings that – while highly influential – were not developed and carried out as strategic litigation projects. Social/legal/political impact is certainly one of the goals of strategic litigation, but such impact can also be generated by non-strategic cases. In other words: high impact of a court decision does not *per se* provide insights into the use of litigation in a strategic way. This means that even though gender equality landmark cases are well researched (particularly at the European level), this research does not necessarily shed light on strategic litigation efforts in this field. Since the present report aims to investigate what drives or impedes strategic litigation, an examination of landmark cases will be of limited usefulness for this purpose.
- *The involvement of a civil society organisation (CSO) does not automatically indicate that the case at hand is a strategic litigation project.* In almost all of the examined countries, non-profit organisations, equality bodies, law clinics or other institutions provide some kind of legal assistance to victims of sex discrimination, particularly if they cannot afford commercial legal representation.¹⁷ However, providing legal assistance to victims of discrimination does not automatically mean that the ensuing litigation will be strategic. On the contrary: If an organisation has a mandate to provide legal assistance, this assistance will most likely not consist of strategic litigation (at least for the most part) – even if the respective cases go to court. Therefore, aid litigation is conceptually distinct from strategic litigation: After all, the sole (or main) focus of aid litigation lies on the interests of the client, and not on the *strategic* use of litigation in order to achieve a legal/social/political goal. Besides,

12 Fuchs, ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries’, 192.

13 European Equality Law Network (EELN) <https://www.equalitylaw.eu/>.

14 The questionnaire is attached to this report, in Annex 1.

15 ‘The Emancipatory Potential of Strategic Litigation at the CJEU and the ECtHR’ by Marion Guerrero, defended at the European University Institute in Florence, Italy on 17.12.2018.

16 There are, however, a few academic contributions that mention strategic litigation in the area of gender equality – mostly (but not exclusively) from a political scientific perspective. These include, inter alia, Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*; Anagnostou, D. and Millns, S., ‘Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System’ (2013) 28 Canadian Journal of Law and Society 115; Fuchs, ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries’; Jacquot and Vitale, ‘Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women’s Groups at the European Level’; Alter and Vargas, ‘Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy’; and others.

17 See *infra*, section 2.3.

confounding aid litigation with strategic litigation produces ethical dilemmas: if litigation is employed to further a particular agenda, then clients need to be on board with this project. This means that they need to be informed in detail of both the particular agenda and the possible ramifications of the litigation project. Aid litigation, on the other hand, does not usually display such agenda-driven elements. While there might be certain overlaps between aid and strategic litigation – for example, an aid litigation case might evolve into strategic litigation along the way – the mere involvement of a CSO is not *per se* proof of the existence of strategic litigation.

Given these considerations, it is difficult to state decisively whether a case was strategic, or merely resulted in an influential precedent, possibly with the participation of a CSO. It is even more difficult to ascertain whether an unsuccessful (or less impactful) decision was the result of a strategic effort. However, such information would be paramount for attempting a complete and compelling systematisation of past strategic litigation projects in the area of gender equality law in Europe. Therefore, a different analytical approach is necessary, as outlined above.

1.2 Strategic litigation – an introduction

1.2.1 Terms and definitions

‘Strategic litigation’ or ‘impact litigation’ is part of the **‘cause lawyering’** toolbox. Cause lawyering is also referred to as ‘public interest lawyering’ or ‘lawyering for social change’. It is defined by a desire to contribute to society by employing legal means.¹⁸ Sarat and Scheingold describe cause lawyering as ‘frequently [being] directed at altering some aspect of the social, economic, and political status quo.’¹⁹ Cause lawyering is not limited to ‘strategic (or impact) litigation’,²⁰ but can also include non-litigation legal approaches,²¹ such as legislative lobbying, public-private collaborations (e.g. supporting legislators as experts or consultants for law reform projects, etc.), data collection and analysis, and many more.²² Historically, cause lawyering was a progressive endeavour.²³ The term ‘progressive’ refers here, in simple words, to the opposite of ‘reactionary’, meaning the adherence to an agenda that aims for social justice, the improvement of minority rights, and – particularly in the area of non-discrimination – the advancement of gender equality, among other things.

However, strategic litigation has also been employed by reactionary forces, for instance to *oppose* gender equality projects.²⁴

‘Strategic (impact) litigation’ is one of the manifestations of cause lawyering. There is no coherent definition of the term ‘strategic (or impact) litigation’ in the literature. Strategic litigation differs from classical litigation in that it tends to transcend the interests of a single litigant and is often carried out by interest groups and/or socially conscious lawyers as a form of activism.²⁵ In this sense, strategic

18 Sarat, A. and Scheingold, S., ‘Cause Lawyering and the Reproduction of Professional Authority. An Introduction’ in Sarat, A. and Scheingold, S., (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998), 3.

19 Ibid, 4.

20 Marshall and Hale, ‘Cause Lawyering’, 302-305.

21 Ibid, 303.

22 Trubek, L., ‘Crossing Boundaries: Legal Education and the Challenge of the New “Public Interest Law”’ (2005) 455 *Wisconsin Law Review* 455, 460-466.

23 Menkel-Meadow, C., ‘The Causes of Cause Lawyering’ in Sarat, A. and Scheingold, S., (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998); 31-68.

24 In Croatia, for instance, the legality of abortion rights has (unsuccessfully) been challenged at the Constitutional Court numerous times. The Constitutional Court adopted a single decision on 21 February 2017 on seven separate proposals for review of constitutionality submitted between 1991 and 2016, see Constitutional Court, U-I-60/1991 et al., Decision of 21 February 2017 (HR).

25 Marshall and Hale, ‘Cause Lawyering’, 303; Sarat and Scheingold, ‘Cause Lawyering and the Reproduction of Professional Authority. An Introduction’, 4.

litigation pursues social change²⁶ rather than an individual victory; it usually prioritises a given societal or political agenda over the immediate interests of a particular client.²⁷ Sometimes, strategic litigation efforts are embedded in a comprehensive long-term strategy, stretching over a period of several years (or decades).²⁸

For the purpose of this report, strategic litigation will be defined as follows: strategic litigation (SL) is litigation which:

- aims to effect change that transcends the victory in a particular case, and
- prioritises a specific (legal/social/political) agenda over the particular interests of a client.²⁹

While conflicts between the immediate interests of a particular client and a (legal/social/political) change agenda do not have to arise, they *can* occur; for instance, if a landmark decision is a real possibility, but a client nonetheless chooses not to continue with a case or to accept a settlement with their employer in order to avoid remaining risks, long court proceedings, or re-victimisation.³⁰

The most obvious outcome strategic litigation strives for is *legal* or *doctrinal* change, for instance, by winning a case and obtaining a positive precedent that results either in law change, or in a more favourable legal interpretation of existing law. However, strategic litigation can produce *additional effects* such as, inter alia, creating awareness, mobilising people around a particular issue, or generating political debate.³¹

As already noted, it is important to distinguish strategic litigation from (socially motivated) litigation without a larger social change impetus, such as legal aid litigation.³² Legal aid lawyers may arguably classify as ‘cause lawyers’ since the motivation underlying their occupation – supporting those in need – is essentially social. However, legal aid litigation aims to improve the particular situation of the assisted individual, rather than to create social change. Strategic litigation, on the other hand, is an activity *the objective of which goes beyond litigating a particular case*. It means devising and carrying out litigation which achieves – or is meant to achieve – *a particular social change goal*.³³

Of course, it is sometimes difficult, if not impossible, to distinguish whether the main motivation for litigation is seeking redress for a personal injustice, or whether litigation is meant to propel social change.³⁴ Moreover, a non-strategic case can well take on a strategic agenda in the course of its progression. The exact incentive that led an organisation, a law firm, an individual lawyer, or a party to pursue litigation is hard to determine – more often than not, litigation will be driven by a mix of different intentions.

Agents of strategic litigation, for the purpose of this report, are organisations or individuals that carry out or significantly support strategic litigation projects. This means that they either litigate in their own

26 The term ‘social change’ is borrowed from political theory and sociology. It means, in the largest sense, the alteration of the status quo of a given society. It can include change of social behaviours, interactions, institutions, rules governing and organising a society, and so on. There are a number of different theories of social change; for an overview, see Leicht, K., ‘Social Change’ (*Oxford Bibliographies Online*, 2 March 2018) <http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0047.xml>.

27 Sarat and Scheingold, ‘Cause Lawyering and the Reproduction of Professional Authority. An Introduction’, 4.

28 An example is the fight for marriage equality in the US. Cummings, S. and NeJaime, D., ‘Lawyering for marriage equality’ (2010) 57 *UCLA Law Review* 1235. For Europe, see, e.g. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*.

29 This definition was developed in detail in Guerrero, M., ‘Activating the Courtroom for Same-Sex Family Rights. “Windows of Opportunity” for Strategic Litigation Before the European Court of Human Rights (ECtHR)’ in Casonato, C. and Schuster, A. (eds), *Rights on the Move Rainbow Families in Europe* (University of Trento 2014).

30 On this issue see also *infra*, section 2.6.

31 Andersen shows this by tracing the impact of LGBT rights court decisions – positive and negative – in U.S. society. Andersen, E., ‘Transformative Events in the LGBTQ Rights Movement’ (2017) 5th *Indiana Journal of Law and Social Equality* 441.

32 Abel, R., ‘Law without Politics: Legal Aid under Advanced Capitalism’ (1985) 32 *UCLA Law Review* 474, 540-586.

33 The term ‘social change’ here means an alteration to the status quo of a society in a broad sense. See *supra*, note 46.

34 On the distinction of aid litigation and cause lawyering, see Abel, ‘Law without Politics: Legal Aid under Advanced Capitalism’, 540-586, or Cummings, S., ‘The Pursuit of Legal Rights – and Beyond’ (2012) 59 *UCLA Law Review* 506, 510.

name, provide or hire a lawyer to represent victim(s) of discrimination, issue *amicus* briefs, or provide 'support' for strategic litigators – for instance, by conducting research, collecting data or referring clients to other organisations/lawyers. These latter organisations, while not litigating themselves, can play a vital role – particularly in concerted, long-term litigation strategies, involving a number of organisations (often with limited resources).

Strategic litigation agents can consist of civil society organisations (CSOs) such as women's rights organisations, institutions such as equality bodies or chambers of labour, trade unions, commercial law firms or individual lawyers. In order for an organisation/individual to carry out strategic litigation by themselves, they will need to have standing, either as (counsel to) applicants or third-party interveners / *amicus curiae*.

A strategic litigation agent is *not* the same as a victim of discrimination – however, if victims are activist themselves and somewhat involved in planning, carrying out or supporting the strategic litigation project, the lines of this distinction can be blurred.

Gender equality / sex discrimination. Since this report covers the material scope of the above-mentioned Equality Directives that deal mostly with sex discrimination issues, this report will use the terms 'gender equality' and 'sex discrimination' interchangeably and make distinctions only where necessary.

1.2.2 Origins and development of strategic litigation

The concept of 'strategic litigation' originated in the USA, where historically, political traditions have been tightly connected to law and its practice.³⁵ Its origins date back to the early 1900s.³⁶ 'Strategic litigation' has gained renown in the context of the civil rights movement in the USA; the 'National Association for the Advancement of Colored People' (NAACP) has famously used litigation as a way to achieve law reform.³⁷ However, after the US Supreme Court's landmark decision *Brown v Board of Education*³⁸ in 1954, the enthusiasm for impact litigation somewhat declined, since the high hopes that Brown would swiftly end segregation did not manifest.³⁹

Strategic litigation regained momentum with the emergence of the '**lawyering for social change' movement** in the 1970s. It was propelled, to a certain degree, by the problem of unequal access to justice: since judicial proceedings are costly and complicated, court proceedings tend to favour those who are already advantaged in terms of education, resources and hegemonic power.⁴⁰ Courts, thus, appear likely to perpetuate existing power structures instead of challenging them.⁴¹ This poses the following questions: should marginalised groups relinquish the law and the judicial process as a way to assert their rights? Or should they look for ways to participate in influential judicial discourses – and if so, how?

The 'lawyering for social change' movement provides an answer to this dilemma. A core problem frustrating the social reform potential of law is that certain 'repeat players' in the legal system have

35 Feeley, M., 'Foreword' in Scheingold, S. (ed), *The Politics of Rights Lawyers, Public Policy, and Political Change* (2nd edn, University of Michigan Press 2004), xii, xiii.

36 Louis D. Brandeis, who would later go on to become one of the US Supreme Court's most accomplished Justices, noted already in 1905 that lawyers had a social responsibility towards civil society, and that they could – and should – use the law in order to achieve greater equality within society. Brandeis, 'The Opportunity in the Law', 29-30.

37 Bracey, C., 'Louis Brandeis and the Race Question' (2001) 52 *Alabama Law Review* 859, 878-905.

38 *Brown v Board of Education*, 347 U.S. 483 (1954) (USA).

39 For accounts on this, see Bell, D., 'Law, Litigation and the Search for the Promised Land' (1987) 760 *Georgetown Law Journal* 229, 229-231; Bell, D., *Silent Covenants: Brown v Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford University Press 2004).

40 Bellamy, R., *Political Constitutionalism* (Cambridge University Press 2007), 39.

41 Hirschl, R., *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004), 54. See also Audrey Lorde's famous saying that 'the master's tools will never dismantle the master's house', Lorde, A., *Sister Outsider* (Crossing Press 1984), 112. For a collection of essays on this issue, see, e.g., Kairys, D. (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books 1982).

considerable strategic advantages over people who only occasionally appear before courts.⁴² Such ‘repeat players’ – such as transnational corporations with a legal department or access to high-profile law firms – ‘are engaged in many similar litigations over time’,⁴³ usually disposing of extensive resources, legal expertise and ample practical experience. Therefore, they are in a position to intentionally use litigation not only to succeed in a particular case, but to pursue long-term goals, as well; for instance, by aiming for decisions establishing a legal precedent.⁴⁴ This means that the judicial system is not fairly balanced, being used disproportionately by one particular segment of society. In his ground-breaking article *Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change*, published in 1974, lawyer and activist Marc Galanter suggested that civil society should organise in agencies that could also afford to pursue long-term litigation strategies by prioritising general interests above the immediate interests of a single litigant.⁴⁵ He thus conceived of strategic litigation as a form of advocacy. This approach has since spread across the globe,⁴⁶ including to Europe.

1.3 Different types of strategic litigation

Strategic litigation can have a number of different forms and objectives. The Strategic Litigation Handbook published by the European Network of Equality Bodies (EQUINET) defines eight particular types of strategic litigation in the area of equality and non-discrimination law:

- ‘To clarify or establish a point of law / the meaning of a particular legal provision.
- To effect a change in the law.
- To obtain judicial clarity on the application of equality and non-discrimination law.
- To establish that non-discrimination law covers or does not cover a particular situation.
- To highlight a serious issue such as a policy or practice which has a negative effect on many people, as part of a wider campaign for legal and social change.
- To ensure that non-discrimination law is upheld.
- To overturn “bad” case law.
- To establish legal precedent, enabling others to enforce their rights more confidently’.⁴⁷

Apart from these goals, strategic litigation can have a number of additional effects, such as creating media attention or public awareness, be an empowering experience, or (especially concerning EU law litigation) achieve a greater level of uniformity in the implementation of EU law. These possible effects are described below (section 1.5).

Sometimes, strategic litigation is part of a larger, comprehensive social change venture, flanked by a multitude of different activities such as political and legislative lobbying, media and publicity work, awareness-raising measures, and many others. Often, this will be the case if ‘strategic litigation’ is understood as a long-term plan spanning over a number of years or even decades and consisting of many similar litigations throughout the years. An example for both a comprehensive and a long-term strategic litigation project is the fight for marriage equality in the US.⁴⁸ The US LGBT movement used strategic

42 Galanter, M., ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 Law and Society Review 95, 9.

43 Ibid.

44 Börzel, ‘Participation Through Law Enforcement: The Case of the European Union’, 129.

45 Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’, 44.

46 For accounts on the use of lawyering in different local, national, and transnational legal environments, see, e.g., Sarat, A. and Scheingold, S. (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press 2001); Sarat, A. and Scheingold, S. (eds), *State Transformation, Globalization, and the Possibilities of Cause Lawyering* (Oxford University Press 2001).

47 Morris and others, ‘Strategic Litigation. An Equinet Handbook’, 9.

48 For a comprehensive overview, see Cummings and NeJaime, ‘Lawyering for marriage equality’.

litigation (among other tactics, such as media and political lobbying, consciousness-raising, educative efforts, and others) in order to achieve the goal of same-sex marriage.⁴⁹

1.4 Debates about strategic litigation

In recent years, strategic litigation has been discussed contentiously in academic circles.⁵⁰ Change through the courtrooms is not without risks; engaging in strategic litigation carries a number of potentially problematic implications, such as the risk of generating popular or political backlash,⁵¹ or of robbing a social movement of its radical impact and innovative potential, since translating a (political) claim into legal language might have an assimilative effect on a previously subversive social movement.⁵² Another claim which is often advanced applies to litigation which is aimed at producing legal/doctrinal change by urging a (high) court to review laws, policies or executive acts. It concerns the alleged lack of democratic legitimation of practices such as judicial review (the power of the judiciary to review and possibly invalidate acts adopted by executive and/or legislative organs).⁵³ Such mechanisms are frequently condemned as a threat to democracy, since they would re-distribute quasi-legislative powers to judges, thus compromising the 'separation of powers'.⁵⁴ Since judges were usually not subjected to electoral monitoring, it was questionable whether they should be allowed to circumvent traditional political discourse mechanisms by autocratically deciding contentious issues.⁵⁵ While this criticism is not directed at the litigators, but rather at the courts' practices, it nonetheless carries important implications for strategic litigation; after all, the power of (high) courts to review and interpret legislation is one of the elements enabling strategic litigation.

Advocates of strategic litigation, on the other hand, view their approach as a deeply democratic endeavour. They underline the participatory character of 'lawyering for social change', claiming it would open a gateway for individuals to directly take part in a form of policy-making which had usually been reserved for certain elites.⁵⁶ Strategic litigation is seen as a tool to empower civil society – after all, courts are spaces where diverse societal groups can negotiate their distinct legal perceptions, engaging in a process of legal meaning creation.⁵⁷ Apart from establishing a more balanced access to the judicial system, 'lawyering for social change' might be an especially promising route for minority groups with scarce hope of harnessing politicians to their agendas, be it due to a lack of support in the general population or because they do not dispose of a powerful political lobby.⁵⁸ In fact, litigation is sometimes the only possibility available to such groups to take part in influential decision-making processes.⁵⁹

49 Which was ultimately achieved with the landmark US Supreme Court decision *Obergefell v Hodges*, 576 U.S. ____ (2015) (USA). For an analysis of the strategic litigation efforts of the US LGBT movement and interviews with involved activists, see Guerrero, M., 'Lawyering for LGBT Rights in Europe. The Emancipatory Potential of Strategic Litigation at the CJEU and the ECtHR' (PhD Thesis, European University Institute 2018), 381-417.

50 See, e.g., Scheingold, S., *The Politics of Rights. Lawyers, Public Policy, and Political Change* (2nd edn, University of Michigan Press 2004), 95; Bell, D., *Silent Covenants: Brown v Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford University Press 2004), Lopez, G., *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press 1992), and, of course, Rosenberg, G., *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008).

51 Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*

52 Eskridge Jr, W., 'Channeling Identity-Based Social Movements and Public Law' (2001-2002) 150 University of Pennsylvania Law Review 419, 459-467.

53 For a more detailed account on judicial review, see, e.g., Epp, C., *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998).

54 Schor, M., 'Mapping Comparative Judicial Review' (2008) 7 Washington University Global Studies Law Review 257, 270.

55 Bellamy, *Political Constitutionalism*, 32; Ely, J., 'Toward a Representation-Reinforcing Mode of Judicial Review' (1977) 37 Modern Law Review 451, 485-487.

56 Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'.

57 Cover, R., 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court' (1983-1984) 97 Harvard Law Review 4.

58 Hunter, N., 'Lawyering for Social Justice' (1997) 72 New York University Law Review 1009, 1017; see also: Ackerman, B., 'Beyond Carolene Products' (1985) 98 Harvard Law Review 713, 732 (describing how some minority groups are so stigmatised or overlooked that they are unlikely to generate the necessary political sympathy for pushing for their claims on the legislative level).

59 Hunter, 'Lawyering for Social Justice', 1017.

1.5 Impact of strategic litigation

Strategic litigation can have a multitude of effects, not all of them legal. However, the precise impact of strategic litigation is difficult to define. Usually, it will be multidimensional, as Duffy observes in the context of human rights strategic litigation:

‘We may consider for example the broad *types* of impact (such as material and non-material, concrete and symbolic impacts, for example), *who or what* is affected (victims, perpetrators, the law, the courts themselves or the public for example), or *how* litigation brings about change (such as through what has been described as the “unlocking”, “participation”, “reframing” or “socio-economic” effects of national courts in economic and social rights cases).’⁶⁰

1.5.1 Potential benefits of strategic litigation

Law reform / doctrinal reform The legal results of successful strategic litigation may consist in legal and/or doctrinal change.⁶¹ If a court (with judicial review capabilities)⁶² annuls a law, ordains its disapplication, or demands law reform, this can be described as legal change. A preliminary ruling by the CJEU may also mean that national law reform becomes necessary. Finally, legal change can occur if the executive and/or legislative feel compelled to introduce law reform projects due to political debate connected to the respective court proceedings – this is especially likely to happen if the litigation was accompanied by intense media attention.⁶³ Doctrinal change happens if a high court changes or specifies its interpretation of certain legal terms, or if the CJEU declares that EU law provisions require a certain interpretation (which in turn may mean that national laws need to be interpreted accordingly).

Extra-legal effects of strategic litigation Apart from legal impacts, strategic litigation may also develop extra-legal impacts. This depends to a certain degree on the bigger picture: namely, whether litigation is part of a larger campaign or not. In fact, civil society organisations often use litigation as one tactic among many, embedded in a comprehensive strategy to advance their particular agenda.⁶⁴ The extra-legal impacts of litigation include creating mobilisation for a cause, inciting public debate on an issue, increasing popular and media awareness, generating sympathy and support for a cause, educating the public at large (including judges and lawmakers) about a certain topic, exerting political pressure, among many others. A prime example of a highly publicised case is the recent *Coman* case,⁶⁵ which dealt with the definition of ‘marriage’ within the meaning of the Citizens’ Rights Directive⁶⁶ (and solely in the ambit of residency rights). Media attention was high by the time the case was referred – Coman and his husband gave a lot of interviews, LGBT rights groups issued accompanying press releases, and a number

60 Helen Duffy, *Strategic Human Rights Litigation. Understanding and Maximising Impact* (Hart 2018), 39.

61 Strategic litigation could also have the aim and effect of ensuring systemic compliance with equality law.

62 ‘Judicial review’ usually describes a court’s practice of reviewing acts by the executive and/or legislative based on laws and/or values expressed in a higher-order text. For a more detailed account on judicial review, see, e.g., Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*.

63 Andersen shows this by tracing the impact of LGBT rights court decisions – positive and negative – in U.S. society. Andersen, E., ‘Transformative Events in the LGBTQ Rights Movement’ (2017) 5th Indiana Journal of Law and Social Equality 441.

64 Della Porta and Caiani, ‘Europeanization from below? Social movements and Europe’.

65 Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385 [2018].

66 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Citizens’ Rights Directive) [2004] OJ L 158/77.

of institutions and academics (who can be described as LGBT-friendly) wrote about the case from the outset.⁶⁷ Their opponents, however, also mobilised the press.⁶⁸

Some of these effects can also kick in when a case is lost, and sometimes with even more vigour – for instance, by fortifying a movement's identity due to outside resistance, by mobilising constituents, or just by profiting from heightened media attention.⁶⁹ Cummings has accordingly observed that 'contemporary public interest lawyering has moved beyond the founding conception and now can be understood as a diverse set of ideals and practices deeply engaged in the political fight to shape the very meaning of a just society.'⁷⁰

Litigation as an empowering experience As previously mentioned, litigation can be a gateway to participate in (judicial) decision-making for disempowered groups without sufficient political representation. For some, it might even be the last resort to exercise some kind of power over otherwise much more influential opponents.⁷¹ Using the judicial system in a proactive way might therefore be an empowering experience.⁷² A grievance will often be understood *prima facie* as purely personal misfortune, rather than a wrong caused by systemic injustice.⁷³ This can produce a sense of powerlessness and abandon. Translating the issue into legal language can sometimes provide relief by creating a certain structure and calculability of the steps ahead.⁷⁴

This might be particularly true for strategic litigation: An individual grievance transcends from the realm of the personal into the legal/political sphere and becomes the basis for a cause, rather than a personal injury. This can contribute to building consciousness, regaining control and restoring agency, especially for members of marginalised groups.

Litigation as a driver of EU law integration Individual litigants play an important role in holding Member States to their obligations under EU law.⁷⁵ Litigation is one way to enforce the correct application of EU law, even against one's own Member State.

Many scholars have pointed out that the Court of Justice of the European Union (CJEU) plays a decisive role in advancing European integration,⁷⁶ guaranteeing the uniformity of EU law and its application,⁷⁷ and ensuring Member States' accountability under the EU Treaties,⁷⁸ among other things. However, its most influential procedure – the preliminary reference procedure – requires that the Court be addressed by a

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- 67 'Coman-Hamilton. Meeting with the Couple That Might Put an End to Discrimination Against Same-Sex Couples Under the Freedom of Movements' (*L'Association Européenne pour la défense des Droits de l'Homme/AEDH*, 2017) http://www.aedh.eu/wp-content/uploads/2017/12/interview_AEDH_with_Clai_Hamilton-Adrian_Coman_EN.pdf?x51973; 'ILGA meets... Adrian Coman and Clai Hamilton' (*ilga.org*, 18 September 2016) <http://ilga.org/ilga-meets-adrian-coman-clai-hamilton-romania>.
- 68 ADF International, 'Redefining Marriage? EU Court to Rule on National Marriage Laws' (*adfinternational.org*, 24 April 2017) <https://adfinternational.org/detailspages/press-release-details/redefining-marriage-eu-court-to-rule-on-national-marriage-laws>.
- 69 NeJaime, D., 'Winning Through Losing' (2011) 96 *Iowa Law Review* 94, 969-1011.
- 70 Cummings, 'The Pursuit of Legal Rights – and Beyond', 510.
- 71 Hunter, 'Lawyering for Social Justice', 1017; See also: Ackerman, 'Beyond Carolene Products', 732 (describing how some minority groups are so stigmatised or overlooked that they are unlikely to generate the necessary political sympathy for pushing for their claims on the legislative level).
- 72 Felstiner, W., Abel, R. and Sarat, A., 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980-1981) 15 *Law and Society Review* 631.
- 73 Ibid, 633.
- 74 Ibid. The authors have shown how the process of 'naming, blaming, claiming' can provide disadvantaged persons or groups with remedies to re-define what happened to them in a more proactive, empowering way, and show them 'a way out' of their situation.
- 75 The EU Commission has also recognised this, inter alia, in the context of the infringement procedure. Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 410. See also: Commission, 'Eighteenth Annual Report on Monitoring the Application of Community Law' COM (2001) 309 final.
- 76 Conant, L., 'Europeanization and the Courts: Variable Patterns of Adaptation Among National Judiciaries' in Cowles, M., Caporaso, J. and Risse, T. (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001), 97.
- 77 Burley, A. and Mattli, W., 'Europe Before the Court: A political Theory of Legal Integration' (1993) 47 *International Organization* 1, 42.
- 78 Ibid.

Member State court in order to become active. The national court, in turn, usually needs to be approached by (national) litigants. Litigation in this sense ‘activates’ court proceedings that might ultimately lead to influential decisions.

Especially in the area of gender equality and anti-discrimination law, litigation has given the CJEU the opportunity to clarify and develop its jurisprudence and thus, to improve and align the level of protection throughout the Member States.

Litigation as a Civil-Society-Builder in Europe As many authors have pointed out, there is a certain lack of civil participation in the European Union – often labelled ‘democratic deficit’.⁷⁹ Connected to this is the issue of *who* actually forms the entity that might participate democratically in the European Union. There are a number of factors suggesting that the civil participation at the EU level would have to take on a very different dynamic than at the national level: For one, the formation of a ‘European civil society’ might be challenging, due to Europe’s high cultural and political diversity.⁸⁰ While political parties have traditionally served as democratic representatives, collecting the interests of certain groups into a cohesive agenda, they might not be able to take on the same role at the EU level,⁸¹ also because the dynamics of party politics (including access to information on political debates, etc.) are very different at this level. The high level of technocratic knowledge required to understand political processes in the EU might further discourage the public from trying to participate.⁸² However, as Maduro points out, the participation and representation of individuals that are affected by EU policies is of high importance for the democratic legitimation of the European Union.⁸³ This poses the question of how civil society can be enlisted to participate in and support the European Union.

Transnational strategies, driven by a common agenda – such as the fight for equality – can create transnational communities based on collective interests.⁸⁴ The emergence of an active civil society is highly dependent on the opportunities it encounters to participate in decision-making processes.⁸⁵ Strategic litigation is one such way of making one’s agenda heard at the European level. At (high) courts, various groups in a society have the chance to promote and negotiate the interpretation of law and rules that ultimately affect them.⁸⁶ The same is true for proceedings before the CJEU. Litigation gives civil society actors the chance to challenge and re-negotiate legal meaning and thus, to interact directly with influential policy makers.⁸⁷ Therefore, EU-level litigation can be a way for civil society to participate in European decision-making.

79 The debate on whether or not there is a democratic deficit in the EU has been led for several years. While some scholars see the need to redress societal participation, others (such as Moravcsik or Majone) claim that the EU was never meant to provide civil participation like a nation state. Moravcsik, A., ‘In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union’ (2002) 40 *Journal of European Market Studies* 603; Moravcsik, A., ‘The Myth of Europe’s “Democratic Deficit”’ (2008) 43 *Intereconomics*; Majone, G., ‘Europe’s “Democratic Deficit”: The Question of Standards’ (1998) 4 *European Law Journal* 5. For an overview of the debate, see: Follesdal, A. and Hix, S., ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies*; Rumford, C., ‘European Civil Society or Transnational Social Space? Conceptions of Society in Discourses of EU Citizenship, Governance and the Democratic Deficit: An Emerging Agenda’ (2003) 6 *European Journal of Social Theory*.

80 Lindseth, P., ‘Of the People: Democracy, the Eurozone Crisis, and Lincoln’s Threshold Criterion’ (2012) 22 *Berlin Journal*.

81 Bartolini, S., ‘Should the Union Be “Politicised”? Prospects and Risks’ (2006) *Notre Europe* Paris 1, 22.

82 Moravcsik, ‘The Myth of Europe’s “Democratic Deficit”’, 337-340.

83 Pinares Maduro, M., ‘Europe and the Constitution: What If this is as Good as it Gets?’ *conWEB – webpapers on Constitutionalism and Governance beyond the State* <https://www.wiso.uni-hamburg.de/fachbereich-sowi/professuren/wiener/dokumente/conwebpaperspdfs/2000/conweb-5-2000.pdf>.

84 This has been described in the area of LGBTIQ rights by Phillip M. Ayoub and David Paternotte, ‘Introduction’ in Ayoub, P. and Paternotte, D. (eds), *LGBT Activism and the Making of Europe: A Rainbow Europe?* (Palgrave Macmillan 2014), 15; see also Paternotte, D. and Kollman, K., ‘Regulating Intimate Relationships in the European Polity: Same-Sex Unions and Policy Convergence’ (2013) 20 *Social Politics* 510, 518, 526-527.

85 Della Porta and Caiani, ‘Europeanization from below? Social movements and Europe’.

86 Cover, ‘Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court’, 26.

87 The role of the CJEU as a policy maker is seldom challenged; see, e.g., Weiler, J., *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and other Essays on European Integration* (Cambridge University Press 1999).

1.5.2 Challenges and responses

Strategic litigation is certainly not without risks. It is important to be aware of possible challenges and to undertake a realistic risk assessment in order to determine whether litigation is the right approach – or whether an alternative course of action might be indicated.

Losing a case The most obvious risk of strategic litigation is the danger of losing a case and creating a negative precedent, which in turn can lead to a cementation of the status quo, or – even worse – negative law reform/doctrinal change. This concern is exacerbated by the emergence of ‘reactionary’ strategic litigation.⁸⁸ Nonetheless, losing a case can also have positive effects – by, among other things, generating publicity, sympathy and social movement mobilisation.⁸⁹

Costs of litigation Strategic litigation, as any litigation, is resource intensive,⁹⁰ requiring financial means, expert knowledge, and personnel, among other things. Moreover, court proceedings can last for several years, particularly if several instances are involved. Therefore, strategic litigation requires serious commitment. This makes it necessary to carefully calibrate the possible benefits of litigation against the probable costs that such an approach requires. If the time and money spent on devising and executing a litigation strategy do not correlate with the possible positive *effects* of such an effort, then resources might be better spent elsewhere.

Conflict of interests The prioritisation of a social change agenda might conflict with the achievement of an optimal result for the individual client.⁹¹ This is a delicate situation that may significantly influence the lawyer-client relationship.⁹² It is therefore very important that expectations are managed from the outset, and that options and agendas are communicated candidly.⁹³ However, often clients themselves are activists, or at least committed to the idea of not just gaining individual relief, but contributing to sustainable social change.⁹⁴

Victimisation Litigation – especially if it is used in a political way and part of a larger campaign – will likely expose the victim of discrimination. This might lead to problematic consequences for the victim, both professionally and on a personal level.⁹⁵ It is essential that the strategic litigation agent (be it a CSO, an activist lawyer or another entity) displays complete honesty when disclosing possible consequences for the victim, and refrains from exerting pressure of any kind.⁹⁶ It might be conducive if the victim identifies with the social change goal behind the strategic litigation, and is given the chance to actively participate in the process.⁹⁷

88 Reactionary strategic litigation has also occurred in the realm of gender equality in Europe; such litigation has been reported, e.g. by experts from **Austria, Belgium, Croatia, Cyprus, Ireland, Poland, Spain, and Sweden**. The most common subjects of such litigation are female quotas, reproductive rights or LGBTI rights.

89 NeJaime, ‘Winning Through Losing’.

90 In terms of budget, time, knowledge, and so on. Bellamy, *Political Constitutionalism*, 39.

91 Sarat and Scheingold, ‘Cause Lawyering and the Reproduction of Professional Authority. An Introduction’, 4.

92 Derrick A. Bell has traced the sometimes difficult relationship between clients and lawyers in the litigation for school desegregation. Bell, D., ‘Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation’ (1976) 85 Yale Law Journal 470. See also Sarat and Scheingold, ‘Cause Lawyering and the Reproduction of Professional Authority. An Introduction’, 4.

93 Duffy, *Strategic Human Rights Litigation. Understanding and Maximising Impact*, 256-259.

94 Paul Johnson points this out in his oral history account on LGBT rights litigation before the ECtHR, for which he interviewed a number of UK LGBT rights activists, as well as applicants in ECtHR cases. Johnson, P., *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press 2016), 176-181.

95 On this issue, see *infra*, section 2.6.

96 Duffy, *Strategic Human Rights Litigation. Understanding and Maximising Impact*, 256-259.

97 *Ibid*, 258-259.

Backlash There is a concern that using the courts to achieve change might backfire by creating backlash, especially if the population is not on board.⁹⁸ It is of course arguable that social change strategies are vulnerable to contingencies. This is true for strategic litigation, as it is for non-judicial approaches, as well. Any progressive project – be it a legislative project, a political campaign or strategic litigation – might create backlash.⁹⁹ This is shown, *inter alia*, by the emergence of conservative men's rights groups and movements as a reaction to feminist achievements.¹⁰⁰

It is important to note here that political, social and legal developments are not linear. Even a loss in court might not only carry negative consequences, as mentioned above.

The emancipatory potential of strategic litigation Another (mostly academic) criticism against strategic litigation concerns the emancipatory potential of strategic litigation. Some schools of thought question whether (minority) activists *can* and *should* use litigation in order to advance their agendas. Feminist and queer theories have brought up serious (empirical and normative) concerns on whether adjudication and law are adequate vehicles for the advancement of gender-related rights.¹⁰¹ This view is often inspired by a perception of adjudication as an intrinsically hierarchical and elitist process with little potential for activist intervention.¹⁰² These concerns have in common that they view law as a social change tool in a sceptical way, questioning (in one way or another) whether the legal arena is the right place to push for progress (especially in the area of gender rights), and whether using the law to promote social change (e.g. via litigation) can ever have an emancipatory impetus. However, as political scientists and sociologists have pointed out, law and constitutional governance cannot be understood merely as hegemonic top-down processes; indeed, the legal arena seems rather to present itself as a complicated net of cross-influences and interactions between a number of different players, such as courts, legislators, lawyers, social movements, activists and institutions, as well as media and other civil society actors, among others.¹⁰³ To recognise that adjudication is a multi-player process (albeit with admittedly different degrees of influence) can be empowering and destabilise the idea of simple vertical hierarchies. Civil society actors have always contributed to legal developments,¹⁰⁴ which becomes particularly obvious in the development of EU law. After all, in order to become active, courts need to be approached by litigants first – and without (national) litigation, the CJEU would not have been able to develop its case law via the preliminary reference procedure.

1.6 Preview of Chapters 2 and 3

The following Chapters 2 and 3 of this report will examine the indicators enabling or discouraging strategic litigation efforts at the national and at the EU level. As mentioned previously, a clear separation between these two levels is almost impossible in the area of gender equality. Strategic litigation will mostly start at the national level, even if it eventually reaches the CJEU (usually by way of the preliminary reference procedure). Therefore, the drivers and mechanisms for strategic litigation at the national level are also relevant for strategic litigation at the CJEU level. Thus, the focus of this report lies on the examination

98 A powerful account regarding the backlash thesis comes from Gerald Rosenberg: Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Responses: Cummings and NeJaime, 'Lawyer for marriage equality'; Keck, T., 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights' (2009) 43 *Law and Society Review* 151; Eskridge Jr, W., 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States' (2013) 93 *Boston University Law Review* 275; NeJaime, 'Winning Through Losing'; to mention just a few.

99 Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law', 471.

100 See, e.g., McDonald & White, 'The Backlash Against Gender Equality Is Arising in New Forms' (*LSE Business Review*, 8 November 2018) <https://blogs.lse.ac.uk/businessreview/2018/11/08/the-backlash-against-gender-equality-is-arising-in-new-forms/>.

101 See, e.g., Holzleithner, E., 'Emanzipatorisches Recht: Über Chancen und Grenzen rechtlicher Geschlechtergleichstellung' (2010) *juridikum* 6; Franke, K., 'The Politics of Same-Sex Marriage Politics' (2006) 15 *Columbia Journal of Gender and Law* 236; Goldberg, S., 'Sticky Intuitions and the Future of Sexual Orientation Discrimination' (2009) 57 *UCLA Law Review* 1375.

102 See, e.g. Lorde, *Sister Outsider*.

103 Della Porta and Caiani, 'Europeanization from below? Social movements and Europe'.

104 Siegel, R., 'The Jurisgenerative Role of Social Movements in United States Constitutional Law' (2015) https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf; Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court'.

of indicators for strategic litigation at the national level (Chapter 2). Chapter 3 will then provide an examination of additional indicators, specific to litigation before the CJEU.

The legal/judicial system itself contains factors enabling or discouraging litigation. Of course, legal protections in the area of non-discrimination law facilitate litigation; but there are a number of additional factors to consider. For example, strategic litigation requires the availability of adequate fora. These are courts or tribunals that have authority to challenge the legal *status quo* – for instance, by exercising judicial review, creating precedents, and if their decisions are usually implemented. However, if a decision by a court or tribunal does not usually develop consequences *beyond* the particular case at hand, then it might not be worthwhile to invest resources and time to build a strategic litigation case to bring before that particular court or tribunal. This *may* be the case if the tribunal cannot issue binding decisions (as is the case for some equality bodies, acting as tribunals); if its decisions are not sufficiently publicised; if there is no adherence to precedent whatsoever (not even informally); if there is no public discourse produced by such decisions (e.g. if the public is regularly excluded during the procedure); etc.

The existence of adequate agents of strategic litigation is also essential: CSOs, law firms, lawyers or other entities that can undertake strategic litigation efforts, and have access to resources (financial, personal and expert knowledge) as well as to transnational networks,¹⁰⁵ are aware of and/or familiar with strategic litigation mechanisms, etc. Moreover, the legal standing of such actors also influences their ability to directly carry out strategic litigation.

Apart from that, a number of other factors influence the viability of strategic litigation: whether the access to justice of victims of discrimination is safeguarded;¹⁰⁶ whether victims of discrimination trust the institutions for the defence of their rights¹⁰⁷ (or whether they fear additional victimisation if they speak up), whether the legal environment (including judges, practitioners and academics) knows about and supports strategic litigation, or whether there are viable alternatives to strategic litigation efforts (i.e. strong industrial relations or solid channels of political influence for unions and/or equality bodies and civil society organisations),¹⁰⁸ among others.

The following two chapters will examine these factors, both at the national and the EU level, as mentioned above. In doing so, they rely on the input provided by national legal experts of the European Equality Law Network.¹⁰⁹

105 Ayoub and Paternotte show – in the context of LGBT rights – how NGOs and civil society groups created transnational networks for (legal) LGBT activism. Paternotte, D., 'The NGOization of LGBT activism: ILGA-Europe and the Treaty of Amsterdam' (2016) 15 Social Movement Studies 388, 389; Ayoub and Paternotte, 'Introduction', 15.

106 Fuchs, 'Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries'.

107 Fuchs, 'Strategische Prozessführung, Tarifverhandlungen und Antidiskriminierungsbehörden – verschiedene Wege zur Lohnungleichheit?', 103.

108 Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', 459.

109 The questionnaire is attached to this report, in Annex 1.

Chapter 2 – Strategic litigation at the national level

This Chapter examines the indicators allowing or deterring strategic litigation in the area of sex discrimination law at the national level, relying in large part on the questionnaires sent to the national legal gender experts. The emerging patterns will inform the recommendations in Chapter 4.

The strategic litigation indicators are organised in the following way:

	Factors	What they indicate:	Issue in question:
What?	Legal Standards of Non-Discrimination Law	What is the legal basis for strategic litigation (SL) efforts? (EU acquis & case law, national provisions)	Material scope of SL
Where?	Adequate Fora for Strategic Litigation	Where can SL take place?	Judicial structure
Who?	Agents of Strategic litigation	Who can potentially carry out / support SL?	Actors of SL and their legal standing and funding
	Resources	What kind of resources are available to them?	
How / Why?	Access to Justice	Is SL attractive?	Incentives / Disincentives for SL
	Socio-Legal Culture	Is SL attractive?	

The first section of this Chapter, as shown in the scheme above, deals with ‘legal standards of non-discrimination law’, delineating the legal scope in which strategic litigation takes place. The second section – ‘adequate fora for strategic litigation’ – examines the existing judicial structure regarding its potential for strategic litigation approaches. The subset of the third and fourth sections looks at possible agents of strategic litigation, their legal standing and ability to participate in litigation projects in distinct ways, and the resources available to them. The last two sections – ‘access to justice’ and ‘socio-legal culture’ – analyse possible drivers for and obstacles to strategic litigation, both regarding procedural and cultural/social elements.

This analysis focuses on the conditions for strategic litigation, rather than on the factual existence of it: firstly, because empirical data in the latter area is scarce (as mentioned in the introduction); and secondly, because an evaluation of the *potential for strategic litigation* allows for an assessment of whether national environments would enable the (future) emergence of strategic litigation, and allows conclusions to be drawn as to what would have to be done to assist such a development.

2.1 Legal standards of non-discrimination law

Legal standards expressing commitment to equality or non-discrimination are of course advantageous for the purposes of strategic litigation. They provide the material basis for strategic litigation projects in the area of gender equality / non-discrimination law. In turn, strategic litigation can contribute to the doctrinal development of law and expand the body of law (especially case law).¹¹⁰ In fact, litigators have done exactly this, time and again, which has led to the development of a solid body of jurisprudence in the area of gender equality, as is well documented in the area of CJEU case law. National provisions – such as constitutional guarantees – can also be starting points for strategic litigation efforts. A

¹¹⁰ Siegel has shown how civil society actors have contributed to the development of law via litigation. Siegel, ‘The Jurisgenerative Role of Social Movements in United States Constitutional Law’.

constitutional commitment to gender equality, a prohibition of discrimination on the basis of sex and/or other constitutional provisions on gender equality exist in all of the examined European countries.¹¹¹

National anti-discrimination provisions in the area of gender equality are deeply interconnected with EU law,¹¹² as the Member States are obliged to transpose EU law into their national law. Without a doubt, the EU (and within its institutions, particularly the CJEU) has contributed immensely to the development of gender equality within EU Member States. At the moment, however, harmonisation of gender equality law across EU Member States has still not been completely achieved,¹¹³ with some countries providing stronger protection than others.¹¹⁴

The ever-growing EU gender equality acquis and the body of national laws that implements it expands the latitude for litigation – both in a procedural and a material legal sense – creating new possibilities for civil society participation.¹¹⁵ On one hand, the extensive corpus of legislative materials and case law provides litigants with a wealth of legal references and arguments. On the other hand, the EU institutional structure provides additional fora for fighting discrimination – first and foremost, of course, the CJEU.

Importantly, the doctrines of ‘supremacy’¹¹⁶ and ‘direct effect’¹¹⁷ developed by the CJEU, have contributed to making EU law accessible to citizens.¹¹⁸ Claire Kilpatrick writes that the CJEU introduced ‘supremacy’ and ‘direct effect’ with the hope to:

‘ensure that private individuals, through litigation before national courts, and the use of the preliminary reference mechanism ... would provide both more and better compliance by Member States with EC law obligations they had assumed.’¹¹⁹

Litigants have thus received additional leverage during proceedings before national courts: national courts and other institutions are required to disapply national rules that contradict EU law.¹²⁰ This of course strengthened the judicial branch in an unprecedented manner. Courts were given an instrument to urge the CJEU to overturn national legislation, which in turn provided social change activists with a new route to induce legal change by challenging the compatibility of national rules and practices in light of the EU acquis.¹²¹

111 Timmer, A. and Senden, L., ‘Gender equality law in Europe. How are EU rules transposed into national law in 2018?’ (2019) European Network of Legal Gender Experts in Gender Equality and Non-Discrimination / European Commission; Chopin, I. and Germaine, C., ‘A Comparative Analysis of Non-Discrimination Law in Europe 2017’ (2017) European Network of Legal Gender Experts in Gender Equality and Non-Discrimination / European Commission, Annex 1, p 132.

112 Mazey, S., ‘The European Union and Women’s Rights: From the Europeanization of National Agendas to the Nationalization of a European Agenda?’ (1998) 5 Journal of European Public Policy. However, level of compliance with the requirements of EU law provisions varies greatly. Zhelyazkova, A., ‘Complying with EU Directives’ Requirements: The Link between EU Decision-Making and the Correct Transposition of EU Provisions’ (2012) 20 Journal of European Public Policy.

113 Timmer and Senden, ‘Gender equality law in Europe. How are EU rules transposed into national law in 2018?’

114 For an analysis, see McCrudden, C. and Prechal, S., ‘The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach’ (2009) European Network of Legal Gender Experts in Gender Equality and Non-Discrimination / European Commission. This is also pointed out by Timmer and Senden, ‘Gender equality law in Europe. How are EU rules transposed into national law in 2018?’, 92.

115 Börzel, ‘Participation Through Law Enforcement: The Case of the European Union’, 130.

116 Case C-6/64, *Costa v ENEL* ECLI:EU:C:1964:66 [1964] ECR 585.

117 Case 26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 [1963] ECR 1.

118 Schepel, H. and Blankenburg, E., ‘Mobilizing the European Court of Justice’ in de Búrca, G. and Weiler, J. (eds), *The European Court of Justice* (2nd edn, Oxford University Press 2001), 28.

119 Kilpatrick, C., ‘The Future of Remedies in Europe’ in Kilpatrick, C., Novitz, T. and Skidmore, P. (eds), *The Future of Remedies in Europe* (Hart 2000), 2.

120 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629. Barnard, C., ‘Introduction: The Constitutional Treaty, the Constitutional Debate and the Constitutional Process’ in Barnard, C. (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press 2007), 38.

121 Stone Sweet, A. and Brunell, T., ‘The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95’ (1998) 5 Journal of European Public Policy 66, 72.

Moreover, it is well established that Member States' institutions (including, of course, national courts) are required to interpret national law 'in light of' directives ('harmonious interpretation' or 'vertical indirect effect' of directives).¹²² This is the most important theory that the CJEU has advanced to ensure that directives develop their full force,¹²³ and it is a powerful instrument to hold Member States to their obligations under EU law. Importantly, the obligation to interpret national law in conformity with directives also applies to national provisions that *predate* the directive and/or are *not specifically connected* to it.¹²⁴ In fact, this interpretive obligation applies to the national legal system *as a whole*.¹²⁵

The limits of 'harmonious interpretation' are reached where national law cannot reasonably bear a certain construction.¹²⁶ It is up to the national court to decide if and when this point is reached.¹²⁷ Activists can make use of the doctrine of 'harmonious interpretation' or 'uniform interpretation' to advance more favourable constructions of national anti-discrimination law.

Due to these reasons, the EU and national mechanisms for the enforcement of anti-discrimination provisions are deeply intertwined – also procedurally: as is well known, private litigants have no direct standing at the CJEU level – a national court has to make a preliminary reference in order for a case to reach the CJEU.¹²⁸

Litigation has contributed to the harmonisation of EU law among Member States, particularly if it resulted in preliminary rulings.¹²⁹ In fact, the preliminary reference procedure was designed to promote the uniform application of EU law.¹³⁰ The CJEU often uses preliminary rulings to clarify vague EU law provisions.¹³¹ Anagnostou and Millns observe:

'For the most part ... enforcement of EC/EU law, including in the area of gender equality, has relied upon decentralized processes of litigation and legal mobilization by individuals and collective or institutional entities.'¹³²

In fact, both the development of EU gender equality law,¹³³ as well as its enforcement,¹³⁴ has heavily relied on litigation by private actors and/or civil society organisations (CSOs).

However, the *absence* of non-discrimination laws is not *per se* a deterrent for strategic litigation. After all, one of the goals of strategic litigation is precisely the enhancement of legal protections. For instance, pushing for a construction of a national provision that is in conformity with EU law can be a strategic

122 Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153 [1984] ECR 1891, paras 26-28; Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* ECLI:EU:C:1990:395 [1990] ECR I-4135, para 8; Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* ECLI:EU:C:2004:584 [2004] ECR I-8835, paras 115-118; and others.

123 Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 200.

124 *Ibid*, 202.

125 *Pfeiffer and Others* (Joined Cases C-397/01 to C-403/01) [2004] ECR I-8835, para 118.

126 Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 203.

127 Of course, in such a case, courts might still be required to set aside national provisions. In *Mangold*, for instance, the Court held that 'It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.' Case C-144/04, *Werner Mangold v Rüdiger Helm* ECLI:EU:C:2005:709 [2005] ECR I-9981, para 78.

128 Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', 460.

129 Mattli and Slaughter describe the importance of preliminary rulings for the project of European integration. Mattli, W. and Slaughter, A-M., 'Revisiting the European Court of Justice' (1998) 52 *International Organization*.

130 Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', 123.

131 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 6; Börzel, 'Participation Through Law Enforcement: The Case of the European Union', 246.

132 Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', 123.

133 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 6; Börzel, 'Participation Through Law Enforcement: The Case of the European Union', 130.

134 Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', 123; Börzel, 'Participation Through Law Enforcement: The Case of the European Union', 133.

litigation objective. Such attempts can activate the emancipatory potential of law. The more successful activist lawyers are in suggesting a certain interpretation, the greater influence they exert. Nan Hunter writes:

'In my view, ... the single most common and powerful activity within social change lawyering has become the use of litigation to secure enforcement and expansive interpretation of statutes.'¹³⁵

Example of strategic litigation having considerable societal effects: in **Poland**, strategic litigation led not only to law change in the area of non-discrimination law, but also to the update of procedural safeguards in the area of reproductive rights. In *Tysiac v Poland*,¹³⁶ the European Court of Human Rights (ECtHR) decided on a case where a woman was not granted the right to appeal against a medical decision *not* to end her pregnancy based on health grounds. The ECtHR awarded compensation for non-pecuniary damage to the applicant. The ECtHR's respective recommendation was then included in the Law on Patients' Rights,¹³⁷ installing a special Commission in the Office of the Commissioner for Patients' Rights. This Commission can receive and decide on patients' appeals against any doctor's decision. However, the practical use of this appeals procedure in abortion cases remains limited.

2.2 Adequate fora for strategic litigation

One of the first decisions of a strategic litigation project is the choice of forum, assessing whether a particular court is an adequate addressee for a particular litigation. This requires (among other things) an evaluation of a court's case law as a whole, considering if the risk of fortifying a court's negative jurisprudence outweighs the chances of winning.¹³⁸ Similarly, if a (positive) decision by a court generates few to no effects (including side effects, such as raising awareness among the public for equality, influencing the policy development within Member States and/or at the European level, etc.) – then it makes no sense to address a court by way of strategic litigation. That is why it is important to determine whether a court's judgments develop influence beyond a particular case. Three inquiries are of particular interest in the area of sex discrimination law:

- Do courts have the authority to establish standards that transcend a particular case?
- Is there a system of (judicial or quasi-judicial) equality bodies in place that could address and rule on sex discrimination?
- Do courts provide insight into their decision-making process – e.g. by providing for dissenting/concurring opinions?

2.2.1 Authority of courts

Influence beyond a particular case. A main function of strategic litigation is the creation of social change by striving for favourable precedents.¹³⁹ For strategic litigation to be successful, it is not necessary that adherence to precedents is legally required (doctrine of *stare decisis*); it suffices that there is a doctrinal custom to observe and make reference to previous jurisprudence. While the practice of precedents is native to common law systems,¹⁴⁰ courts in most civil law countries usually mind the decisions by their High Courts, as well – especially if their case law displays a certain level of uniformity.¹⁴¹

¹³⁵ Hunter, 'Lawyering for Social Justice', 1012.

¹³⁶ *Tysiac v Poland* App no 5410/03 (ECtHR, 20 March 2007).

¹³⁷ Article 31 of the Law on the Patients' Rights and Commissionnaire for Patients' Rights of 6 November 2006 * unified text JoL 2019 Item 1127 (PL).

¹³⁸ Guerrero, 'Lawyering for LGBT Rights in Europe. The Emancipatory Potential of Strategic Litigation at the CJEU and the ECtHR' (PhD Thesis, European University Institute 2018); 399.

¹³⁹ See, e.g., Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'.

¹⁴⁰ Alexander, L., 'Constrained by Precedent' (1989) 63 Southern California Law Review, 3.

¹⁴¹ Fon, V. and Parisi, F., 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 International Review of Law and Economics.

In this sense, (high) court decisions contribute to a body of legal doctrine that judges interact with when making decisions.¹⁴²

Another contributive factor to strategic litigation is a court's ability to exercise **judicial review** – allowing a court to review legal and/or administrative acts, and to possibly set them aside if they conflict with a higher order text (such as a constitution or EU law).¹⁴³ Judicial review gives the judiciary considerable power, since it allows the courts to guard said texts even against acts of government and parliament.¹⁴⁴

Most European countries have adopted some form of judicial review;¹⁴⁵ notable exceptions are the **Netherlands**, where the constitution forbids constitutional judicial review,¹⁴⁶ and the **UK**, where judicial review is restricted to the examination of administrative acts; laws may not be set aside by courts.¹⁴⁷ Of course, judges in both countries are still required by EU law to review national laws regarding their conformity with EU law, if the occasion arises.

The following 29 countries display some kind of judicial review (consisting either in the authority to demand law reform, to void executive/legislative acts, to order their disapplication, or to declare them unconstitutional): **Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain** and **Sweden**.

There are different systems of judicial review in Europe.¹⁴⁸ Stone Sweet distinguishes two main systems – the 'European system' (with a constitutional court) and the 'American system' (without a constitutional court).¹⁴⁹ In the 'European system', the authority to exercise judicial review is reserved for a specialised (constitutional) court.¹⁵⁰ In the 'American system', a constitutional court is absent; all courts may deliberate on the constitutionality of legal and administrative acts. In such systems, the decisions by a high court on questions of constitutionality will usually carry most weight.

In **Austria**, the constitutional court has the power to practise both concrete judicial review (constitutional review of legislative acts originating from a pending case) – and abstract judicial review (constitutional review of legislative acts not linked to a concrete case).¹⁵¹ The court can either repeal an unconstitutional law, or set a binding deadline for the legislature to 'repair' the law in question, sketching out guidelines for its reform.¹⁵² Lower courts are not allowed to disapply or void a legal provision; they are, however, required to bring the matter before the constitutional court if they suspect a legal provision to be unconstitutional. The legality of administrative acts is reviewed by a special system of administrative courts, which can also invoke the constitutional court if the constitutionality of an administrative act is in question.¹⁵³ This is an example of the most common system of judicial review in Europe – constitutional review is reserved

142 Robertson, D., *The Judge as Political Theorist. Contemporary Constitutional Review* (Princeton University Press 2010), 282.

143 Ely, J., *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press 1980).

144 Fiss, O., *The Civil Rights Injunction* (Indiana University Press 1978).

145 Lustig, D. and Weiler, J., 'Judicial Review in the Contemporary World—Retrospective and Prospective' (2018) 16 International Journal of Constitutional Law. Ferejohn traces this back to the adoption of constitutions after authoritarian rule, and to the desire to enforce these constitutions. Ferejohn, J., 'Constitutional Review in the Global Context' (2002) 6 Legislation and Public Policy, 50.

146 Article 120, Constitution of the Kingdom of the Netherlands, 22 September 2008 (NL). However, judicial review of national law against EU law is allowed (EU law obligation).

147 Courts and Tribunals Judiciary (Webpage of the UK Judiciary), *Judicial review*, available at <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/>.

148 For an overview, see, e.g., Stone Sweet, A., 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 Michigan Law Review 2744.

149 Ibid, 2770.

150 This is also called the 'Austrian system', named after Hans Kelsen's constitutional vision. Bezemek, C., 'A Kelsenian Model of Constitutional Adjudication. The Austrian Constitutional Court' (2012) *Zeitschrift für Öffentliches Recht*. See also Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter', 2766-2669.

151 Bezemek, 'A Kelsenian Model of Constitutional Adjudication. The Austrian Constitutional Court', 125.

152 Ibid, 127.

153 Berka, W., *Verfassungsrecht* (6th edn, Österreich Verlag 2016).

for a constitutional court that has the function of ‘safeguarding’ the constitution.¹⁵⁴ Apart from **Austria**, a comparable system is adopted by **Belgium, Bulgaria, Croatia, Czech Republic, France, Germany, Hungary, Italy, Latvia, Liechtenstein** (State Court), **Lithuania, Malta, Poland, Romania, Slovakia, Slovenia**, and **Spain**.

The Nordic countries (**Denmark, Finland, Iceland, Norway** and **Sweden**) do not have a constitutional court; the constitutionality of legal/administrative acts can be examined by all courts, but judicial review is usually practised with caution. The impact of EU/EEA law and the European Convention on Human Rights has led to an intensification of judicial review in all five countries.¹⁵⁵ In **Finland**, for example, the parliament – and not the courts – is traditionally considered to be the guardian of the constitution. However, in 2000, a limited version of judicial review was introduced by constitutional reform.¹⁵⁶ Since then, all courts can disapply legislation that is *in evident conflict* with the constitution.

The judicial review process in **France** is noteworthy, since constitutional review is only carried out by the Constitutional Council (*Conseil constitutionnel*). It rules on the constitutionality of proposed statutes before they are signed into law (*a priori* review), and can also examine the constitutionality of existing law that is challenged during a court case (*a posteriori* review); it does not, however, rule on administrative acts.¹⁵⁷ The Administrative Supreme Court (Conseil d’Etat) can rule on the legality of all administrative acts, including their constitutionality.¹⁵⁸ There is an ongoing debate on whether the Constitutional Council can be considered a court or not;¹⁵⁹ however, this question is negligible for the purposes of strategic litigation.

The remaining countries display a mixture of the above-mentioned systems: in **Portugal**, there is a Constitutional Court – but lower order courts are also empowered to strike down unconstitutional laws. The Constitutional Court can then review these decisions (by way of appeal).¹⁶⁰ In **Estonia**, the Supreme Court has a Constitutional Review Chamber. In **Ireland**, there is no constitutional court – but the Supreme Court is empowered to review the constitutionality of laws.¹⁶¹ The system in **Cyprus** is similar: all courts can examine the constitutionality of a provision, but the final decision lies with the Supreme Court.¹⁶² In **Greece**, every court can incidentally review the constitutionality of statutes (as well as administrative acts)¹⁶³ and either interpret the examined provisions in conformity with these standards, or disapply provisions that they consider to be contrary to these standards.

A high court’s power to authoritatively **interpret the constitution** (or legislation with regard to the constitution) is also relevant for the purposes of strategic litigation; this power is present in **Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Germany, Iceland, Italy, Latvia, Liechtenstein, Poland, Portugal, Slovakia, Slovenia**, and **Spain**, according to the reports by national experts.

154 This is also known as the ‘Austrian system’; see *supra*, footnote 172.

155 Buzelius, K., ‘The Nordic Constitution and Judicial Review’ (2014) Opening Ceremony of the 40th Nordic Conference of Lawyers, 5.

156 Constitution of Finland, Act No. 731/1999 (FIN). See also Kirvesniemi, L., Sormunen, M. and Ojanen, T., ‘Developments in Finnish Constitutional Law: The Year 2016 in Review’ Global Review of Constitutional Law http://www.iconnectblog.com/2017/12/developments-in-finnish-constitutional-law-the-year-2016-in-review/#_ednref3.

157 Tallon, D., Hazard, J. and Berman, G., ‘The Constitution and the Courts in France’ (1979) 27 The American Journal of Comparative Law, 568-570; Stone Sweet, ‘Why Europe Rejected American Judicial Review: And Why It May Not Matter’, 2746-2766.

158 For example, on an administrative act which violates the principle of equality inscribed in the Constitution, Council of State (*Conseil d’Etat*), 27 July 2005, n° 270833, Louis v. Ministre de l’Outre-mer (FR).

159 Tallon, Hazard and Berman, ‘The Constitution and the Courts in France’; Wright, S., ‘The French Conseil constitutionnel under an Evolving Constitution’ in Birkinshaw, P. (ed), *European Public Law*, Vol 23 (Kluwer 2017), 250-251.

160 De Almeida Ribeiro, G., ‘Judicial Review of Legislation in Portugal: A Brief Genealogy’ in Biagi, F., Frosini, J. and Mazzone, J. (eds), *Constitutional History: Comparative Perspectives* (forthcoming) (2019).

161 Ó Tuama, S., ‘Judicial Review under the Irish Constitution: More American than Commonwealth’ (2008) 12 Electronic Journal of Comparative Law, available at <https://cora.ucc.ie/handle/10468/19>, 13.

162 Article 146, Constitution of the Republic of Cyprus, 16.08.1960 (CYP).

163 Spiliotopoulos, E., ‘Judicial Review of Legislative Acts in Greece’ (1983) 56 Temple Law Quarterly, 470-472.

The prevalence of EU law concepts in the area of sex discrimination law means that courts might be regularly confronted with the duty to review national provisions and acts for their EU law conformity – and disapply conflicting national acts, if necessary. This has provided courts in countries that were formerly adverse to judicial review (e.g. the **Netherlands**) with a review competence in relation to EU law. In **Greece**, the courts acknowledge the primacy of EU law also over the constitution, often interpreting and applying the constitution in light of EU law, in particular in gender equality cases.

The practice of judicial review gives the judiciary considerable influence.¹⁶⁴ This also means that strategic litigation will have greater impact if the forum it addresses has strong judicial review powers.

2.2.2 Equality bodies, acting as tribunals

In many countries, equality bodies can issue decisions on sex discrimination claims. For this purpose they therefore act as equality tribunals, even if they are not officially defined as such.¹⁶⁵ In any event, this decision-making function makes them potential addressees of strategic litigation efforts.

Several equal treatment directives¹⁶⁶ require Member States (as well as EFTA States and accession candidates) to establish equality bodies. However, the institutional make-up and mandates of equality bodies differ greatly.¹⁶⁷ Drawing on the European Commission against Racism and Intolerance (ECRI)'s Policy Recommendation No. 2,¹⁶⁸ Crowley distinguishes three main functions of equality bodies:

- 'Promotion and prevention: "The function to promote equality and prevent discrimination".'
- Support and litigation: "The function to support people exposed to discrimination and intolerance and to pursue litigation on their behalf".
- Decision-making: "The function to take decisions on complaints".¹⁶⁹

The lines between these functions can be blurred; often, one equality body will have several functions.¹⁷⁰ While the first – and particularly the second – functions constitute equality bodies as potential agents of strategic litigation, the third function means that an equality body could theoretically be the addressee of strategic litigation.

A total of 23 countries have equality bodies with decision-making capabilities with a mandate to (also) pursue gender-related claims, namely: **Austria, Bulgaria, Croatia, Cyprus** (regarding human rights violations), **Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Iceland**,¹⁷¹

164 Fiss, *The Civil Rights Injunction*.

165 Crowley, N., 'Equality Bodies Making a Difference' (2018) European Network of Legal Gender Experts in Gender Equality and Non-Discrimination / European Commission, 47.

166 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive) [2000] OJ L 180/22; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1.

167 Crowley, 'Equality Bodies Making a Difference', 38, 46.

168 Council of Europe, European Commission against Racism and Intolerance (ECRI) (2017), General Policy Recommendation No. 2 on Equality Bodies to Combat Racism and Intolerance at the National Level (Revised), Strasbourg, Council of Europe, 7 December 2017.

169 Crowley, 'Equality Bodies Making a Difference', 47.

170 Ibid, 47.

171 In Iceland, the 'Gender Equality Complaints Committee' issues binding rulings on violations of the Gender Equality Act. Article 5, Act on Equal Status and Equal Rights of Women and Men No. 10/2008, as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016 and No. 56/2017 (Gender Equality Act) (IS).

Ireland, Latvia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia and Sweden.¹⁷² Most of these bodies, however, cannot issue legally binding decisions.¹⁷³

In **Austria**, the Equal Treatment Commissions (*Gleichbehandlungskommissionen*)¹⁷⁴ are non-judicial bodies with limited powers. They can issue non-binding written determinations about, inter alia, sex discrimination claims. It is, however, not mandatory for civil or labour courts to follow their opinions. If a written determination of a Commission is entered into discovery during court proceedings, the court has to provide a reasoned statement if it chooses to deviate from it. The non-binding nature of the Commissions' opinions is intentional, since this lowers the threshold for bringing complaints and enables an informal exchange between the parties.¹⁷⁵

In a minority of countries, it is possible for specialised anti-discrimination tribunals to issue legally binding decisions. In **Cyprus**, the equality body can issue recommendations and/or impose fines; this is also true in **Hungary** and **Romania**. In **Denmark**, the Equality Board has the power to make binding decisions and award compensations. In **Norway**, the Anti-Discrimination Tribunal is an administrative body with limited powers to impose restitution and compensation. The Tribunal may provide redress for non-monetary loss in connection with employment and can make decisions about compensation for concrete financial losses in 'simple cases'.¹⁷⁶ In matters concerning regulations or administrative decisions, the Tribunal can issue a 'statement' that such an act contravenes the Equality and Anti-Discrimination Act. The Gender Equality Complaints Committee in **Iceland** can issue binding rulings on violations of the Gender Equality Act, which are binding for the parties to the case.¹⁷⁷ Parties to the case can bring the ruling before a court of law. If a violation is found, the victim of discrimination can then proceed to the courts to claim damages.

In **Portugal**, an employer has the obligation to request a binding legal opinion by the Commission for Equality in Labour and Employment (*Comissão para a Igualdade no Trabalho e no Emprego, CITE*)¹⁷⁸ in certain cases – for instance, before dismissing a pregnant worker.

In the case of equality bodies providing legally binding decisions, they present possible fora for strategic litigation – especially if these decisions can establish or alter general standards, which depends on the doctrinal influence of their decisions. The influence that decisions develop also depends on whether these decisions are publicised and thus, made accessible to a wider range of legal practitioners, judges and academics.

Whether it is expedient to first approach the equality bodies or to go directly to the courts, is a strategic decision that litigators need to make.¹⁷⁹ Decision-makers in equality bodies will most likely be sensitised to anti-discrimination matters, which could be an advantage. Whether this course of action is recommendable also depends on the question of whether an appeal to civil/labour/administrative courts is possible, and on how courts tend to receive the decisions of equality bodies.

Even if an equality body does not have the power to issue binding opinions, it might be worthwhile to start strategic litigation there – for instance, if its decisions can still provide advantages at court. For instance,

172 See also: Crowley, 'Equality Bodies Making a Difference', 54.

173 Crowley has examined 25 equality bodies with decision-making powers – out of these, 19 did not have the competence to issue legally binding decisions or to impose sanctions. Ibid.

174 *Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft – GBK/GAW-Gesetz* (BGBl. Nr. 108/1979) (AT); *Bundesgesetz über die Gleichbehandlung im Bereich des Bundes* (BGBl. Nr. 100/1993) (AT).

175 Mayer-Maly, *Gleichbehandlungsgesetz: Bundesgesetz vom 23. Februar 1979 über die Gleichbehandlung von Frau und Mann bei Festsetzung des Entgelts* (1981) 59.

176 'Simple cases' entails cases when the complainant is not asserting anything but the inability to pay or other obviously unsustainable objections.

177 Act on Equal Status and Equal Rights of Women and Men No. 10/2008, as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016 and No. 56/2017 (Gender Equality Act); Regulation No. 220/2017, *Reglugerð um málsmeðferð fyrir kærunefnd jafnréttismála* (IS).

178 *Comissão para a Igualdade no Trabalho e no Emprego (CITE)* <http://cite.gov.pt/>.

179 In Iceland, the Equality Complaints Committee will most likely be the first addressee of strategic litigation, due to its competence to deal with discrimination cases.

if the Ombudsperson in **Greece** has found a violation of the gender equality principle in labour contexts, the Labour Inspectorate is obliged to impose administrative fines, or otherwise issue a substantiated justification of why it chooses not to do so. In **Latvia**, the non-binding opinions by the Ombudsperson are frequently used in court.

The influence of an equality body also depends on the dissemination and publicity of its decisions. If neither practitioners, nor judges or academics have a chance to learn about an equality body's opinions, their impact will naturally be limited. This is the case in **Italy**: information regarding decisions on discrimination cases by equality bodies is not made public, and it is hard to obtain specific information on the cases they handle. This is a major barrier for strategic litigation.

On the other hand, easy access to (or even proactive distribution of) such decisions can maximise the thrust of an equality tribunal – and consequently, its suitability as a forum for strategic litigation. In **Croatia**, for instance, the Ombudsperson publishes a yearly report with detailed information on discrimination cases, including statistical data and analysis of said data. They also conduct surveys, studies and publish reports on discrimination matters. In **Cyprus**, the decisions of the equality body are published on its website.¹⁸⁰

Bringing a case before an equality tribunal may also be a way to win more time for the preparation of a court case, particularly if proceedings before an equality tribunal have a suspensory effect on time limits for bringing sex discrimination claims. This is the case in **Austria**: the time limit for bringing a sex discrimination claim is between 14 days and 6 months, but proceedings at the Equality Commission extend this period.

The reflections on equality tribunals are of course also applicable to other quasi-judicial (or even in some cases administrative) tribunals, such as labour or industrial tribunals. In **Belgium**, the labour inspectorate¹⁸¹ can mediate conflicts and conduct investigations in certain cases of suspected labour law violations. In **Estonia**, the dispute committee of the labour inspectorate (government agency) can reside over labour disputes and issue binding decisions on sex discrimination cases. It can also make decisions on remedies.

2.2.3 Dissenting/concurring opinions

Separate opinions are valuable sources of knowledge for strategic litigation. For one thing, they increase transparency.¹⁸² Agents of strategic litigation can gain insights into the workings of a court's decision-making, since separate opinions usually shed light on the arguments that were considered, and how they were weighed. Dissents may contain valuable clues for activist litigants on the viability of a particular strategy that might work in the future or give important hints as to whether a court might be ready to reconsider its approach in the near future.¹⁸³

At the constitutional/supreme court level, separate opinions are *not* allowed in **Austria, Belgium, France, Italy, Luxembourg, Malta** and the **Netherlands**.¹⁸⁴ In all other countries, separate opinions are allowed.

However, the practice of issuing such opinions varies from country to country. In **Ireland**, for instance, separate opinions are not allowed in most constitutional matters, but accepted at the Supreme Court.¹⁸⁵ In **Romania**, the Constitutional Court adopted a decision significantly limiting the possible content of

180 Exceptionally, in cases of discrimination in the context of provision of goods and services, the equality body can adopt a decree which is published in the official gazette. Article 14, Law 42(I)/2004 (CYP).

181 The labour inspectorates are not part of labour or industrial tribunals, but civil servants in charge of monitoring compliance with labour law.

182 Buyse, A., 'Separate Opinions' 27 May 2008) <http://echrblog.blogspot.com/2008/05/separate-opinions.html>.

183 This is particularly true if there is a high number of dissents, if allowed by the judicial system.

184 Raffaelli, R., *Study: Dissenting opinions in the Supreme Courts of the Member States* (European Parliament 2012).

185 Ibid, 24.

separate opinions, by prohibiting, for example, opinions that are ‘direct criticism’ of the decision of the Court.¹⁸⁶

In many countries, separate opinions are – even if possible – uncommon; this is the case in **Denmark, Finland, Germany, Latvia, Lithuania** and the **UK**. In **Croatia**, the practice of issuing separate opinions has been increasing over the past few years, but it is still under-utilised. The same is true for **Hungary**.

In **Poland**, the judgments of the Constitutional Court often contain more than one dissenting opinion. Since 2017, there are rules regarding the allowed content of separate opinions¹⁸⁷ – which is widely understood as an attempt to unconstitutionally limit the Constitutional Court’s scope of action. In **Greece**, dissenting opinions are common, in particular at the supreme civil and administrative courts. While one dissenting opinion is the norm, there can be more than one separate opinions (including concurring opinions), especially in cases of high importance.

2.3 Who litigates? Agents of strategic litigation

General

In order for strategic litigation to flourish, there need to be organisations and/or individuals capable and willing to design, carry out and support strategic litigation projects. This depends also on the question of whether such entities have direct access to the courts (**standing rights**).

Organisations or individuals that have direct standing at the court can carry out strategic litigation all by themselves.

If standing rights are limited or lacking, organisations may still plan and design strategic litigation projects and hire a lawyer to do the actual litigation. Since strategic litigation is usually a form of advocacy and involves far more than arguing at court, an organisation can still be in charge of the strategic litigation project, even if it needs to team up with a lawyer to execute it. For instance, such an organisation may define the goal the strategic litigation project strives for, significantly influence the litigation strategy and legal arguments brought forward, carry out most or all of the activities surrounding the litigation – such as designing a media strategy, engaging in legislative/political lobbying, networking with other organisations – and so on.

Even if an entity is not primarily in charge of a strategic litigation project, it can provide meaningful support to organisations/individuals carrying out strategic litigation and thereby, back strategic litigation projects. For example, an organisation can collect relevant data, draft legal briefs, provide resources, expertise and/or personnel, participate in media strategies, etc.

In Europe, several entities may act as agents of strategic litigation in the area of sex discrimination. Equality bodies and civil society organisations (CSOs) dealing (also or exclusively) with gender equality issues are the most likely agents in the context of sex discrimination. In the employment context, representative organs of employees, such as trade unions or chambers of labour, are responsible for the protection and promotion of workers’ rights. This includes, in most countries, the protection against discrimination based on sex. The institutional architecture of such organs often resembles a mixture

186 Grabenwarter, C., Hermanns, M. and Šimáčková, K., *Report on Separate Opinions of Constitutional Courts, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018)*, 28; Constitutional Court decision no. 1/2017 of 23 June 2017, Official Gazette, Part I no. 447. of June 23, 2017 (RO).

187 Dissenting opinions cannot be given with respect to the so-called *rubrum* of the ruling – which is the part indicating the issuing authority (Constitutional Tribunal), place and date as well as the composition of the bench. See: Paragraph 54 Of the Rules of Conduct of the Constitutional Tribunal constituting the appendix to the Resolution of the General Assembly of the judges of the Constitutional Court of the 27 July 2017, published in the Official Gazette of the Republic of Poland 2017 Item 767 (PL).

between a CSO and a public institution, depending on the particular history, traditions and industrial and legal environment in a particular country.¹⁸⁸ The emerging clinical legal movement in Europe also contains interesting opportunities for public interest litigation.¹⁸⁹ Law firms and private lawyers can also play a role in strategic litigation; this will often happen in the context of pro bono practice.¹⁹⁰

Whether an organisation can carry out strategic litigation depends on several factors, such as its standing rights, but also its access to resources and its willingness (or lack thereof) to commit time, personnel and budget to a strategic litigation project.

Standing rights. Standing rights give representatives of certain organisations the opportunity to be heard by a court and thus, take part in the judicial decision-making process by forwarding arguments, evidence or expert opinions. A number of national jurisdictions allow certain organisations the right to provide legal advice to claimants, represent one or more individual claimants in a trial, or even participate (in support of a claimant) as a party themselves in the context of anti-discrimination proceedings.¹⁹¹ The respective rules are relevant for litigation both at the national and the EU level, since the Court of Justice of the European Union (CJEU) cannot be approached directly by litigants: the most common way to address the CJEU is to go through the national court system.

In the realm of non-discrimination law – which is, as has been mentioned before, largely based on EU law provisions – procedural remedies for private litigants have significantly been strengthened in the past decades;¹⁹² for instance, by expanding the possibilities for individuals to evoke EU law before their national courts (and thus, potentially, before the CJEU as well, through the preliminary ruling procedure).

The Equal Treatment Directives provide limited guidance to Member States regarding the legal standing of their equality bodies.¹⁹³ On the other hand, Article 17 of the Recast Directive¹⁹⁴ and Article 8 of the Goods and Services Directive¹⁹⁵ require Member States to ensure that:

‘associations, organisations or other legal entities which have, *in accordance with the criteria laid down by their national law*, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.’

188 For an excellent overview, see Poole, M., *Industrial Relations: Origins and Patterns of National Diversity* (Routledge 1986).

189 Bartoli, C., *Legal Clinics in Europe: For a Commitment of Higher Education in Social Justice* (Diritto & Questioni Pubbliche 2016), 54.

190 Boutcher, S., ‘Lawyering for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society’ (2013) 18 *Mobilization: An International Journal*.

191 The handbook ‘How to Present a Discrimination Claim’, published by the Network of European Anti-Discrimination Experts, provides an exemplary overview of relevant national rules. Farkas, L. and O’Dempsey, D., *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives* (Publications Office of the European Union 2011), 67.

192 Claire Kilpatrick describes the development of these remedies through the Court’s case law (based on the principles of effectiveness and equivalence of EU law and to the expense of national procedural autonomy), Kilpatrick, ‘The Future of Remedies in Europe’, 3-8. See also: Harlow, C., ‘A Common European Law of Remedies?’ in Kilpatrick, C., Novitz, T. and Skidmore, P. (eds), *The Future of Remedies in Europe* (Hart 2000), 70.

193 Kádár, T., ‘The Legal Standing of Equality Bodies’ (2019) 1 *European Equality Law Review*, 2.

194 Recast Directive (2006/54/EC) [2006] OJ L 204/23; this mirrors the provision in the Race Equality Directive (2000/43/EC) [2000] OJ L 180/22; Article 7(2) of the Race Equality Directive, and 9(2) of the Employment Equality Directive state: ‘Member States shall ensure that associations, organisations or other legal entities which have in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of these Directives are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under these Directives.’ Ibid. However, it is noteworthy that while the Race Equality Directive also demands the set-up of specific equality bodies (Article 13), the Employment Equality Directive does not. Bell, M., ‘The Principle of Equal Treatment: Widening and Deepening’ in Craig, P. and de Burca, G. (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011), 619. See also: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive) [2000] OJ L 303/16.

195 Goods and Services Directive (2004/113/EC) [2004] OJ L 373/37.

However, the standards of standing for equality bodies and/or CSOs vary greatly within the Member States.¹⁹⁶

For the purpose of strategic litigation, the **type of access** to the courts is also of interest. There are four main ways to address the court via litigation:¹⁹⁷

- by representing a victim of discrimination at court – either directly (as a CSO / equality body / law firm / etc), or via cooperation with a law firm / by hiring a lawyer / etc. – or by acting *on behalf* of the victim;
- by litigating as a party in their own right (*actio popularis*);
- by way of a class action;
- by way of joining proceedings as a third party or an *amicus curiae*.

Representing / acting on behalf of a victim. The most common case of pursuing strategic litigation is to represent a victim at court. The fact alone that individuals can usually freely choose their representation when appearing before court (as long as this representative fulfils certain formal criteria, e.g. being admitted to the national bar) opens participatory gateways for civil society organisations. With the consent of the claimant, they can thus proceed to strategically put their representative activity in the service of a larger purpose – namely, the advancement of a social change agenda.

However, victims may face negative repercussions in their social or professional environment due to advancing a lawsuit, or feel discouraged by the burdens of lengthy and risky court proceedings.¹⁹⁸ A way to take the burden off individual litigants is giving standing to other entities which can pursue a case on their behalf, usually with their consent.¹⁹⁹ In the employment context, such standing is often given to trade unions.²⁰⁰

However, this kind of standing is not to be confused with the right of an organisation to bring actions *in their own name* (*actio popularis*, see below).

Actio popularis. An *actio popularis* is a special type of claim that is brought forward to protect, further or obtain a remedy for the violation of a collective/public interest. The right to bring an *actio popularis* is sometimes given to CSOs and other organisations and entities engaged in promoting public interests.

EU Non-Discrimination Directives explicitly hold that Member States have to allow for associations with a legitimate interest to engage, either *in support or on behalf of* a claimant, and with their approval, in non-discrimination cases.²⁰¹ The CJEU has further held in *Feryn*²⁰² and *Asociația Accept*²⁰³ that the identification of an individual victim was *not* necessary, and that associations can have autonomous standing in such cases.²⁰⁴ This basically establishes that a Member State can choose to introduce an

196 Chopin and Germaine, 'A Comparative Analysis of Non-Discrimination Law in Europe 2017', 89.

197 See also: Kádár, 'The Legal Standing of Equality Bodies', 6.

198 Fredman, S., 'Making Equality Effective: The Role of Proactive Measures' (2009) European Network of Legal Gender Experts in Gender Equality and Non-Discrimination / European Commission, 12.

199 Ibid, 16.

200 Ibid, 17.

201 E.g. Article 7(2) of the Race Equality Directive (2000/43/EC) [2000] OJ L 180/22; Article 9(2) of the Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16, which provide that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the Directives are implemented, 'may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'. A similar provision exists notably in Directive 2006/54 on sex equality in employment and occupation: Article 17(2).

202 C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397 [2008].

203 C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* ECLI:EU:C:2013:275 [2013].

204 While no identifiable victim is necessary to forward this claim, there usually needs to be a public interest, such as furthering equality, fighting discrimination or ending a discriminatory situation for a large number of people. Farkas, for instance, calls this 'group justice'. Farkas, 'Limited Enforcement Possibilities under European Anti-Discrimination Legislation – A Case Study of Procedural Novelties: Actio Popularis Action in Hungary', 185.

actio popularis (i.e. giving an organisation the opportunity to bring an action *in their own name*). In 2016, 16 Member States had made use of this possibility.²⁰⁵ In such cases, it is usually not necessary for the litigating party to be directly affected by the challenged action or act.

Class action. A *class action* (or group action) is a type of action where one lawsuit is filed for a group (or class) of people with analogous claims.²⁰⁶ They can have many forms, depending on the particular provisions in each country. Historically, the instrument of ‘class action’ originates in the Anglo-American room; however, it is becoming increasingly popular in Europe, as well.²⁰⁷

Group actions usually provide an incentive for litigation in the area of non-discrimination law, since they increase access to justice for plaintiffs without an abundance of means.²⁰⁸ In cases where individual plaintiffs are not likely to forward claims on their own, the class/group action can be an efficient instrument.²⁰⁹

Historically, the instrument of ‘class action’ originates in the Anglo-American room – however, it is becoming increasingly popular in Europe, as well.²¹⁰ The demarcation of class actions to *actio popularis* claims is not always clear-cut; however, one of the main differences is that bringing a class action demands the existence of concrete victims (the class or group).²¹¹

Amicus curiae / third-party intervention. Courts can allow (or invite) equality bodies, trade unions or CSOs to join a case in support of a victim (as a third party or *amicus curiae*, i.e. friends of the court) and/or to present their views in the form of written or oral opinions (amicus briefs). This of course presents a great strategic litigation opportunity for activist lawyers, providing their arguments with considerable leverage.²¹²

The practice of providing *amicus* briefs can also be a way to gain access to a court if the options of advancing an *actio popularis* or a class action or representing a victim at court are not available. It is also an opportunity to provide expertise without investing extensive resources.

The table below demonstrates whether or not an organisation has legal standing before national courts and tribunals in one of the ways mentioned above. Standing is understood in the broadest sense possible. The role and standing rights of specific agents of strategic litigation, such as equality bodies, civil society actors, law clinics and law firms, will be examined in more detail later.

Explanation of symbols:

‘n.a.’ means that no information was available, a ‘✓’ means yes, and an ‘x’ means no.

Caveat: Standing rights differ significantly from country to country, so this table is merely meant to give an approximate impression. Explanations are added where necessary.

Caveat 2: The categorisation of law clinics is tricky: Whereas most law clinics do not officially have standing at court, they will often cooperate with a lawyer who oversees a litigation project for the clinic. The clinic will still initiate and significantly influence the litigation project, under the guidance of the lawyer. It would

205 Tymowski, J., *The Employment Equality Directive – European Implementation Assessment* (EPRS / European Parliament Research Service, 2016), 53.

206 Definition provided by the Legal Information Institute at Cornell Law School, available at https://www.law.cornell.edu/wex/class_action.

207 Kelemen, ‘Suing for Europe: Adversarial Legalism and European Governance’, 112.

208 Kelemen, R., ‘Suing for Europe: Adversarial Legalism and European Governance’ (2006) 39 *Comparative Political Studies* 101, 112; Guiraudon, V., ‘Equality in the Making: Implementing European Non-Discrimination Law’ (2009) 13 *Citizenship Studies*, 536.

209 Aceves, W., ‘Actio Popularis – The Class Action in International Law’ (2003) 2003 *University of Chicago Legal Forum*, 354.

210 Kelemen, ‘Suing for Europe: Adversarial Legalism and European Governance’, 112.

211 Aceves, ‘Actio Popularis – The Class Action in International Law’, 358.

212 For an account on the strategic use of *amicus* briefs, see Collins Jr, ‘Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation’.

therefore be difficult to say whether or not such an organisation has standing rights. A similar case applies to organisations which cannot represent victims of discrimination at court themselves, but hire law firms / lawyers for the representation of victims at court: even though they have no direct standing *per se*, they might still be in charge of a litigation project, as described above. These situations will be indicated in the table below by 'x/✓'.

Table 1: Potential agents of strategic litigation with some type of standing rights

	Equality bodies (more details: see Table 3!)	CSOs (more details: see Table 4!)	Trade unions / chambers of labour (employment contexts)	Law clinics*	Law firms through pro bono programmes
Austria	x	✓	✓	x	✓
Belgium	✓	✓	✓	✓ ¹⁸⁾	x
Bulgaria	✓	✓	✓	n.a.	✓ ²⁴⁾
Croatia	✓	✓	✓	x	x
Cyprus	✓	✓	✓	x	n.a.
Czech Republic	✓	x/✓ ⁶⁾	x	x	✓
Denmark	n.a.	n.a.	n.a.	n.a.	n.a.
Estonia	✓ ¹⁾	x/✓ ⁶⁾	x	x	✓
Finland	✓ ¹⁾	x/✓ ⁶⁾	✓ ¹¹⁾	x/✓ ²¹⁾	x
France	✓	x/✓ ⁶⁾	✓	x/✓ ¹⁹⁾	✓
Germany	✓ ²⁾	x/✓ ⁷⁾	✓ ¹²⁾	x/✓ ¹⁹⁾	n.a.
Greece	x	✓	✓ ¹³⁾	x	✓ ²⁴⁾
Hungary	✓	✓	✓	x	✓
Iceland	✓	x/✓ ⁶⁾	✓ ¹⁶⁾	✓ ¹⁰⁾	✓
Ireland	✓	✓	✓ ¹⁴⁾	x ²⁰⁾	✓
Italy	✓	✓	✓	x/✓ ¹⁹⁾	x
Latvia	✓	✓ ⁸⁾	✓	x ²²⁾	✓
Liechtenstein	✓ ¹⁾	✓ ⁹⁾	✓	x	x
Lithuania	✓ ¹⁾	✓ ¹⁾	✓ ¹⁾	x	✓ ¹⁾
Luxembourg	x	✓	✓ ¹⁵⁾	x	x
Malta	✓	✓	✓	x	✓
Netherlands	✓	✓	✓ ¹⁶⁾	x ²³⁾	✓
Norway	✓	x/✓ ⁶⁾	✓	✓	✓ ¹³⁾ 19)
Poland	✓ ⁴⁾	x/✓ ⁶⁾	✓	x/✓ ²¹⁾	✓
Portugal	✓ ³⁾	✓ ¹⁰⁾	✓	x ²⁰⁾	n.a.
Romania	✓	✓	✓ ¹⁷⁾	x	x
Slovakia	✓ ⁵⁾	✓ ⁵⁾	✓ ⁵⁾	x	x
Slovenia	n.a.	n.a.	n.a.	n.a.	n.a.
Spain	✓ ¹⁾	✓	✓	✓ ¹⁹⁾	x
Sweden	✓	✓	✓ ¹⁶⁾	x	✓ ²⁵⁾
UK	✓	✓	✓	✓	✓

* an 'x' in this column may either indicate that (existing) law clinics do not have legal standing – or that law clinics dealing (also) with sex discrimination issues DO NOT EXIST in the country

1) however, this possibility has so far never been used

2) only amicus curiae briefs at constitutional stage, if asked to do so by Constitutional Court

3) only at constitutional stage

4) but only regarding violations by public bodies (not against private persons), or as amicus curiae before constitutional tribunal

- 5) but not at constitutional court
- 6) the CSO itself cannot represent the victim, but can hire a lawyer to do so
- 7) consumer organisations only (hardly any involvement in discrimination cases)
- 8) only if it is defined, by its statutes, as working on human rights / non-discrimination
- 9) prerequisite: organisations need to have existed for five years
- 10) strict prerequisites
- 11) usually, only unions who are part of collective agreements have standing rights at labour courts
- 12) unions only represent their members, very limited standing in discrimination cases court
- 13) however, this possibility has so far hardly been used in gender discrimination cases
- 14) only at the quasi-judicial stage before the Workplace Relations Commission
- 15) trade unions have *actio popularis*
- 16) unions only represent their members
- 17) only in administrative procedures
- 18) *amicus curiae* in ECtHR cases
- 19) often via cooperation with other CSOs / institutions / law firms
- 20) students can be placed with CSOs / institutions / law firms
- 21) standing rules like a CSO + cooperation with other CSOs / institutions / law firms
- 22) unless registered as an NGO
- 23) usually, law clinics have no standing – unless they have the legal form of foundation (as most NGOs in the Netherlands)
- 24) limited – only for relatives of lawyer and/or financially deprived clients
- 25) however, there is no information available on the extent of pro bono practices, and to the knowledge of the national expert, this possibility has so far never been used in a gender discrimination case

Providing support for strategic litigation projects. Organisations that cannot (or will not) carry out strategic litigation projects by themselves can still support strategic litigation projects executed by other organisations. Support for strategic litigation can have many forms. An organisation may provide initial legal advice to victims of discrimination, refer them to experienced lawyers/institutions, or provide any other kind of backing for strategic litigation projects, such as legal research, publication of relevant data (e.g. statistics and reports), launching topical (media) campaigns, etc.

In most examined countries, **equality bodies** as well as specialised **CSOs** can provide primary legal support on sex discrimination matters. **Trade unions** and/or chambers of labour can also advise their members on sex discrimination issues in the employment context. Many **law clinics** offer initial legal advice.

Law firms are not included in this chart, because it goes without saying that law firms can provide initial legal support in the form of legal advice.

Table 2: Providers of initial legal support (also) in the area of gender equality²¹³

	Trade unions / chambers of labour (employment contexts)	Other CSOs	Equality bodies	Law clinics*
Austria	✓	✓	✓	x
Belgium	✓	✓	✓	✓ ²⁾
Bulgaria	✓	✓	✓ ¹⁾	n.a.
Croatia	✓	✓	✓	✓
Cyprus	✓	✓	✓	x
Czech Republic	✓	✓	✓	x
Denmark	n.a.	n.a.	n.a.	n.a.
Estonia	✓	✓	✓	n.a.
Finland	✓	✓	✓	x
France	✓	✓	✓	✓
Germany	✓	✓	✓	✓
Greece	✓	✓	x	x

213 Explanation of symbols: ✓ = yes; x= no; n.a. = no information available.

	Trade unions / chambers of labour (employment contexts)	Other CSOs	Equality bodies	Law clinics*
Hungary	✓	✓	✓	✓
Iceland	✓	✓	✓	✓
Ireland	✓	✓	✓	✓
Italy	✓	✓	✓	✓
Latvia	✓	✓	✓	✓
Liechtenstein	✓	✓	✓	x
Lithuania	✓	✓	✓	✓
Luxembourg	✓	✓	✓	x
Malta	n.a.	n.a.	n.a.	n.a.
Netherlands	✓	✓	✓	✓
Norway	✓	✓	✓	✓
Poland	✓	✓	✓	✓
Portugal	✓	✓	✓	n.a.
Romania	✓	✓	✓	x
Slovakia	✓	✓	✓	x
Slovenia	n.a.	n.a.	n.a.	n.a.
Spain	✓	✓	✓	✓
Sweden	✓	✓	✓	✓
UK	✓	✓	✓	✓ ³⁾

* an 'x' in this column may either indicate that (existing) law clinics do not provide initial legal advice – or that law clinics dealing (also) with sex discrimination issues DO NOT EXIST in the country

- 1) this possibility is provided for by law, but usually does not happen in practice
 2) in the area of human rights law
 3) possible, but unusual in practice

Apart from providing primary legal advice, organisations can support strategic litigation in a number of different ways. Strategic litigation will always be most successful if embedded in a comprehensive social change campaign, including media strategies, political/legislative lobbying, topical (academic) publications, consciousness-raising strategies, and so on.²¹⁴ Organisations that do not themselves carry litigation strategies can support strategic litigation projects by taking over one or more of these tasks.

Best practice example: In **Belgium**, trade unions provide primary legal assistance to their members; however, they usually refer their members to the Institute for Equality between Women and Men if a sex discrimination case is concerned. However, in one case, the trade union *Fédération Générale du travail de Belgique / Algemeen Belgisch Vakverbond*,²¹⁵ the trade union took over the costs for the proceedings before the Supreme Court (Court of Cassation) for one of its members in the area of pay discrimination relating to maternity.

Best practice example: In **Romania**, the Anti-discrimination Coalition²¹⁶ is an informal group of CSOs, working to combat discrimination on various grounds (including sex discrimination). While it also provides support for proceedings before the NCCD, the Romanian equality body, it also provides initial legal support and broadly works on advocacy on anti-discrimination issues. In 2014, the group (represented by its member organisation ACCEPT) successfully applied for an EEA grant to further

214 Guerrero, 'Lawyering for LGBT Rights in Europe. The Emancipatory Potential of Strategic Litigation at the CJEU and the ECtHR' (PhD Thesis, European University Institute 2018), 391.

215 Final judgment in the case, Labour Court of Appeal in Brussels, 2 September 2009, *Chroniques de droit social / Sociaalrechtelijke Kronieken*, 2010, p.23 (B).

216 Anti-Discrimination Coalition <http://www.antidiscriminare.ro>.

access to justice in the area of non-discrimination, strengthen redress mechanisms and remedies, and increase the advocacy capacity of the Anti-discrimination Coalition.²¹⁷

Best practice example: The Rape Crisis Centre *Tukinainen* in **Finland**: It has made attempts at strategic litigation over the years but stopped due to funding issues. Now, it is focusing on creating social change by providing courses and consultations (such as gender sensitivity training) to legal professionals, prosecutors, judges and other public authorities dealing with sexual violence. Tukinainen also repeatedly offers know-how based on its expertise in the field. Even though sexual violence as such does not fall under the scope of the Equality Directives, providing training to legal professionals, trade union representatives, and other personnel working in the context of sex discrimination prevention and prosecution might be a worthwhile approach, especially given that low awareness of sex discrimination law is one of the factors preventing strategic litigation (see below).

Best practice example: In **Poland**, a case is sometimes supported by the resources of more than one organisation. For example, the Polish Society for Anti-Discrimination Law cooperated with the Helsinki Foundation for Human Rights and the *Kampania Przeciwko Homofobii* (Campaign Against Homophobia) in order to initiate a historical case on discrimination by association in the area of sex discrimination law.²¹⁸ This pooling of resources also enabled the hiring of a pro bono lawyer. The case was ultimately successful.

Types of agents of strategic litigation

In Europe, there are four major types of potential agents of strategic litigation: equality bodies, civil society actors (CSOs), law (legal) clinics and law firms / private lawyers. The following section will attempt to provide a more detailed view of their potential role in strategic litigation projects. This view is by no means a comprehensive account of strategic litigation projects that they have actually carried out, nor a complete list of every possible organisation that might be able to participate in strategic litigation in each country (due to the fact that exhaustive information is not available, to the knowledge of the author as well as the national experts). However, this section is meant to provide an impression of the situation in Europe regarding potential strategic litigation agents, and point to possible areas of development.

2.3.1 Equality bodies

Equality bodies in Europe display a variety of functions and institutional builds.²¹⁹ They are part of the institutional EU non-discrimination architecture, set up to promote equality and tackle discrimination based on sex, among other grounds.

EQUINET describes their particular role as:

- ‘Investigating cases of discrimination;
- Building a culture that values equality, diversity and non-discrimination;
- Providing information and in some cases legal support to potential victims;
- Monitoring and reporting on discrimination issues;
- Conducting research and providing policy recommendations;
- Engaging with public bodies, employers and NGOs to foster non-discriminatory practices and ensure awareness and compliance with equal treatment legislation.’²²⁰

217 Information available at the EEA Grants Homepage, at <https://eeagrants.org/archive/2009-2014/projects/RO09-0105>

218 Judgment of the District Court in Łomża, case no: I Ca 75/17, acting as the second instance (PL).

219 For an overview, see Crowley, ‘Equality Bodies Making a Difference’.

220 EQUINET, ‘What are Equality Bodies?’ (Brochure 2019), available at <http://equineteurope.org/2019/03/19/equality-bodies-and-equinet-promoting-equality-in-europe/>.

Whether an equality body can act as an agent of strategic litigation depends largely on its mandate.²²¹ Equality bodies that are designed as ‘equality tribunals’ (i.e. equality bodies that can issue decisions on sex discrimination claims)²²² first and foremost are, however, less likely to take on litigation tasks.²²³ According to the data provided by national experts, many equality bodies have direct access to the courts in one of the following ways:

Table 3: Standing rights of equality bodies²²⁴

	Representation of victims of discrimination at court	<i>Actio popularis</i> / litigating in own name	Class action / group action	Amicus curiae / third-party interveners
Austria	x	x	x	x
Belgium	✓	✓ ⁶⁾	x	✓
Bulgaria	n.a.	✓ ⁷⁾	n.a.	n.a.
Croatia	x	✓	x	✓
Cyprus	✓ ¹⁾	x	x	x
Czech Republic	n.a.	n.a.	n.a.	✓
Denmark	n.a.	n.a.	n.a.	n.a.
Estonia	n.a.	n.a.	n.a.	✓ ¹¹⁾
Finland	✓ ³⁾	x	x	✓
France	x	x	x	✓
Germany	x	x	x	✓ ¹³⁾
Greece	x	x	x	x ¹⁴⁾
Hungary	✓	✓	x	✓
Iceland ²²⁵	✓ ²⁾	✓ ⁸⁾	✓	✓
Ireland	✓	✓	x ⁹⁾	✓
Italy	✓	✓	✓	✓
Latvia	✓	x	x	x
Liechtenstein	x	x	x	✓ ¹¹⁾
Lithuania	x	x	x	✓
Luxembourg	x	x	x	x
Malta	n.a.	n.a.	n.a.	n.a.
Netherlands	x	✓	x	✓
Norway	✓ ⁴⁾	x	x	✓
Poland	✓	✓	x	✓ ¹²⁾
Portugal	n.a.	n.a.	n.a.	x
Romania	x	x	x	✓
Slovakia	✓ ⁵⁾	✓ ⁵⁾	✓ ⁵⁾	✓ ¹²⁾
Slovenia	n.a.	n.a.	n.a.	n.a.
Spain	x	✓ ⁷⁾	x	✓

221 Morris and others, ‘Strategic Litigation. An Equinet Handbook’, 7.

222 See also *supra*, section 2.2.2.

223 Kádár, ‘The Legal Standing of Equality Bodies’, 5.

224 Explanation of symbols: ✓ = yes; x = no; n.a. = no information available.

225 Regulation No. 220/2017, Article 11 (IS) provides that the Directorate for Gender Equality can request that a case is dealt with by the Gender Complaints Committee, if it has reason to believe an institution, company or a non governmental organisation has violated the GEA and/or received information substantiating such claims. The role of the Directorate for Gender Equality is to subsequently inform the relevant institution, company or NGO in writing about its decision. The Directorate of Gender Equality is then the plaintiff and brings forth a claim concerning the issues at stake.

	Representation of victims of discrimination at court	<i>Actio popularis</i> / litigating in own name	Class action / group action	Amicus curiae / third-party interveners
Sweden	✓	x	✓	x
UK	✓	✓	✓ ¹⁰⁾	✓

- 1) representation at industrial dispute tribunals
- 2) can file a complaint on behalf of complainants before Equality Tribunal (legally binding decisions)
- 3) under special circumstances – so far, no cases
- 4) representation before the Equality Tribunal (legally binding decisions)
- 5) representation at all stages but the Constitutional Court
- 6) equality body can bring actions covered by the Gender Act²²⁶
- 7) possible, but no cases yet
- 8) representation before Equality Tribunal (legally binding decisions)
- 9) while 'representative actions' (a form of 'group action') are available, a separate initiating action must be taken on behalf of each claimant/plaintiff
- 10) 'class actions' in a strict sense are not permitted; however, group litigation – where each individual with a potential claim chooses to opt in and join forces, and where their claims are managed together – is allowed
- 11) possible, but no cases yet
- 12) usually at the constitutional stage
- 13) only at constitutional stage, if asked by constitutional court
- 14) however, opinions issued by the Ombudsperson can be used before labour courts as means to prove the discrimination suffered by the victim

While in some countries (such as **Austria**²²⁷ and **Luxembourg**) equality bodies have no standing rights at all, equality bodies in other countries can participate in legal proceedings to varying degrees.

The **Romanian** equality body, the National Council for Combating Discrimination (NCCD), has a special competence: it must be subpoenaed in all anti-discrimination cases filed at civil courts. The opinions by the NCCD are treated as expert opinions, rather than partisan interventions.²²⁸

In a number of countries, equality bodies have been actively involved in strategic litigation.

In the **UK**, the Equality and Human Rights Commission (EHRC) regularly intervenes in discrimination cases (it has made submissions in roughly 5–15 cases a year, including the landmark cases *Eweida and Chaplin*, *Ladele and McFarlane* before the European Court of Human Rights).²²⁹ It has intervened in a number of landmark gender equality cases, such as a case regarding gender segregation in a religious private school,²³⁰ or in a landmark case regarding a discriminatory tax reduction scheme, which disadvantaged victims of domestic violence.²³¹

Since 2010, the **Swedish** Equality Ombudsperson has initiated proceedings in seven cases regarding sex discrimination. All cases were won. In **Norway**, the Equality Ombud has acted as *amici curiae* in several discrimination court cases. In 2018, the Ombud has acted as an *amicus curiae* at the request of a lawyer in a case regarding pregnancy discrimination.²³²

In **Belgium**, the Institute for Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes*) is the main strategic litigation body in the area of gender equality in the country. It can represent victims at court. Its **case selection** depends on the persuasiveness of a case (e.g. on convincing facts

226 Gender Act of 10 May 2017 (B).

227 In Austria, the equality body represents victims of discrimination before the Equality Commission; however, the Equality Commission cannot issue legally binding decisions. See above.

228 Kádár, 'The Legal Standing of Equality Bodies', 10.

229 *Eweida & Others v UK* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

230 United Kingdom, Court of Appeal England and Wales, EWCA Civ 1426, 13 October 2017, <https://www.judiciary.uk/wp-content/uploads/2017/10/interim-executive-board-of-al-hijrah-school-20171013a.pdf> (UK).

231 *R (Winder and ors) v Sandwell Borough Council* United Kingdom, High Court, EWHC 2617 (Admin) (UK), 30 July 2013, https://www.escri-net.org/sites/default/files/caselaw/r-winder-v-sandwell-council-2014-ewhc-2617-admin_full_judgment.pdf (UK).

232 Borgarting Court of Appeal, case no. 18-159246ASD-BORG/01 (NOR).

and sympathetic clients), on the likelihood of obtaining a favourable judgment, and also on its available resources. The main goals it pursues with strategic litigation are visibility, publicity and law/doctrinal reform. The Institute for Equality can also bring discrimination complaints to court *without* an action from the victim.

Best Practice Example: In **Belgium**, strategic litigation by the Institute led to the landmark decision in the case of *Sadia Sheik*²³³ (even though it is not a sex discrimination case under the EU acquis). The young woman was murdered by members of her family after refusing to enter a forced marriage. The Institute's intervention in the case was vital to have gender discrimination recognised as one motive of the murder, which is an aggravating circumstance under the Belgian Penal Code.²³⁴

In **Hungary**, the Equal Treatment Authority may initiate lawsuits (*actio popularis*) in order to protect the rights of individuals or groups.²³⁵

In **Croatia**, government and other public bodies could in principle make use of *actio popularis* claims. A so-called associational action,²³⁶ a type of *actio popularis* claim, may be filed by the Ombudsperson for Gender Equality without identifying a victim by name – however, there have been very few cases so far. Most of them have dealt with sexual orientation discrimination: since 2016, the Ombudsperson has intervened in eight such cases. In a 2015 case, the Ombudsperson intervened on behalf of a lesbian Catholic religion schoolteacher in a sexual orientation discrimination case. The case is currently pending at the Constitutional Court.²³⁷ Apart from this, the Ombudsperson is also entitled to initiate constitutional judicial review.

In **Poland**, the Commissioner for Human Rights can initiate proceedings before the Constitutional Tribunal.

Best Practice Example: In **Iceland**, the Directorate for Gender Equality initiated legal proceedings in an equal pay case in the early 2000s. The case went up to the Supreme Court.²³⁸

In **Ireland**, the Irish Human Rights and Equality Commission has participated in virtually all discrimination cases in recent years. It has – in the past – successfully supported strategic cases.²³⁹

In some countries, equality bodies do not use their litigation powers – even if they are granted standing by laws or regulations. An example is **Finland**: the Equality Ombudsperson has the mandate to assist victims of discrimination at court; but so far, she has never made use of it. The same is true in **Spain**, where the Women's Institute has the power to advance *actio popularis* claims but has never acted on this power.

One issue that was identified by legal experts as possibly preventing the use of such claims was the institutional entrenchment of equality bodies with government agencies, which might compromise

233 *Cour d'assises* of Namur, 20 December 2012 (B).

234 According to article 405^{quarter} Penal Code for criminal offences referred to in Articles 393 to 405^{bis} of the Penal Code. (B).

235 Article 14, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003 (HU).

236 Associations, bodies, institutions or other organisations established in line with the law and having a justified interest in protecting the collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person who has violated the right to equal treatment (Article 24(1) of the Anti-Discrimination Act). See: Article 30(3) Gender Equality Act 2008 (Text No. 2663); Article 24(1) Act of 9 May 2008 on the suppression of discrimination (the Anti-Discrimination Act) (Text No. 2728); Articles 502.a – 502.h Civil Procedure Act of 8 October 1991 (Text No 53/91, 91/92, 112/99, 129/00, 88/01, 117/03, 88/05, 2/07, 96/08, 84/08, 123/08, 57/11, 25/13 and 89/14) (HR).

237 I.e. Constitutional court, U-III-5099/2016, Decision of 7 May 2019 (HR). Two dissenting opinions are attached to this decision, one by a single judge and one joint dissenting opinion by three judges.

238 The legal basis for this was the former Gender Equality Act no. 96/2000, which stipulated in Article 3(5) that the Centre for Gender Equality was authorised to proceed before courts of law in special cases, if it was perceived that the judgment of a court of law might be of significance for gender equality matters, or that the interests of the claimant were of such importance that it would be important to obtain a judgment on the issue.

239 See, e.g., Case C-378/17, *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission* ECLI:EU:C:2018:979 [2018].

their autonomy and their action radius. For instance, the **Spanish** equality body is not independent, but subjected to the government. However, while such close ties might discourage litigation (especially against the state), tight relations to the government might be conducive to other forms of lobbying (see below).

Providing (additional) support for strategic litigation projects. Equality bodies can back strategic litigation projects by collecting (statistical) data on sex discrimination cases, administering analyses of such data, and/or conducting independent surveys on gender equality matters. Such tasks are carried out by equality bodies in **Austria, Croatia, Czech Republic, Denmark, France, Greece, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden** and the **UK**.

Importantly, equality bodies can participate in negotiations preceding legal drafts, issue recommendations on law and policy reforms and/or advise the government or parliament on sex discrimination issues in **Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Hungary, Iceland, Ireland, Latvia, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Slovenia, Sweden** and the **UK**.

In **Hungary**, the equality body can demand parliamentary investigations and debates, and in **Italy**, it can participate in social dialogue negotiations. The equality bodies in **France** and the **UK** have launched media and consciousness-raising campaigns.

Transnational and international cooperation, support and exchange of best practices and resources can also be a good method to further strategic litigation activities. Networks such as EQUINET²⁴⁰ provide valuable platforms in this regard. Some equality bodies have also enlisted EU support mechanisms to develop their strategic litigation capacities:

Best practice example: in **Estonia**, the Estonian Human Rights Centre (EHRC) has built up strategic litigation expertise with the help of an EEA Grant.²⁴¹ The goal of the project was the protection of the rights of vulnerable groups by creating a basis for the use of strategic litigation in this area. This was achieved by training both EHRC staff and interested lawyers. Hence, this project has both positioned strategic litigation as an advocacy tool within the EHRC's advocacy repertoire and increased the awareness for strategic litigation and legal remedies among Estonia's legal community.

2.3.2 Civil Society Actors (CSOs)

Social/political scientists have often looked at 'social movements' as agents of advocacy approaches, such as strategic litigation.²⁴² Especially in Europe, non-governmental organisations (NGOs) or non-profit organisations (NPOs) are often identified as providers of strategic litigation.²⁴³ While the terms civil society organisation (CSO), social movement and NGO have considerable overlaps, they are not congruent:

The definitions of '**social movement**' vary in academic literature.²⁴⁴ For the purpose of 'strategic litigation', Della Porta's and Diani's definition seems most useful, describing social movements as *dense informal networks of actors who are engaged in political and/or cultural conflicts meant to promote or oppose social change, which share a distinct collective identity*.²⁴⁵ Social movements in Europe have

240 EQUINET <http://equineteurope.org/2019/03/19/equality-bodies-and-equinet-promoting-equality-in-europe/>.

241 Information available on the EEA webpage, at <https://eeagrants.org/archive/2009-2014/projects/EE03-0046>.

242 Della Porta and Caiani, 'Europeanization from below? Social movements and Europe', 15.

243 Paternotte has argued – in the context of LGBTI rights – that organisations such as ILGA-Europe and the opportunities contained in EU law, such as the Treaty of Amsterdam, have contributed to the 'NGOization' of the European LGBT movement, transforming it from a 'fringe social movement' into a key player in European equality politics. Paternotte, 'The NGOization of LGBT activism: ILGA-Europe and the Treaty of Amsterdam', 389.

244 See, e.g., Sydney Tarrow, *Power in Movement* (Cambridge University Press 1994), 4, 5; Charles Tilly, 'Social Movements and National Politics' in Bright, C. and Harding, S. (eds), *Statemaking and Social Movements* (University of Michigan Press 1984), 306; McCann, M., 'Law and Social Movements: Contemporary Perspectives' (2006) 2 Annual Review of Law and Social Science 17, 23.

245 Della Porta, D. and Diani, M., *Social Movements. An Introduction* (2 edn, Blackwell 2006), 20, 21.

increasingly extended their 'collective action' repertoire to include the opportunities provided for by European institutions.²⁴⁶ For instance, with the CJEU, activists have received a new forum to push for (doctrinal/legal) change, even against their own governments/legislators. One example is the achievement of the direct applicability of the equal pay provisions via strategic litigation.²⁴⁷

A social movement is not the same as a **CSO** or an **NGO/NPO**. Such organisations can, of course, identify with and be part of a social movement and work towards advancing its agenda, for instance, by cause lawyering. Edelman, Leachman and McAdam have examined the interplay between organisations, social movements and law, suggesting that these fields are overlapping and mutually influential.²⁴⁸

The terms NGOs and CSOs are sometimes used interchangeably. However, as a United Nations Development Programme (UNDP) report points out, NGOs 'should be properly understood as a subset of CSOs',²⁴⁹ just as NPOs (non-profit organisations) are a subset of NGOs.²⁵⁰

The EU has advanced a **definition of CSOs** in the development cooperation context; it considers:

'Civil Society Organisations (CSOs) to include all non-State, not-for-profit structures, non-partisan and non-violent, through which people organise to pursue shared objectives and ideals, whether political, cultural, social or economic. Operating from the local to the national, regional and international levels, they comprise urban and rural, formal and informal organisations.'²⁵¹

This definition seems workable also in the European gender equality context. It can also include **law clinics**,²⁵² **unions** or **employees' chambers**, depending on their particular institutional make-up.

In virtually all of the examined countries, **CSOs** have access to the courts in one way or another:

Table 4: Standing Rights of CSOs²⁵³

	Representation of victims of discrimination at court	Actio popularis/ litigating in own name	Class action / group action	Amicus curiae / third-party interveners
Austria	✓	x	x/✓ ¹¹⁾	✓
Belgium	x	✓ ⁷⁾	x/✓ ¹²⁾	✓ ¹⁶⁾
Bulgaria	n.a.	✓ ⁸⁾	✓	✓ ¹⁷⁾
Croatia	x	✓	x	✓ ¹⁸⁾
Cyprus	✓	x	x	✓
Czech Republic	n.a.	n.a.	n.a.	n.a.
Denmark	n.a.	n.a.	n.a.	n.a.
Estonia	x/✓ ¹⁾	n.a.	n.a.	✓ ¹⁹⁾

246 Della Porta and Caiani, 'Europeanization from below? Social movements and Europe', 15.

247 See below, section 3.1.1.

248 Edelman, L., Leachman, G. and McAdam, D., 'On Law, Organizations, and Social Movements' (2010) 6 Annual Review of Law and Social Science 653.

249 Tomlinson, B., *Working with Civil Society in Foreign Aid. Possibilities for South-South Cooperation?* (UNDP Report), 2013, Annex 1 (NGOs and CSOs: A Note on Terminology).

250 Definition 'Non-Profit Organisation' (NPO), Grabler Wirtschaftslexikon, available at <https://wirtschaftslexikon.gabler.de/definition/nonprofit-organisation-npo-39562?redirectedfrom=41194>.

251 European Commission, 'International Cooperation and Development', available at https://ec.europa.eu/international-partnerships/our-partners/civil-society_en.

252 A law clinic is usually situated at a university and is a method of practical law teaching. It provides both legal education to law students by engaging them in hands-on legal activity, and societal services by providing legal advice, legal aid and/or carrying out strategic litigation. More information is available on the webpage of the European Network for Clinical Education (ENCLE) at <http://encle.org/>.

253 Explanation of symbols: ✓ = yes; x = no; n.a. = no information available.

	Representation of victims of discrimination at court	Actio popularis/ litigating in own name	Class action / group action	Amicus curiae / third-party interveners
Finland	X/✓ ¹⁾	X	X	X
France	X/✓ ¹⁾	✓ ⁹⁾	✓ ¹³⁾	✓
Germany	X/✓ ²⁾	X	X	✓ ²⁰⁾
Greece	✓	X	X	✓
Hungary	✓	✓	X	✓
Iceland	X/✓ ¹⁾	✓	✓	✓
Ireland	X/✓ ¹⁾	X	X ¹⁴⁾	X
Italy	✓	✓	X/✓ ¹¹⁾	✓
Latvia	✓ ³⁾	X	X	X
Liechtenstein	✓ ⁴⁾	X	✓ ⁸⁾	✓ ¹⁹⁾
Lithuania	✓	✓	X	X
Luxembourg	✓ ⁴⁾	✓ ¹⁰⁾	X	X
Malta	n.a.	n.a.	n.a.	n.a.
Netherlands	✓	✓	✓	✓ ²⁰⁾
Norway	X/✓ ¹⁾	✓ ⁸⁾	X/✓ ¹⁾	✓
Poland	X/✓ ⁵⁾	✓	X	✓
Portugal	n.a.	✓	n.a.	n.a.
Romania	✓	✓	X	✓
Slovakia	✓ ⁶⁾	✓ ⁶⁾	✓ ⁶⁾	✓
Slovenia	n.a.	n.a.	n.a.	n.a.
Spain	X	✓	✓	X
Sweden	✓	X	✓	X
UK	✓	✓	✓ ¹⁵⁾	✓

- 1) CSOs can hire lawyers to represent victims at court
- 2) only consumer organisations (this might be relevant, e.g. in the realm of access to goods and services)
- 3) only if it is defined, by its statutes, as working on human rights / non-discrimination
- 4) a number of prerequisites apply, e.g. CSO must have existed for one (or more) year(s),
- 5) via cooperation with lawyers
- 6) at all stages except constitutional stage
- 7) CSO has to have existed for three years
- 8) possible, but no cases yet
- 9) only in very rare instances (such as before the Committee on Human Rights or the Council on Bioethics)²⁵⁴
- 10) CSO is (in principle) entitled to exercising the rights granted to a victim of discrimination, with consent of the victim
- 11) group action for consumer organisations only under certain circumstances (this might be relevant, e.g. in the realm of access to goods and services)
- 12) only in the field of consumer protection
- 13) only in the context of recruitment discrimination cases / CSO has to have existed for five years
- 14) while 'representative actions' (a form of 'group action') are available, a separate initiating action must be taken on behalf of each claimant/plaintiff
- 15) 'class actions' in a strict sense are not permitted; however, group litigation – where each individual with a potential claim chooses to opt in and join forces, and where their claims are managed together – is allowed
- 16) CSO has to have existed for three years
- 17) CSO can join until the end of judicial deliberations at first instance court
- 18) CSO may join until the end of the proceedings
- 19) possible, but no cases yet
- 20) only at constitutional stage

²⁵⁴ Some prestigious organisations have played a direct role as amicus curiae in front of the Cour de Cassation (Supreme Court), but more often during the investigative phase of trials than during the final judicial hearings. See, e.g. Rafael Encinas de Munagorri, 'L'ouverture de la Cour de cassation aux amici curiae (Ch. mixte, 23 nov. 2004', *Revue trimestrielle de droit civil*, 2005, 73, available at <https://halshs.archives-ouvertes.fr/halshs-01889467/document> (FR).

Similarly, **trade unions and/or chambers of labour** can also potentially carry out strategic litigation regarding sex discrimination matters in employment contexts. Trade unions have forwarded test cases, which happened, for instance, in **Belgium, Denmark, Finland, Greece, Hungary, Spain, Sweden** or the **UK**.

Best practice example: In the **UK**, the union UNISON initiated the strategic litigation case of *R (on the application of UNISON) v Lord Chancellor*²⁵⁵ which resulted in a landmark decision, overturning the imposition of fees in employment, including for discrimination cases. The Supreme Court found that the fees were discriminatory as well as unlawful for restricting access to justice. This led to law reform and public debate and has been hugely significant in terms of access to justice in the UK. It is one of the most remarkable strategic litigation cases in the UK.

In **Hungary**, the Democratic League of Independent Trade Unions (LIGA) initiated a strategic litigation case regarding 'reverse discrimination' in the area of state pensions, since the option for early retirement was only available to women, but not to men. The case was not successful.²⁵⁶

However, problems can arise if unions are not sensitised in the area of sex discrimination; this is, for instance, the case in **Greece**, where unions have hardly supported sex discrimination cases despite having the mandate to do so.

In many countries, CSOs have participated in litigation in the gender equality context, for instance, in **Belgium, Bulgaria, Czech Republic, Croatia, France, Germany, Greece,**²⁵⁷ **Hungary, Ireland, Italy, Malta**, the **Netherlands, Norway, Poland, Romania, Slovakia**, and the **UK**.

Best practice example: In **Greece**, the Greek League for Women's Rights (GLWR) lodged a complaint before the Council of the State (Supreme Administrative Court), petitioning for the annulment of a decision by the Minister of Education.²⁵⁸ This decision excluded maternity and parental leave time from the period of service required for teachers in order to apply for a post as school director or counsel. The GLWR was represented by prominent lawyer and gender expert Sophia Spilitopoulos, who advanced this case in order to establish the *locus standi* of women's NGOs in the absence of concrete victims. This was successful.

Best practice example (even if beyond the remit of the EU directives): In **Malta**, the Women's Rights Foundation filed a judicial petition calling for the legalisation of the morning after pill in Malta. This led to public protests and eventually to the legalisation of the morning after pill.

In **Spain** and **Sweden**, landmark cases were established through litigation with the participation of CSOs; however, it is unclear whether there was an underlying social change agenda present or not.

In **Austria**, an activist LGBT rights case led to a Constitutional Court judgment, opening up marriage to same-sex couples. This was the first time that a court in Europe brought about same-sex marriage.²⁵⁹

255 United Kingdom, Supreme Court, 2017] UKSC 51, 26 July 2017, at <https://www.supremecourt.uk/cases/uksc-2015-0233.html> (UK).

256 Hungary, Constitutional Court Decision (*AB határozat*) No. 28/2015. (IX. 24.), 22 September 2015 (HU).

257 In Greece, any legal entity with a relevant legitimate aim has i) the right to engage in litigation in the name of the victim upon his/her 'approval' and ii) the right to intervene in favour of the victim, before any competent administrative authority and court. However, this provision on the standing of entities and unions of persons before the courts is incorrectly worded. It requires the wronged person's 'consent', while EU law requires the wronged person's 'approval'. Under Greek law, 'consent' must be given before the lodging of proceedings, while the 'approval' can be given thereafter. Thus, until the consent is obtained, the remedy may well be time barred (e.g. a dismissal can be challenged within three months of its notification and an administrative act within 60 days from the date on which the wronged person took cognisance thereof). Moreover, this rule is not incorporated into the procedural codes, while there are insurmountable barriers to justice for CSOs and other entities that have standing, but inadequate resources.

258 Council of State 4875/2012 (GR).

259 VfGH 04.12.2017, G258/2017 (AT).

While this is not a sex discrimination case, there is no reason why this approach should not be applicable to the sex equality context, as well.

In the **UK**, associations with sufficient interest in a matter connected to discrimination are granted standing to initiate administrative judicial review actions against public authorities. They do not have to be victims of the wrongful act themselves in order to do so.²⁶⁰ Moreover, national courts can allow NGOs who have proven their expertise in a certain area to bring forward ‘third-party interventions’, presenting their views on a legal point in a specific case.²⁶¹ There are many more examples, including the possibility to file *amicus* briefs, intervention on behalf of a party, pre-trial assistance, class actions, etc.²⁶² An ultimately unsuccessful, but nonetheless impressive example is the case of the Fawcett Society, a CSO which challenged an entire national budget in 2010, on the basis that it did not comply with the government’s equality duty.²⁶³

In **Poland**, a number of CSOs have participated in strategic litigation; however, more often than not, a CSO will match a victim with a lawyer and possibly join the proceedings at a later stage.

Best practice example: In **Poland**, the Helsinki Foundation for Human Rights is a very active strategic litigator that also often cooperates with other CSOs, the equality body, lawyers and other organisations. It was the driver behind a highly successful case on pregnancy discrimination²⁶⁴ that incited widespread public debate and may have led to doctrinal reform. Upon request of the Helsinki Foundation, two lawyers offered their services on a pro bono basis.

Often, cases will be especially successful if CSOs join forces with other organisations. Usually, one CSO will take the lead.

Best practice example: In the **Netherlands**, the Bureau Clara Wichman (formerly: the Fund for Test Cases Clara Wichman)²⁶⁵ is involved in multiple strategic litigation cases. In two cases, it challenged a conservative party (the Conservative Reform Party, SGP) on their practice of prohibiting women candidates.²⁶⁶ For this case, the Bureau collaborated with many other CSOs and relied on the expertise of specialised lawyers. The case was successful, both at the Supreme Court and later, at the European Court of Human Rights. Important doctrinal change was achieved: The Supreme Court ruled that Article 7a of the CEDAW²⁶⁷ was directly applicable in the Netherlands, urging the Dutch State to ensure that women could take political office. The effect of the case was that women inside the SGP were empowered to step up and demand the chance to run for office.

Best practice example: In **Romania**, a group of 16 NGOs forwarded a claim regarding discrimination in the military, stating that the Ministry of National Defence employed a recruitment policy that was discriminatory against women. An individual victim was not identified. While the NGOs were not assisted by a lawyer in the proceedings before the Equality Tribunal,²⁶⁸ they were assisted by a lawyer from the Anti-Discrimination Coalition once the case reached the courts.²⁶⁹ The court case itself was

260 Farkas and O’Dempsey, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, 67.

261 Ibid, 67.

262 For an overview, see *ibid*, 66 to 72. See also: Bodrogi, B., ‘Legal Standing – The Practical Experience of a Hungarian Organisation’ (2007) 5 *European Anti-Discrimination Law Review* 23, 25.

263 *R (Fawcett Society) v Chancellor of Exchequer*, United Kingdom, High Court, [2010] EWHC 352 (UK).

264 Case No VII Pa 326/15, Ruling of 20 October 2016 of the Regional Court in Kraków (PL).

265 Bureau Clara Wichmann <https://www.clara-wichmann.nl/>.

266 Elaborate information with references to all the relevant court decisions in this case can be found on the website of Bureau Clara Wichmann: <https://www.clara-wichmann.nl/rechtszaken/sgp-en-het-kiesrecht>.

267 Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13.

268 NCCD, Decision No. 577 of 13.10.2014, available at http://nediscriminare.ro/uploads_ro/docManager/715/hotarare_577-14.pdf (RO); NCCD, Decision No. 577 of 13.10.2014, available at http://nediscriminare.ro/uploads_ro/docManager/715/hotarare_577-14.pdf (RO).

269 Bucharest Court of Appeal (*Curtea de Apel București*), Decision No.1090 of 1 April 2016 (RO).

successful, because the courts upheld the NCCD's finding of discrimination.²⁷⁰ The strategic litigation project has achieved its goal, since the Ministry of National Defence has changed its respective policy in the aftermath of the litigation. However, there has not been a check-up to see whether the new (non-discriminatory) policy is being correctly implemented.

Providing support for strategic litigation projects. A number of CSOs and trade unions / chambers of labour provide important support to vitalise strategic litigation.

Best practice example: In **Finland**, the National Council of Women of Finland (an umbrella organisation for 60 Finnish women's organisations) promotes women's rights, for instance, by lobbying for legal amendments or coordinating advocacy efforts among its member organisations (also such organisations that engage in strategic litigation). The high level of coordination enables optimal advocacy results.

Best practice example: In **Poland**, the Society of Anti-Discrimination Law organises trainings for lawyers, including awareness-raising workshops on discrimination law in cooperation with regional legal advisors and lawyers' organisations in order to ensure maximum attendance.

International/transnational organisations are also importantly involved in building up strategic litigation capacities in some European countries. An example is the Soros-backed Open Society Justice Initiative:²⁷¹ the organisation has been active in more than 120 countries, among them some European countries (especially in Eastern Europe), investing personnel and financial resources to establish advocacy structures and carry out strategic litigation projects (among other things) concerning discrimination.²⁷²

The Helsinki Foundation has also fostered strategic litigation competences in **Poland**, via the 'Programme of precedential case law' (*Program spraw precedensowych*). The aim of this programme is to conduct research and spread awareness of strategic litigation and to create tools (such as handbooks) for the successful implementation of strategic litigation as an advocacy approach for CSOs and law firms in Poland.

2.3.3 Law (legal) clinics

A law clinic is usually situated at a university and is a method of practical law teaching. It provides both legal education to law students by engaging them in hands-on legal activity, and societal services by providing legal advice, legal aid and/or projects (such as strategic litigation) promoting social justice.²⁷³

The pedagogical benefits of legal clinics are well researched, as are their contributions to public interest law.²⁷⁴

On one hand, law clinics can shape students' awareness of social injustice and increase their motivation to do something about it,²⁷⁵ increase their readiness to take initiative, foster entrepreneurial behaviour and teach students innovative approaches towards the law.²⁷⁶ These are traits that are important for lawyers

270 High Court of Justice and Cassation, Decision of 1 February 2019 (not available yet) (RO).

271 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

272 Ibid.

273 Definition of a legal clinic at the ENCLE webpage <http://encle.org/>.

274 Trubek, 'Crossing Boundaries: Legal Education and the Challenge of the New "Public Interest Law"' (2010) 33 University of Arkansas Little Rock Law Review 417; Hall, J. and Kerrigan, K., 'Clinic and the Wider Law Curriculum' (2011) International Journal of Clinical Legal Education; Wizner, S., 'The Law School Clinic: Legal Education in the Interests of Justice' (2002) 70 Fordham Law Review; Aiken, J. and Wizner, S., 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' (2004) 73 Fordham Law Review; Wilson, R. and Rasmussen, J., *Promoting Justice. A Practical Guide to Strategic Human Rights Lawyering* (International Human Rights Law Group 2001), 78.

275 Aiken and Wizner, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice', 1010.

276 Hall and Kerrigan, 'Clinic and the Wider Law Curriculum', 30.

designing and carrying out strategic litigation projects. Therefore, law clinics can certainly contribute to strategic litigation by giving future lawyers the necessary skill for strategic litigation.

On the other hand, law clinics themselves can be a resource for strategic litigation – either by providing legal assistance and representation, or by supporting strategic litigation efforts of other organisations with research, advice, personnel (i.e. student interns) and other forms of assistance.²⁷⁷

In 17 of the examined countries, **law clinics** exist that (also) deal with gender equality and/or sex discrimination law; 3 of these countries – the **Netherlands, Norway** and **Poland** – have at least one law clinic (or section of a law clinic) dealing specifically with women's rights. 12 countries have no law clinics covering the area of gender equality / sex discrimination. No information on law clinics was available from **Portugal** and **Liechtenstein**.

Very few law clinics have **direct access to the courts**: in the **UK**, at least nine clinics have represented clients at court.²⁷⁸ In **Norway**, clinics have directly supported clients before equality tribunals. In **Poland**, a law clinic is treated like an CSO regarding direct standing at court. For instance, they can join proceedings as third parties or submit *amicus* briefs if they fulfil the necessary conditions.²⁷⁹

An example of strategic litigation with the participation of a **Polish law clinic** is a 2005 case on the alleged discrimination of a woman who wanted to become the first female mountain guide in Poland, but was denied the mountain guide licence for many years.²⁸⁰ The case was ultimately unsuccessful. The Warsaw University Law Clinic joined the proceedings (under the rules applicable to CSOs).

Nonetheless, a lot of law clinics **participate in court cases or enable their students to participate in judicial proceedings**. This usually happens in one (or more) of four ways:

- **Cooperation with law firms / lawyers**: Some clinics cooperate with law firms or individual lawyers who are responsible for the representation of a client, and who are actively supported by the law clinic. This model is chosen by law clinics in **Germany, Ireland, Italy, Poland** and the **UK**.
- **Cooperation with CSOs and/or equality bodies**: Similarly, students in law clinics can support a case brought forward by a CSO or by an equality body in **Belgium, France, Ireland, Poland, Spain** and the **UK**.
- **Placement with other organisations**: clinics in **Germany, Ireland** and **Slovenia** place their students with CSOs, equality bodies and other organisations (for instance, in the form of internships) where they can sometimes participate in litigation (in **Germany**, however, CSOs and equality bodies usually do not have direct standing at court, except in a very limited way, as *amicus curiae* on the constitutional stage).
- **Referral arrangements**: clinics in the **Netherlands** and the **UK** refer clients to other organisations for representation, such as CSOs, equality bodies, trade unions or law firms.

In **Italy**, about 20 universities operate law clinics. The University of Brescia was the first university to install a law clinic in 2009/2010.²⁸¹ Law clinics operate in similar ways at all universities: instead of providing students with theory, they are given a real-life case as a starting point for their learning process. The case is chosen by the board of professors of the legal clinic together with the lawyers cooperating with the clinic. The case must fulfil the following conditions: it must be didactically valuable and of social relevance / public interest. Mostly, a clinic will pick clients based on their social and economic need who

277 Trubek, 'Crossing Boundaries: Legal Education and the Challenge of the New "Public Interest Law"', 460-466.

278 Drummond, O. and McKeever, G., *Access to Justice through University Law Clinics* (Ulster University 2015), 19.

279 These conditions are laid down, inter alia, in Articles 8, 61-63 of the Act of 17 November 1964, Code of Civil Procedure (PL), in Article 10 of the Act of 6 June 1997, Code of Criminal Procedure (PL), or Article 31 of the Act of 14 June 1960, Code of Administrative Procedure (PL).

280 First instance ruling of 8 December 2005, case no: I Ns 596/05, Regional Court in Zakopane. Second instance ruling case no: Cz 99/06, District Court in Nowy Sącz (PL).

281 Webpage of *Le Cliniche Legali di Brescia* (Brescia Law Clinics), at <http://clinicalegale.unibs.it>.

would be entitled to judicial assistance. The students are directly in touch with the client, if possible. A lawyer will act as the official representative of the client, and students and professors will flank the lawyer and the client with legal advice and counselling. The mix between theory and practice enables students to identify problems, carry out research, draw up legal opinions, conduct negotiations and manage relations with clients.

Providing support to strategic litigation projects. Law clinics are also particularly interesting examples for providing supportive tasks for strategic litigation. Due to their embeddedness in the academic institutional architecture, they perform (or could perform) the following support functions for strategic litigation projects:

- carrying out academic research in support of strategic litigation projects, such as data collection and analysis,²⁸² researching and workshopping legal arguments, publishing topical articles or reports, etc.
- educating socially conscious students and future strategic litigators; also by providing students with internships at CSOs and equality bodies (as is the case in **Germany, Ireland and Slovenia**).
- Legal aid clinics can be the first point of contact for victims of discrimination in need of assistance and thus, connect strategic litigators with potential clients through referrals. Legal aid and/or preliminary legal advice is provided by clinics in **Belgium, Croatia, France, Germany, Hungary, Ireland, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Spain, Sweden**²⁸³ and the **UK**.
- Clinics in the **Netherlands** and the **UK** refer victims in need of court representation to adequate organisations.

In **Poland**, the University Law Clinic at the University of Warsaw has a section specifically dedicated to victims of discrimination and violence against women. Students provide pro bono legal counselling to affected women, although they cannot represent them at court.

2.3.4 Law firms / private lawyers

Private law firms or individual lawyers can also carry out strategic litigation; this will often happen in the context of pro bono programmes.²⁸⁴ In fact, the emergence of pro bono practices has somewhat blurred the borders between public and private interest lawyering.²⁸⁵

Law firms and individual lawyers that are admitted to their national bar can, of course, always act as counsel to victims of sex discrimination. In some instances, lawyers cooperate with equality bodies, trade unions / chambers of labour or CSOs on sex discrimination cases.

Best practice example: In **Norway**, some law firms have specialised in pro bono support for victims of discrimination (based on sex and other grounds), such as the firm Egalia.²⁸⁶ Other firms, such as Wikborg Rein,²⁸⁷ have regularly taken on discrimination cases.

However, there are certain factors which act as incentives or as deterrents for lawyers wishing to engage in strategic litigation.

282 Trubek, 'Crossing Boundaries: Legal Education and the Challenge of the New "Public Interest Law"', 460-466.

283 Law clinics are a fairly recent phenomenon in Sweden. In 2014, the University of Gothenburg started the first law clinic in Sweden, in collaboration with non-profit organisations that offer free legal counselling. Apart from one organisation for women's shelters, none of the organisations are working in the area of gender equality. More information available at <https://law.handels.gu.se/english/rattspraktik>.

284 Cummings, S., 'The Politics of Pro Bono' (2004) 52 UCLA Law Review, 6.

285 Boutcher, 'Lawyering for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society', 182.

286 Egalia <https://www.egalia.org/>.

287 Wikborg/Rein <https://www.wr.no/en/>.

Firstly, competitive or flexible remuneration schemes can encourage (strategic) litigation.²⁸⁸ Success-based fees – meaning that an attorney only gets paid if the case is won – reduce the financial risk of litigation for victims of discrimination and/or for organisations that hire lawyers for strategic litigation projects. In **Ireland**, for instance, some law firms operate on a ‘no fee no fee’ basis, meaning that a lawyer only charges their client if the case succeeds. In a *pactum de quota litis* scheme, a lawyer gets paid a contingency fee – e.g. a quota of the damages awarded to the victim of discrimination.²⁸⁹ In **Iceland**, some lawyers (especially personal injury lawyers) may use contingency fees. Of course, such remuneration agreements will establish a particularly high incentive if punitive damages are available.²⁹⁰ In **Greece**, success-based fees (capped at 20 % of the claim’s value) have been a standard practice in labour law cases for a long time. Such fee agreements were particularly common for cases of unlawful dismissal, since the dismissed workers could often not afford a lawyer’s regular fees. However, the economic crisis has reduced the willingness of labour lawyers to offer such agreements, due to the financial risks they carry. Taken together with the fact that administrative and judicial fees have sharply risen (also partly due to the financial crisis), this helps explain why legal practitioners have experienced a significant decrease of labour law cases in recent years (although no official statistical data is available on this issue).

In any case, (purely) success-based remuneration schemes are prohibited in most European countries, as a study from 2006 determined.²⁹¹

Secondly, law firms increasingly provide pro bono programmes that are meant to engage in public interest law. Pro bono departments can, of course, carry out strategic litigation.²⁹²

Pro bono programmes are available in law firms in **Austria**, the **Czech Republic**, **France**, **Germany**, **Hungary**, **Ireland**, the **Netherlands**, **Norway**, **Poland**, **Slovenia** and the **UK**.

However, pro bono programmes are usually not specialised to take on sex discrimination cases. In some of these countries, such as **Austria** or **Norway**, pro bono practice is not very common.

In **Hungary**, the **Netherlands** and **Poland**, lawyers often provide their services to CSOs.

Best practice example: in **France**, lawyers, individual donors and feminist CSOs created the umbrella organisation ‘*Fondation des Femmes*’ in 2014. It is an ad hoc group for the litigation of women’s rights.²⁹³ This is a good example of lawyers cooperating with CSOs.

Best practice example: **Polish** lawyer Mikołaj Pietrzak from the law firm Pietrzak/Sidor has actively supported the pro bono programme run by the NGO Polish Society for Anti-Discrimination Law (PTPA). Assisted by district bar councils in several Polish cities, Pietrzak helped the PTPA create a list of more than 50 lawyers from all over Poland, who expressed their willingness to conduct cases of discrimination. The PTPA was also supported by the **Norwegian Bar Council**.

Other Polish law firms cooperate with organisations such as the Helsinki Rights Foundation, the Federation for Women’s Rights and Family Planning and the Warsaw University Law Clinic

288 Kelemen, ‘Suing for Europe: Adversarial Legalism and European Governance’, 120.

289 Kilian, M., ‘Die erfolgsbasierte Vergütung des Rechtsanwalts. Eine tour d’horizon auf der Weltkarte von Erfolgshonorar und Streitanteil’ (2017) http://www.fbe.org/barreaux/uploads/2017/07/Rapport_KIHILIAN-de.doc, p. 4.

290 Kelemen, ‘Suing for Europe: Adversarial Legalism and European Governance’, 120.

291 Hoche Demolin Brulard Barthélémy (Firm), *Study for the European Commission on the Transparency of Costs of Civil Judicial Proceedings in the European Union. Final Report*. (Contract JLS/2006/C4/007-30-CE-0097604/00-36, 2006), p. 108.

292 Cummings, ‘The Politics of Pro Bono’, 6; Boutcher, ‘Lawyer for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society’, 182.

293 This is a pool of 150 lawyers willing to support women’s organisations. More information available at <https://fondationdesfemmes.org/une-force-juridique/>.

According to the information provided by national experts, pro bono programmes do not exist in **Belgium, Bulgaria, Croatia, Denmark, Estonia, Greece, Italy, Liechtenstein, Luxembourg** and **Romania**. In **Estonia** and **Italy**, however, some law firms cooperate with non-profit organisations.

One of the biggest deterrents for the establishment of pro bono programmes are laws or bar regulations that determine binding minimum fees. While statutory rules on fees exist in many countries, they are usually not binding; exceptions are, for example, **Bulgaria, Greece** or **Croatia**. Even though gratuitous counsel may be possible in exceptional circumstances (i.e. for the representation of a family member or economically deprived clients in **Greece** or **Bulgaria**), such rules on minimum fees prevent pro bono activities and therefore, discourage strategic litigation. In addition to such cases, pro bono services in **Greece** are only allowed by decision of the Administrative Council of the Lawyers' Bar, and either for the promotion of the interests of said Bar, or to support financially deprived individuals. If a Greek lawyer deviates from these rules and represents a client free of charge, this can be considered a disciplinary offence.

However, there seems to be a trend towards deregulation of fees, as a number of countries have repealed their binding laws on lawyers' remuneration since the late 1990s.²⁹⁴

Despite legal rules on minimum fees, individual lawyers and informal networks of lawyers in **Greece** do provide free legal advice and engage in pro bono litigation, often in cooperation with women's rights organisations. In such cases, they usually declare (and are consequently taxed based on) the minimum possible fee, in order to avoid disciplinary or fiscal consequences. These cases evidently are not made very public, which could be a deterrent for creating an effective strategic litigation campaign.

The courts' practice on how to calculate reimbursable fees may also have an impact on strategic litigation: **Polish** lawyer Monika Gąsiorowska runs a boutique law firm specialising, inter alia, in European Court of Human Rights litigation and has done a lot of work in the area of reproductive rights.²⁹⁵ In Gąsiorowska's opinion, the ECtHR's practice of reimbursing fees according to the effective sum paid by the client to the lawyer – and not based on timesheets presented by lawyers, as had previously been the case – *de facto* puts pro bono lawyers at a disadvantage.

Providing support for strategic litigation projects. Private lawyers may support organisations with their expertise or provide free advice and/or representation, either on their own, or within law centres or clinics;²⁹⁶ by connecting victims of discrimination with other organisations; by providing trainings to CSOs and/or equality bodies; and so on.

Bar associations can also be valuable partners in this regard.

Best Practice Example: The **Norwegian Bar Association's** Action and Procedure Group on Immigration Law was set up to further foreigners' rights. Through a careful screening process, affiliated lawyers from different law firms took immigration cases to the courts on a pro bono basis. The results

294 Hoche, Demolin, Brulard, Barthélémy (Firm), *Study for the European Commission on the Transparency of Costs of Civil Judicial Proceedings in the European Union. Final Report*, 108.

295 Kancelarii Adwokackiej – Monika Gąsiorowska (Law Firm Monika Gąsiorowska) <http://gasiorowska.eu/>.

296 An example is Liora Israël's account of the Marxist law shops in Paris, in the early 1970s. A number of idealistic, Marxist-inspired lawyers created open door, self-help law firms, meant to support the local population in their legal struggles. The idea was to break the traditional lawyer-client relationship and to extend social activism beyond the realm of law; individuals seeking legal help were expected to become part of the political community of the law shops, participate in discussions, etc. In turn, they were presented with strategies to 'help themselves' – rather than providing them with lawyers and straightforward legal expertise, the aim was to provide do-it-yourself solutions. However, the experiment failed, because it neglected to take into account the social reality of the prospective clients; many of them were full-time workers with no time to spare, hoping to find some (at times, urgently needed) free legal advice, but unwilling to partake in a revolutionary social project. This eventually led to some law shops, which stuck to their initial premises, becoming more of a pastime for idealistic intellectuals than a real social help project. Israël, L., 'Rights on the Left? Social Movements, Law and Lawyers after 1968 in France' in Anagnostou, D. (ed), *Rights and Courts in Pursuit of Social Change* (Hart 2014).

were quite good, with a success rate of more than 70 %.²⁹⁷ However, the group was closed down in 2014.²⁹⁸ In another instance, the **Norwegian Bar Association** supported the establishment of anti-discrimination litigation structures in Poland.

2.4 Resources

Litigation – especially as a long-term strategy – requires extensive resources, such as financial means, (experienced) personnel, time, access to knowledge and networks. These factors critically influence an organisation's or activist's ability to carry out strategic litigation.

These factors also determine whether a potential agent of strategic litigation will be able to support their court strategy with a larger campaign, including non-litigious approaches, and whether they know where to turn to for support (i.e. whether they know how to enlist 'supporters' of strategic litigation, or find other partners for the litigation itself).

Financial resources / funding. A main impediment for strategic litigation is a lack of funds on part of the (potential) litigators. In **Estonia**, CSOs and lawyers working on sex discrimination had hardly any access to (national) funding. The same is true in **Latvia**, where many NPOs would be interested in pursuing strategic litigation – but refrain from doing so, due to scarce financial resources. The lack of funding for strategic litigation was also determined as a deterring factor in **Belgium, Germany, Greece, the Netherlands, Norway, Romania, Sweden** and the **UK**.

There are three main sources of funding for organisations and activists wanting to engage in strategic litigation: public funding (such as regular subventions by the state, tax benefits and privileges, or the possibility to apply for state funding), private funding (membership fees, donations and fundraising events), and funding via international/European organisations, grants and programmes.

Public funding is often tied to certain conditions. In **Finland**, for instance, it is difficult to get public funds for strategic litigation – also due to the fact that there is little awareness of litigation as a social change strategy. Moreover, the dependence on public funding has the effect that organisations such as Tukinainen are wary of taking 'weak' cases to court, since it is difficult to defend the use of public funding if a case is lost. In **Romania**, strategic litigation is usually not covered by public funds. In **Germany**, CSOs have to be cautious not to appear as partisan in order to obtain funding; strategic litigation is also not included in the list of tax-privileged activities for NPOs. Similarly, publicly funded NPOs seldom litigate against the state in **France**. For these reasons, the Centre for Justice in **Sweden** opts not to accept any state funding so it can maintain absolute independence. However, in **Spain, Norway, Finland, Estonia, Denmark** and **Croatia**, most CSOs rely heavily on public funding. Public funding is also the main source of income for most **equality bodies**. **Trade unions** also often depend on public funds, but also on membership fees. The funding of **law clinics** is usually part of the university budget.

Best Practice Example: In the **Netherlands**, the Clara Wichmann Test Cases Fund (at present: Bureau Clara Wichmann) was instrumental in both conducting and financing strategic litigation in the area of gender equality. In addition, the fund has connected victims of sex discrimination with specialised lawyers, paid for court fees (even if the victim lost), and also initiated litigation itself. It has supported other NPOs as well, and regularly cooperates with other organisations. While it also received public funding, its litigation activities were mostly paid for by private donations.

Since 2018, the Bureau Clara Wichmann forms part of an alliance with four other organisations that are involved in women's rights (Alliance ASWH, or: 'Together it works!'). The alliance is meant to help (financially vulnerable) women to create a better balance between their employment and care

297 Øystein Block, *Strategisk sakførsel som politisk påvirkning- Strategic Litigation as Political Empowerment*, Kritisk juss (2011), available at https://www.idunn.no/kritisk_juss/2011/01/strategisk_sakfoersel_som_politisk_paavirkning.

298 Olaf Halvorsen Rønning, *Legal Aid in Norway* (22.12.2017), available at https://link.springer.com/chapter/10.1007/978-3-319-46684-2_2.

obligations. For this work, they receive subsidies from the Dutch government; the Bureau also uses some of its budget for strategic litigation.

Private funding, on the other hand, ensures ultimate independence, but is not always easy to come by. In **Latvia**, for instance, private donations are rare and low; the same is true for **France** or **Finland**. In some countries, however, CSOs have established mechanisms of obtaining donations, which is the case in **Belgium, Ireland, Italy, the Netherlands, Poland, Romania, Sweden** or the **UK**. The disadvantage of private funding is, of course, that an organisation cannot rely on its continuous availability. Moreover, if the awareness of strategic litigation in the general population is low, private funding for such approaches might be more difficult to acquire.

Funding by **international/transnational/European organisations, programmes and grants** has become increasingly important in the area of strategic litigation – particularly in Eastern Europe. In **Croatia, Estonia, Hungary, Latvia, Poland** and **Romania**, but also in **France** (in the area of racial profiling), funding by non-national organisations and grants has been instrumental to build up litigation strategies and structures (see also below).

Access to knowledge-based resources. Another problem in this area is a shortage of experts, training resources and/or support for CSOs and activists wanting to engage in strategic litigation. Moreover, strategic litigation is still not very well-known in many European countries, which means that there are few lawyers or other legal experts who have the necessary competences to help organisations set up a strategic litigation programme or department. This is further exacerbated by the fact that there seems to be very little exchange on best practice examples (with exceptions). In summary, the lack of strategic litigation structures was defined as a deterrent in **Finland, Lithuania** and **Portugal**. In **Poland**, it is difficult to find clients for strategic litigation – that is, victims of sex discrimination willing to engage in such an approach.

In **Belgium**, on the other hand, mechanisms for enabling strategic litigation exist, but so far, very few NPOs have engaged in it (probably due to a lack of resources). The same might be true in **Spain**. In the **UK**, one obstacle for strategic litigation was the fact that NPOs did not have access to specialist legal advice.

However, transnationally operating organisations – such as the Open Society Foundation / Justice Initiative²⁹⁹ – have served as promoters and knowledge-distributors for strategic litigation. In **Hungary**, the Open Society Foundation, the Helsinki Committee and other organisations have successfully carried strategic litigation and also empowered other organisations to engage in such approaches (often in the area of Roma Rights).

Transnational and European-wide programmes and grants can also encourage strategic litigation. In **Estonia**, the Estonian Human Rights Centre received an EEA grant, which enabled it to build up strategic litigation expertise and distribute it as a multiplier by holding workshops on this issue for other interested parties.³⁰⁰

Access to networks. Networks can provide expertise, exchange of best practice examples, and support for litigation strategies. They can establish fora where like-minded activists can meet and possibly join forces to develop a litigation strategy together.

For European Equality Bodies, **EQUINET**, was described as such a network. Most equality bodies that were mentioned throughout the interviews with experts are members of EQUINET. Apart from that, a number

299 Open Society / Justice Initiative (OS/JI), <https://www.opensocietyfoundations.org/who-we-are/programs/open-society-justice-initiative>.

300 Information available on the EEA grant webpage, at <https://eeagrants.org/archive/2009-2014/projects/EE03-0046>.

of loose networks, informal knowledge exchanges and personal contacts contribute to the distribution of relevant information.

However, comprehensive long-term litigation strategies in the area of gender-equality law that have been supported by a number of different organisations seem rather rare, or at least not very well known. An example of such litigation comes from **Romania**, where a group of 16 NPOs promoting women's rights joined forces to file a complaint at the National Council for Combating Discrimination against the Ministry of National Defence, claiming that the recruitment policies for military higher education were discriminatory towards women.³⁰¹

Best practice example: In the **Netherlands**, the Public Interest Litigation Project is part of (and funded by) the Dutch Lawyers' Committee on Human Rights (NJCM). It receives mostly private contributions and is also significantly supported by the Open Society Foundation.

There is hardly any information available on the funding of strategic litigation by private lawyers and law firms; however, it stands to reason that such activities might be paid for by a firm's commercial activity. Practices such as pro bono representation of victims of sex discrimination, or the cooperation with CSOs on such matters, contribute to the emergence of strategic litigation.

2.5 Access to justice

Access to justice is paramount for the success of strategic litigation projects. Apart from standing rights discussed above,³⁰² access to justice also includes elements such as time limits for advancing claims in the area of sex discrimination, costs incurred by advancing court proceedings (including legal fees and costs for representation), and availability of legal aid.

The efficiency of the judicial system as a whole will affect the suitability of litigation as an advocacy tool.

2.5.1 Time limits for sex discrimination claims

Victims of discrimination will usually take some time to deliberate on whether litigating is the right approach for them, and – moreover – whether they want to be at the centre of a strategic litigation project. Apart from that, the strategic litigation agent (e.g. an organisation and/or activist lawyer) might have to carefully consider whether the case at hand could translate into a promising strategic litigation case.³⁰³ In any case, the creation of a solid litigation strategy takes effort and preparation.

Short time limits to forward discrimination claims can thus negatively influence the exercise of strategic litigation. The same goes for the starting date of time limits: some time limits that start to run when the discriminatory event has taken place – rather than, for example, when the victim has gained knowledge of the discrimination. This is especially relevant for continuous infringements (often the case in wage discriminations).

The directives leave it to the Member States to set appropriate time limits, with the result that there is a great variation in time limits among the examined countries.³⁰⁴

National experts have reported short time limits (six months or less) to forward (sex) discrimination claims in **Austria, Germany, Greece, Iceland** (extension to one year possible, where there is reasonable cause),

301 NCCD, Decision No. 577 of 13.10.2014, available at http://nediscriminare.ro/uploads_ro/docManager/715/hotarare_577-14.pdf (RO).

302 See *supra*, section 2.3.

303 On case selection, see, e.g. Morris and others, 'Strategic Litigation. An Equinet Handbook', 18.

304 Chopin and Germaine, 'A Comparative Analysis of Non-Discrimination Law in Europe 2017', 87.

Ireland (extension to one year possible, given in special circumstances), **Latvia, Liechtenstein, Malta, Netherlands, Poland, Slovakia, Spain, Sweden** (in some instances), and the **UK** (for proceedings at the employment tribunal).

Poland is an extreme case with merely 7 to 14 days to challenge a wrongful dismissal based on sex discrimination, as is **Sweden** in the case of wrongful summary dismissals: an employee must inform the employer of their intention to forward a claim within two weeks after the dismissal.

In **Ireland**, a respondent needs to be notified within two months of the last incident that the matter will be pursued at the Workplace Relations Commission.³⁰⁵

In **France**, the complex variety of time limits (particularly in the field of employment) may present a barrier for litigation.³⁰⁶

Short time periods for appeals can also jeopardise a strategic litigation project, as is the case, for example, in **Ireland** (21-24 days for an appeal, 3 months for an application for judicial review), **Latvia** (appeals in the context of administrative procedures: 1 month), the Netherlands (4 weeks in the case of summary proceedings, otherwise 3 months), or **Romania** (around 30 days).

Best practice: In **Slovenia**, compensation claims for the damage caused due to discrimination need to be filed within three years after the moment when the victim has learned about the damage and the perpetrator.

2.5.2 Duration of proceedings

Litigation ties up resources: personnel, money and time. Therefore, particularly long durations of proceedings may deter strategic litigation, since the prospect of committing years, or even decades to fight in court for a particular cause can discourage the use of strategic litigation in favour of other advocacy approaches.

In **France** and **Slovakia**, proceedings often exceed 4 years; in the **Czech Republic**, proceedings can even last up to 10 years. In **Greece**, civil law litigation that reaches the Supreme Court will last on average 10 to 12 years.

Even though in **Croatia**, discrimination claims are treated with special urgency, the proceedings will usually take over a year.

Best practice: In **Spain**, discrimination proceedings are processed faster than regular judicial proceedings; however, information on the average duration of such proceedings is not available.

2.5.3 Judicial fees

It goes without saying that high costs for court proceedings discourages litigation, especially if funds of potential strategic litigation agents are limited.

The costs of court proceedings consist of two main components: *firstly*, administrative costs / judicial fees for filing claims, applications, injunctions, etc., as well as extra costs for authentication of certificates, expert opinions, translators, etc.. *Secondly*, costs for representation by a lawyer, including pre-trial advice.

Best practice: In **Germany**, constitutional proceedings are free of charge.

³⁰⁵ Ibid, 87.

³⁰⁶ Ibid, 88.

Best practice: In **France** and **Ireland**, no judicial fees are incurred at labour courts.

Best practice: In **Sweden**, trade unions provide support to their members free of charge; this also includes covering all court fees and representation cost

In most of the examined countries, there is a high risk connected to litigation since the unsuccessful party not only has to bear their own court and representation fees (e.g. costs incurred by enlisting a lawyer), but also those of the winning party. In **Spain**, there is an exception to this principle if the losing party received legal aid.

In **France**, the costs for the opposing party's representation only have to be paid if the court so decides. In **Lithuania**, the reimbursement of representation costs for the opposing party are limited by the representation at court.

In some countries, such as **Austria**, **Croatia** or **Slovakia**, there are legal/judicial caps on lawyer fees, usually calculated based on a fixed rate or a rate depending on the value of the claim. In **Sweden** and **Austria**, lawyer fees can be subject to review by the court.

In many countries, however, lawyer fees are not capped (apart from limits imposed by good morals) and depend on the specific contract with the client; this is the case, for example, in **Belgium**, **Bulgaria**, **Cyprus**, **Latvia**, or **Romania**.

In **Greece**, judicial fees have sharply risen during the years of the financial crisis, with the aim of reducing procedural delays by diminishing the courts' heavy caseload. These fees (in addition to the costs for legal representation) often deter victims of discrimination from seeking justice.

It is also noteworthy that in the USA, a rule on fee-shifting exists under many federal statutes, including in the context of discrimination cases: a successful plaintiff will recover lawyer's fees and other legal expenses from the defendant. On the other hand, a prevailing defendant is not similarly entitled to recover their fees from the plaintiff (unless the plaintiff's action was brought in bad faith, was clearly frivolous or brought for purposes of harassment). It might be an interesting topic for further examination to investigate the feasibility of such an approach within Europe.

2.5.4 Public legal aid

Public legal aid can both mitigate the effects of high judicial fees, and provide an incentive for litigation if it effectively reduces the financial burden and/or risks of litigation. However, certain systems of legal aid are more or less conducive to strategic litigation than others, as is the case if:

- legal aid is available for discrimination cases – and ideally covers representation fees
- legal aid also covers the costs if the recipient loses – which is the case, for instance, in **Luxembourg** and **Spain**. In **Greece** and **Hungary**, on the contrary, legal aid is only paid if the recipient is successful. In **Italy**, legal aid is not granted for an appeal if the case is lost in the first instance.
- legal aid can also be claimed by CSOs and/or equality bodies, as is the case in **Spain** if the organisation can be classified as an 'association of social utility'. In **Greece**, non-profit legal entities are also entitled to legal aid if they can establish that the payment of litigation costs makes the pursuit of their aim impossible or problematic.
- financial thresholds for using legal aid are not dissuasive: e.g. very low income levels, like in **Greece**, **Hungary**, **Latvia** or **Slovakia**; the consideration not only of income, but also of property, like in **Bulgaria**, **Croatia**, **Malta**, **Luxembourg**, **Slovenia**, **Sweden** or the **UK**; or the consideration of not only the claimant's, but their whole household's economic situation, as it happens in **Bulgaria**, **Croatia**, **Greece**, **Luxembourg**, **Slovenia** and the **UK**.

- pre-examination of *probabilis causa litigandi* ('substantial grounds for legal action')³⁰⁷ before legal aid is granted, as is the case in **Iceland**³⁰⁸ or **Malta**.

Apart from this, legal aid schemes under which the claimant can freely choose a lawyer – and is not appointed one – are advantageous for the purposes of strategic litigation, since the claimant can pick an agent of strategic litigation for their representation. Such arrangements are possible in **Finland**, **Luxembourg** or **Romania**. In **Italy** and **Poland**, the claimant can choose representation from a list of registered lawyers.

Best practice example: In **Finland**, public legal aid covers the costs for all courts and instances. While lawyer's fees are only reimbursed for a maximum of 80 work hours, the court can lift this cap. Usually, a public lawyer will be appointed for representation at court – but a private lawyer can also be appointed and is then entitled to compensation from state funds.

It is, however, questionable whether the receipt of public legal aid is compatible with strategic litigation. Since strategic litigation tends to prioritise a social change agenda over the immediate interests of an individual claimant, this might create a conflict of interests; after all, public legal aid is usually a social service which is not meant to subsidise an advocacy project, but to provide access to justice for individuals with scarce financial means.

2.6 Socio-legal culture

The emergence of strategic litigation depends not only on the existence of adequate agents of strategic litigation that have access to justice and sufficient resources – but also on the particular social/legal climate. If the awareness of sex discrimination laws and rights is low, or if there is no understanding of strategic litigation mechanisms, then strategic litigation will not be an easily accessible option. Similarly, if victims of discrimination prefer not to enforce their rights, because they do not trust the institutional structure for the defence of their rights, or because they fear negative repercussions – such as re-victimisation, disadvantages at their workplace or in their social environment – it might be difficult for activists or organisations to find clients for their strategic litigation attempts. Lastly, strategic litigation will not be carried out if the risks of strategic litigation (such as conservative backlash, negative precedents, costs or other unintended consequences) are – or are perceived to be – high (risk aversity), or if there are more efficient methods and approaches that achieve the same or similar results (political lobbying, media campaigns, etc.). In addition to all of these factors, general social/political/economic phenomena – such as the financial crisis – can have effects on the prevalence of strategic litigation. In **Greece**, for instance, the dire economic situation caused by the financial crisis has led to a reduction of preliminary references: Lawyers hesitate to request preliminary references to the CJEU since they fear that the costs for legal representation could not be afforded by victims of discrimination.

Lack of awareness. A main obstacle to strategic litigation is the lack of awareness of both issues surrounding sex discrimination (including the relevant EU law provisions) and strategic litigation. In **Bulgaria**, **Estonia**, **Italy**, **Lithuania** and **Poland**, there is a lack of legal practitioners who are specialised in sex discrimination issues. This corresponds with the limited awareness of their rights (and/or mechanisms to enforce them) on the part of the victims of sex discrimination in **Croatia**, the **Czech Republic**, **Estonia**, **France**, **Greece**, **Hungary**, **Italy**, **Lithuania** or **Malta**. In **Luxembourg**, expertise regarding anti-discrimination law is lacking, as well. In 2018, the The Centre for Equal Treatment (equality body) asked in its annual report for the setup of a network of lawyers specialised in anti-discrimination matters and expressed a desire to collaborate with them.

307 Aliverti, A., 'Austerity and Justice in the Age of Migration' in Flynn, A. and Hodgson, J. (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart 2017), 289.

308 The Act on Civil Proceedings No. 91/1991 (*Lög um meðferð einkamála nr. 91/1991*). Regulation No. 45/2008 on the requirements of legal aid and the work of the legal aid committee.

Strategic litigation is not well known by legal professionals in the **Czech Republic, Denmark, Estonia, Finland, Germany, Italy, Spain** and the **UK**. Similarly, there are hardly any structures in support of strategic litigation in **Finland, Lithuania, Poland** or **Portugal**. Connected to this, strategic litigation has hardly been the issue of legal academic debate in Europe (even though a few countries have noticed a still very modest increase in academic interest in the subject).³⁰⁹ An exception is the **UK**. In **Norway**, the term is used in academic literature, but fairly infrequently, according to the national expert. There is no coherent academic terminology when discussing strategic litigation, which often is conflated (or used interchangeably) with the terms for particular actions such as class actions / *actio popularis* or legal aid (on the distinction of these terms, see above in Chapter 1). However, some of the interviewed experts have noticed a slight increase of awareness regarding this issue in recent years.

Lack of trust in institutional structure / fear of re-victimisations. In a lot of countries, victims of discrimination fear that bringing their case to court will have negative repercussions for them. Long court proceedings or a distrust of the court system at large deters victims in **Croatia**, the **Czech Republic, Italy, Liechtenstein** and **Poland** from seeking justice. This means that it will be hard to find a client for organisations or activists wanting to create a strategic litigation case. The same is true if a victim fears that speaking up will get them in trouble with their family, employer, co-workers, friends or wider social environment. This is the case in **Croatia, Estonia, France, Greece, Hungary, Liechtenstein, Malta** and the **Netherlands**. In **Greece**, the financial crisis has particularly exacerbated fears of (re)victimisation or stigmatisation (acquiring a ‘bad name’ in the labour market) because the threat of unemployment is high, in particular for women.

Backlash and non-progressive litigation. In **France**, the increasing acceptance of LGBTIQ rights (which was also promoted by courts) has contributed to the creation of reactionary movements opposing, for instance, adopting rights for gay and lesbian individuals. Moreover, strategic litigation has not only been used by progressive actors. In **Spain**, the ultraconservative party VOX has intentions to carry out strategic litigation in the area of domestic violence. In **Germany**, positive measures in the area of gender equality (such as quotas) have repeatedly been challenged at court with the involvement of reactionary men’s rights groups. However, it is difficult to say whether this backlash was caused by progressive litigation, or would have happened anyway.

Risk-aversity and availability of alternative approaches. In **Germany** and the **UK**, some organisations are refraining from engaging in strategic litigation because they do not want to antagonise public actors – be it because they want to maintain a positive communication atmosphere, or because they fear a reduction of public funding. If potential agents of strategic litigation are part of the public institutional structure of a country (as is the case with many equality bodies), this might also influence their willingness to engage in strategic litigation, especially if the addressee of such litigation is the state. On the other hand, a good relationship between actors at different institutional and organisational levels that are all committed to the promotion of gender equality might also be an advantage. In **Norway**, for instance, there is a strong relationship between institutional actors, lawyers and CSOs working on equality issues.

In some countries, other approaches may be more popular than strategic litigation because similar or better results can be achieved by other methods. In **Finland**, for example, strategic litigation is a side issue for unions, because of strong social partnership structures. This has also been the case in **Austria**, at least until recently (since the social partnership has to face increasing criticism). In many countries, equality bodies and/or CSOs have consultation status regarding reform projects in the area of gender

309 So far, social scientists are those who have mostly attended to this issue: Jacquot and Vitale, ‘Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women’s Groups at the European Level’; Ayoub, P. and Paternotte, D., ‘L’International Lesbian and Gay Association (ILGA) et l’expansion du militantisme LGBT dans une Europe unifiée’ (2016) 70 Critique Internationale 55; Jacquot and Vitale, ‘Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women’s Groups at the European Level’; Börzel, ‘Participation Through Law Enforcement: The Case of the European Union’; and others.

equality or advise government officials / parliamentarians on such issues. It is conceivable that as long as such channels of formal or informal communication exist and function, litigation might be less attractive, since litigating might be more costly, lengthy and risky than communicating directly with law makers and/or government officials. Likewise, litigating in order to achieve law reform / doctrinal reform might jeopardise the solid relationship of a CSO with law makers / government officials, especially if they were not willing to tackle a particular issue for political reasons. Circumventing established channels of communication by going to court in order to achieve change might be perceived as an affront, so CSOs might think carefully about which approach to take. This might be especially true if the counterpart in a litigation project is a state institution itself (e.g. a public health care provider, a public employer, etc.).

Sometimes, however, institutional actors are aware of, or even involved in, litigation measures. This might be the case if an equality body (which is, in most countries, part of the state institutional structure) collaborates in litigation proceedings or even takes on litigation itself. In **Belgium**, for instance, the Institute for Equality between Men and Women has participated in strategic litigation cases, alongside other organisations.³¹⁰

310 For example: Labour Tribunal Liège (Div. Liège), 4 February 2019, RG 17/2299/A, unpublished. Available at https://igvm-iefh.belgium.be/sites/default/files/downloads/2019-02-04_-_tt_liege_-_cancer_du_sein_0.pdf; Labour Tribunal Ghent, 11 October 2018, RG 18/7255, unpublished. Available at https://igvm-iefh.belgium.be/sites/default/files/downloads/geanonomiseerd_vonnis_0.pdf (B).

Chapter 3 – Strategic litigation at the Court of Justice of the European Union

As outlined above, strategic litigation before the Court of Justice of the European Union (CJEU) usually starts at the national level. While direct actions to the CJEU are possible, the preliminary reference procedure has by far produced the most cases.³¹¹ Therefore, the previous Chapter also largely applies to strategic litigation involving the CJEU.

Nonetheless, there are certain particularities to be kept in mind when approaching the CJEU, which will be elaborated on in the following parts. Due to this, the structure of Chapter 3 differs significantly from the previous Chapter 2.

In the following section, we will first take a closer look at the CJEU as a policy maker in the area of gender equality. Then, access to justice at the CJEU will be analysed, since it differs significantly from national court proceedings (especially regarding standing rights). Lastly, the particular function of agents of strategic litigation at the EU level will be discussed.

3.1 The CJEU – setting standards in the area of gender equality

The court is comprised of the European Court of Justice (ECJ), the General Court (GC; formerly Court of First Instance, CFI), as well as a number of specialised courts (formerly judicial panels).³¹² In the following sections, the author will refer to the 'CJEU', except for instances where it is expedient to make a distinction between the different institutions under its roof.

3.1.1 *The CJEU as a creator of standards*

Much has been said about the importance of the CJEU in terms of establishing a kind of European identity.³¹³ Some scholars have pointed out that the fragmentation of power within the EU has allowed institutions such as the CJEU to take over governance functions.³¹⁴ It plays a decisive role in advancing European integration, guaranteeing the uniformity of EU law and its application, and holding Member States to their obligations under the EU Treaties, among other things.³¹⁵

Consequently, the CJEU has been called the 'supreme court'³¹⁶ or 'constitutional court'³¹⁷ of the European Union. Even though the CJEU has not formally adopted a doctrine of precedent, it usually follows its previous case law.³¹⁸

311 Tridimas, T., 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 Common Market Law Review 9, 9.

312 Article 19(1) Consolidated Version of the Treaty on European Union [2012] OJ C 326/13.

313 See, e.g., Burley and Mattli, 'Europe Before the Court: A political Theory of Legal Integration', 42.

314 Stone Sweet, A., 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 Living Reviews in European Governance 2; Scharpf, F., 'Notes Toward a Theory of Multilevel Governing in Europe' (2001) 24 Scandinavian Political Studies 1. Not surprisingly, this development has also drawn extensive normative criticism. In Europe, this has been discussed, for instance, in the wider realm of the democracy deficit debate; lately, the distinction between input and output legitimacy (terms coined by Fritz Scharpf) has become relevant in this regard. Scharpf, F., *Governing in Europe: Effective and democratic?* (Oxford University Press 1999), 6. See also: Majone, 'Europe's "Democratic Deficit": The Question of Standards'; Moravcsik, 'In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union'.

315 Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation Among National Judiciaries', 97; Burley and Mattli, 'Europe Before the Court: A political Theory of Legal Integration', 42.

316 Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 21.

317 Schepel and Blankenburg point out that the CJEU tends to review national measures against community measures in a way that is reminiscent of constitutional judicial review. Schepel and Blankenburg, 'Mobilizing the European Court of Justice', 28.

318 Kaczorowska-Ireland, A., *European Union Law* (4th edn, Routledge 2016), 150. There is an academic debate on the difference between 'persuasive' and 'binding' CJEU precedent. For an overview of this discussion, see: Barceló, J., 'Precedent in European Community Law' in McCormick, D., Summers, R. and Goodhart, A. (eds), *Interpreting Precedents* (Ashgate 1997), 415-16. However, there is general agreement that CJEU judgments are *de facto* an important source of European Union law. The subtleties of this distinction are thus of limited practical significance and beyond the scope of this work.

Importantly, the CJEU has the interpretation monopoly regarding EU law, which grant its judgments considerable leverage. Stone Sweet writes:

‘The court is the authoritative interpreter of EU law, not the Member States. The Member States are principals when they are assembled as a constituent assembly. At most other times, each Member State is a subject of EU law on its own [...].’³¹⁹

Moreover, the CJEU often applies a dynamic form of legal interpretation, which allows modern realities to be taken into account.³²⁰

The CJEU has been a main protagonist in the area of non-discrimination law. It has time and again been asked to determine the scope of protection afforded against discrimination based on sex under EU law, mostly in the area of working life – but also in other areas, such as the access to goods and services.³²¹ The policies it developed have gradually been recorded in written law, most notably in the gender equality directives.

In fact, litigation has been used, time and again, to promote gender equality – at the national level³²² as well as at the European level.³²³ As Anagnostou and Millns point out, ‘the EU’s preliminary reference procedure enabled national judges to refer a large number of gender equality cases to the CJEU’ in response to individual complaints.³²⁴ Since the mid-1970s, the CJEU has developed its equal pay jurisprudence through various decisions. This provided an important catalyst for equal pay legislation, such as the Equal Pay Directive (75/117)³²⁵ as well as the Equal Treatment Directives in employment (76/207)³²⁶ and statutory social schemes (79/7),³²⁷ which in turn were again interpreted and specified

319 Stone Sweet, A., ‘The European Court of Justice’ in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011), 128.

320 Lenaerts, K. and Gutman, K., ‘The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic’ (2016) 64 *The American Journal of Comparative Law* 841, 844, 845. On the CJEU’s practice of using a dynamic interpretation in sex discrimination cases, see, e.g., Burri, S., ‘Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR’ (2013) 9 *Utrecht Law Review* 80, 82. In the realm of LGBT rights, AG Wathelet claimed in his opinion in *Coman* that ‘EU law must be interpreted “in the light of present day circumstances”, that is to say, taking the “modern reality” of the Union into account.’ (citations omitted) Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Opinion of AG Wathelet ECLI:EU:C:2018:2 [2018], para 56, citing Case C-270/13, *Iraklis Haralambidis v Calogero Casilli*, Opinion of AG Wahl ECLI:EU:C:2014:1358 [2014], para 52; and Case C-202/13, *The Queen, on the application of Sean Ambrose McCarthy and Others v Secretary of State for the Home Department*, Opinion of AG Szpunar ECLI:EU:C:2014:345 [2014], para 63.

321 Goods and Services Directive (2004/113/EC) [2004] OJ L 373/37.

322 See, e.g., Fuchs, ‘Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries’; Alter and Vargas, ‘Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy’.

323 Both the CJEU and the ECtHR have, time and again, been approached by activists and women’s rights groups. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*; Anagnostou and Millns, ‘Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System’; Nowicka, W., ‘Sexual and Reproductive Rights and the Human Rights Agenda: Controversial and Contested’ (2011) 19 *Reproductive Health Matters*, 123.

324 Anagnostou and Millns, ‘Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System’, 119.

325 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975, L 45/19.

326 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976, L 39/40.

327 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979, L 6/24.

by the CJEU in its jurisprudence.³²⁸ Since then, a number of directives have been adopted,³²⁹ each one reflecting the latest CJEU case law developments.³³⁰

Elise Muir points out that collective actors, including civil society organisation and public actors such as equality bodies, have indeed played an important role in advancing EU anti-discrimination law via litigation.³³¹ Arguably, the emergence of EU equality and anti-discrimination started with strategic litigation: one of the earliest successful attempts of strategic litigation at the Court of Justice of the European Union (CJEU) are the *Defrenne* decisions, which established equal pay between men and women throughout the European Union.³³² In 1966, Belgian lawyer and activist Éliane Vogel-Polsky – as a response to Belgium's failure to implement the equal-pay requirement laid down in Article 157 TFEU (then Article 119 EEC) – recruited Gabrielle Defrenne, a former flight attendant, in order to create a test case – with great success.³³³ This marked the beginning of the development of a considerable corpus of jurisprudence and legislation in the area of sex discrimination in employment,³³⁴ which was eventually expanded, particularly with the adoption of then Article 13 EC (now Article 19 TFEU) in the Treaty of Amsterdam, to include discrimination on other grounds.³³⁵ Certain concepts inherent in EU anti-discrimination law – such as the reversal of the burden of proof³³⁶ – are conducive to strategic litigation, because they facilitate the creation of a strong case in support of a victim of discrimination. Similarly, provisions that help prevent victimisation³³⁷ or that provide for the dissemination of information regarding rights and support structures in the area of sex discrimination³³⁸ are certainly useful for the purpose of strategic litigation. Of course, national provisions may include an over- or under-fulfilment of EU law requirements.³³⁹ An under-fulfilment of EU obligations can, of course, be at the centre of a strategic litigation project.

A number of landmark cases have reached the CJEU since and resulted in law reform – also at the national level. In **Spain**, national rules on pension schemes for part-time workers were adapted after judgments by the CJEU.³⁴⁰ The same thing happened regarding access to unemployment benefits.³⁴¹

328 Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', 119-120.

329 For instance, Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998, L 14/6; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002, L269/15; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004, L 373/37; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006, L 204/23; and many others.

330 Burri, S., 'EU Gender Equality Law – Update 2018' (2018) European Network of Legal Gender Experts in Gender Equality and Non-Discrimination / European Commission, 8; Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', 120.

331 Muir, E., 'Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices' in Muir, E. and others (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EU Working Paper LAW 2017/17), 113.

332 Case C-80/70, *Gabrielle Defrenne v Belgian State (Defrenne I)* ECLI:EU:C:1971:55 [1971] ECR 445; Case C-43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne II)* ECLI:EU:C:1976:56 [1976] ECR 455; Case C-149/77, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne III)* ECLI:EU:C:1978:130 [1978] ECR 1365.

333 Jacquot and Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level', 593.

334 Bell, 'The Principle of Equal Treatment: Widening and Deepening', 615.

335 Ibid, 612.

336 See, e.g., Article 19, Recast Directive (2006/54/EC) [2006] OJ L 204/23.

337 As demanded by Article 24, *ibid*.

338 E.g. Article 30, *ibid*.

339 Timmer and Senden, 'Gender equality law in Europe. How are EU rules transposed into national law in 2018?'

340 C-385/11, *Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) & Tesorería General de la Seguridad Social (TGSS)* ECLI:EU:C:2012:746; Case C-161/18, *Villar Láz v Instituto Nacional de la Seguridad Social (INSS) & Tesorería General de la Seguridad Social (TGSS)* ECLI:EU:C:2019:382 [2019].

341 C-98/15, *Espadas Recio v Servicio Público de Empleo Estatal (SPEE)* ECLI:EU:C:2017:833 [2017].

Best practice example: the test case *Evrenopoulos*³⁴² in **Greece** resulted in a landmark decision, generating a lot of publicity and awareness in the context of pension schemes, and serving as a catalyst for further case law on occupational schemes. The case was brought to court by prominent lawyer and gender equality expert Sophia Spiliotopoulos.

However, there has also been reactionary litigation reaching the CJEU. In **Germany**, the 1980s and 1990s saw a few complaints filed against regulations giving preferential treatment for women in employment, some of which reached the (then) ECJ.³⁴³

3.1.2 *Opinions by the advocate general*

The CJEU delivers its opinions in a single ruling; there are no dissenting or concurring opinions. Differing judicial views can be expressed in one judgment, sometimes resulting in somewhat ambiguous rulings.³⁴⁴ However, Advocate Generals (AG) can assist the Court by submitting reasoned opinions on cases (although not every case contains such an opinion).³⁴⁵ The AG's opinion is a recommendation on how to decide a case; it is not binding, but in many cases, the Court will follow its reasoning.³⁴⁶

Opinions of the AG are usually more detailed than the Court's opinion, providing insight into the reasoning process and the legal argument in a given case.³⁴⁷ Such opinions can hold interesting hints for strategic litigation projects, especially if they differ from the Court's judgment, offering alternative constructions of a particular legal issue. Advocates can draw on such discrepancies for future litigation strategies.

3.2 Access to justice before the CJEU

Providing access to justice for private parties was not a major concern for the framers of the Treaties.³⁴⁸ For these and other reasons, standing rights at the CJEU are particularly contentious³⁴⁹ and deserve a closer look.

3.2.1 *Legal standing*³⁵⁰

Litigants usually do not have direct access to the CJEU. In most cases, litigation before the CJEU will be initiated by a preliminary reference from a national court; therefore, the standing rights for organisations and individuals mentioned in Chapter 2, section 3 are also highly relevant for litigation at the CJEU.

As mentioned, the doctrines of 'supremacy' and 'direct effect' have opened up EU law for individual litigants at the national level.³⁵¹ However, the fact that litigants cannot directly address the CJEU might deter strategic litigation. In order to establish whether procedures before the CJEU allow for civil society

342 Case C-147/95, *Dimossia Epicheirissi Ilektrismou (DEI) v Evrenopoulos* ECLI:EU:C:1997:201 [1997] ECR I-2057.

343 E.g. C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen* ECLI:EU:C:1995:322 [1995]; C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen* ECLI:EU:C:1997:533 [1997]; C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* ECLI:EU:C:2000:163 [2000].

344 Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 63.

345 Article 252 TFEU.

346 Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 62.

347 Tridimas, T., 'The Role of the Advocate General in the Development of Community Law: Some Reflections' (1997) 34 *Common Market Law Review* 1349, 1359.

348 Bogdandy points out that the European legal system rather 'started as a functional legal order: it was set up in order to integrate the European peoples and States, mainly through an integration of their national economies.' Von Bogdandy, A., 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307, 1308.

349 Eliantonio, M., and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts* (European Parliament 2012).

350 This part (standing rights) is based on the author's dissertation, Guerrero, 'Activating the Courtroom for Same-Sex Family Rights. "Windows of Opportunity" for Strategic Litigation Before the European Court of Human Rights (ECtHR)'.

351 Kilpatrick, 'The Future of Remedies in Europe', 2.

participation, it is important to take a closer look at the formal procedural rules governing these procedures, since they set the legal framework within which litigants can participate in judicial decision-making.³⁵²

The EU court system knows a range of different actions, with highly diverging *modi operandi* and reach. For instance, Article 259 TFEU gives member states the possibility to sue one another for infringing the Treaties; however, it does not provide standing to private actors and is, as such, not particularly suited for strategic litigation efforts. Moreover, the number of cases brought forward under this Article does not exceed single digits.³⁵³

Article 268 TFEU, referencing Article 340 TFEU provides compensation claims for non-contractual liability (torts), in the event that the Union's institutions or representatives have caused damage to individuals or undertakings.³⁵⁴ This action for damages can be sought independently of other EU law remedies; however, applicants are required to first approach their national courts for redress.³⁵⁵

Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the European Commission can hold Member States responsible for non-compliance with an obligation arising under the Treaties ('infringement procedure').³⁵⁶ The Commission has full discretion in deciding whether it wants to initiate infringement proceedings or not.³⁵⁷ Most disputes do not reach the Court, but are settled at a pre-litigious stage,³⁵⁸ which is why this procedure is of limited usefulness for the purposes of strategic litigation: after all, a complainant cannot become a party to the proceedings at any stage of the infringement procedure, due to its bilateral character (Commission – Member State).³⁵⁹ Indeed, the CJEU confirmed that there was no right for third parties to access the pleadings before the Court, and that disclosure of these pleadings would compromise ongoing proceedings.³⁶⁰ Therefore, individual participation is restricted to the initial complaint that prompts the Commission to act.

Article 263 TFEU provides the General Court (GC, formerly Court of First Instance, CFI) with the power to review measures by the Council, the Commission, the European Central Bank, the European Parliament and the European Council ('annulment actions'). An appeal to the Court of Justice is possible.

There have been attempts by CSOs (mostly in the area of environmental rights)³⁶¹ to invoke the annulment procedure in a strategic manner – but so far, without success.³⁶² This is mostly due to the fact that the annulment procedure grants very limited standing to so-called non-privileged applicants (privileged or semi-privileged applicants are Member States and EU institutional actors – all other applicants are 'non-privileged').³⁶³

352 Kelemen writes: '[f]or private enforcement to play a meaningful role, there must be effective access to justice for private parties to enforce those norms.' Kelemen, R., 'American-Style Adversarial Legalism and the European Union' (2008) 37 EUJ Working Papers / RCSAS, 5.

353 Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', 13.

354 Article 268 TFEU, referencing Article 340 TFEU.

355 Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 35.

356 Article 258 TFEU provides the basis for determining a fine for a Member State that failed to comply with its obligations under the Treaties.

357 Snyder, F., 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19, 30.

358 Over 90 %. Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 413.

359 As, e.g., pointed out by the Court of First Instance (CFI) in the Petrie Case. Case T-191/99, *David Petrie, Victoria Jane Primhak, David Verzoni and Others v Commission of the European Communities*, ECLI:EU:T:2001:284 ECLI:EU:T:2001:284 [2001] ECR II-3677, para 70.

360 Case T-36/04, *Association de la Presse Internationale ASBL (API) v Commission of the European Communities* ECLI:EU:T:2007:258 [2007] ECR II-3201, paras 59-140; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Kingdom of Sweden and Others v Association de la presse internationale ASBL (API) and European Commission* ECLI:EU:C:2010:541 [2010] ECR I-8533, paras 77-102.

361 Case C-321/95 P, *Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* ECLI:EU:C:1998:153 [1998] ECR I-1651, paras 27-35.

362 Schepel and Blankenburg, 'Mobilizing the European Court of Justice', 22-27.

363 Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 27.

The CJEU itself endorses the view that annulment procedures are not intended to primarily provide access to justice for individuals; private actors have, after all, the possibility to challenge the implementation of EU measures before their national courts,³⁶⁴ as we shall see below.

3.2.2 *Standing of private actors during the preliminary reference procedure*

The preliminary reference procedure under Article 267 TFEU has produced by far the biggest amount of litigation.³⁶⁵ It gives litigants an instrument to challenge disadvantageous national provisions if these provisions are not compatible with EU law. The CJEU will not directly determine whether a national law is compatible with EU law, but rather offer an 'interpretation' of the respective EU law or Treaty provision,³⁶⁶ the result is often a *de facto* evaluation of the validity of national legislation.³⁶⁷

Litigants do not have the option to directly address the CJEU. During the national proceedings, litigants can suggest that the court refer the case to the CJEU; however, they have no right to *request* a reference themselves.³⁶⁸ The discretion regarding whether and which questions to refer to the CJEU rests fully with the national court or tribunal.³⁶⁹ However, the parties can, in the framework of their national judicial possibilities, assist the national court in formulating a reference question.³⁷⁰ As an array of scholarship points out, national courts are usually not reluctant to address the CJEU.³⁷¹

However, in the context of sex discrimination issues, the questionnaires filled in by national experts have revealed that the referral patterns seem to vary greatly. While in **Spain**, the courts usually follow the litigants' requests for referrals, this cannot be said to be the case in **Bulgaria**, the **Czech Republic**, **Denmark**, **Hungary**, **Lithuania**, **Poland** and **Sweden**.

Best practice example: In **Germany**, refusing a referral to the CJEU may be challenged before the Federal Constitutional Court (*Bundesverfassungsgericht*) as a violation of the right to due process.

However, in general, there seems to be very little information on this issue.

If a preliminary question is referred to the CJEU, the parties can submit written observations to the CJEU.³⁷² Parties are also allowed to participate in the hearing at the CJEU, make observations and comment on other participants' submissions,³⁷³ thereby pleading their case directly to the CJEU.

364 Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 32.

365 Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 9.

366 Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 444.

367 De la Mare, T. and Donnelly, C., 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law* (Oxford University Press 2011), 367, 368.

368 Hornuf, L. and Voigt, S., 'Preliminary References – Analyzing the Determinants that Made the ECJ the Powerful Court it Is' Berkeley Program in Law & Economics Working Paper Series <http://ssrn.com/abstract=1843364>.

369 See, e.g., Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* ECLI:EU:C:1982:335 [1982] ECR 3415, para 9: '[T]he mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177 [now Article 267 TFEU].'

370 The willingness of a court to base its reference on the suggestions of the parties is highly dependent on the national judicial situation, as well as the concrete court and judge. Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', 460.

371 See, e.g., Stone Sweet, A., *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000); Börzel, 'Participation Through Law Enforcement: The Case of the European Union'; Burley and Mattli, 'Europe Before the Court: A political Theory of Legal Integration'; Tridimas, G. and Tridimas, T., 'National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure' (2004) 24 *International Review of Law and Economics* 125; and many others.

372 Article 23, Protocol (No. 3) on the Statute of the Court of Justice of the European Union [2010] OJ C 83/210.

373 Lenz, C., 'The Role and Mechanism of the Preliminary Ruling Procedure' (1994) 18 *Fordham International Law Journal* 388, 402.

While the CJEU does not usually provide for *amicus curiae* briefs or other third-party interventions, there are exceptions.³⁷⁴ Third parties that can show an ‘interest in the result of the case’³⁷⁵ and have already been involved in the national proceedings may be allowed to submit observations to the CJEU.³⁷⁶

Best practice example: The landmark *Test-Achats* case,³⁷⁷ originating in **Belgium**, dealt with equal protection regarding access to goods and services. The case was a strategic litigation case, initiated by a Belgian consumer rights organisation. It resulted in the declaration of invalidity of Article 5(2) of Directive 2004/113 on sex equality in access to goods and services, which provided for a potential permanent derogation to the principle of equality.

Moreover, EU non-discrimination directives explicitly hold that Member States can choose to introduce an *actio popularis*,³⁷⁸ giving CSOs and/or equality bodies the right to fight a discriminatory practice (in some instances even without the necessity of proving individual harm).³⁷⁹ As mentioned, a number of Member States have taken advantage of these provisions, providing organisations (such as equality bodies or certain CSOs) with the right to support or represent individual claimants in a trial, or even participate as a party themselves.³⁸⁰ In 2014, 16 Member States had made use of this last possibility.³⁸¹

All of these developments have greatly enhanced the chances of civil society litigants to make their views heard before the CJEU.³⁸² In **Germany**, a case regarding pay discrimination based on sex, which will likely result in a reference to the CJEU (after passing through all the instances), is supported by the CSO Society for Civil Rights.³⁸³ In **Finland**, a case supported by trade unions went up to the CJEU in the context of

374 Almqvist, J., ‘The Accessibility of European Integration Courts from an NGO Perspective’ in Treves, T. and others (eds), *Civil Society, International Courts and Compliance Bodies* (Asser Press 2005), 277.

375 Article 40, Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210.

376 Order of the Court, 3 June 1964, Case 6/64, *Costa v ENEL* ECLI:EU:C:1964:34 [1964] ECR 614; Order of the President of the Court, 9 July 2006, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others (Application of the French Bar)* ECLI:EU:C:2006:389 [2006], para 9. The General Court (formerly CFI) has adopted a more inclusive interpretation of the term ‘interest in the result’, therefore allowing interventions by certain interest groups, if its members’ interests would be considerably affected by the forthcoming judgment. GC (formerly CFI): Order of the President of the Court, 17 June 1997, Joined cases C-151/97 P(I) and C-157/97 P(I), *National Power plc and PowerGen plc v British Coal Corporation and Commission of the European Communities* ECLI:EU:C:1997:307 [1997] ECR I-3491, para 66.

377 Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL et al v Conseil des ministres* ECLI:EU:C:2011:100 [2011] ECR I-773.

378 E.g. Race Equality Directive (2000/43/EC) [2000] OJ L 180/22; Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16. Article 7(2) of the Race Equality Directive, and 9(2) of the Employment Equality Directive state: ‘Member States shall ensure that associations, organisations or other legal entities which have in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of these Directives are complied with, may engage, either on behalf or in support of the complainant, with his or her Approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under these Directives.’ Race Equality Directive (2000/43/EC) [2000] OJ L 180/22; Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16. However, it is noteworthy that while the Race Equality Directive also demands the set-up of specific equality bodies (Article 13), the Employment Equality Directive does not. Bell, ‘The Principle of Equal Treatment: Widening and Deepening’, 619. Article 17(2) of Directive 2006/54 on sex equality in employment and occupation provides for a similar provision on rights of associations to intervene in court, as does, for example, Article 8(3) of Directive 2004/113 on sex equality in access to goods and services. These two latter directives also provide for the obligation to create or appoint an equality body.

379 Bodrogi, ‘Legal Standing – The Practical Experience of a Hungarian Organisation’, 27. See also: Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECLI:EU:C:2008:397; Case C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* [2013] ECLI:EU:C:2013:275.

380 The handbook ‘How to Present a Discrimination Claim’, published by the Network of European Anti-Discrimination Experts, provides an exemplary overlook of relevant national rules. Farkas and O’Dempsey, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, 67.

381 Tymowski, J., *The Employment Equality Directive – European Implementation Assessment* (EPRS / European Parliament Research Service, 2016), 53.

382 One example: Case C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulation Reform* ECLI:EU:C:2009:128 [2009] ECR I-1569, extending the scope of the Employment Equality Directive to include mandatory retirement age. It should also be mentioned that the Lisbon Treaty has introduced a number of interesting changes. Article 47 of the Charter of Fundamental Rights, which establishes the right ‘to an effective remedy and to a fair trial’ became legally binding for EU institutions, as well as for Member States when implementing EU law. Articles 47, 51 of the Charter of Fundamental Rights of the European Union [2007] OJ C 303/1.

383 *Gesellschaft für Freiheitsrechte* (Society for Civil Rights) <https://freiheitsrechte.org/equalpay/>.

maternity leave discrimination.³⁸⁴ The **French Bougnaoui case**³⁸⁵ is an example of strategic litigation on the issue of religious discrimination, supported by the CSO CCIF. It resulted in doctrinal change and very lively public debate.

Best Practice Example: In **Ireland**, a case supported by the Human Rights and Equality Commission led to highly influential doctrinal change regarding the question of whether the Workplace Relations Commission had the power to disapply national law conflicting with EU law – which the CJEU confirmed.³⁸⁶

3.2.3 Time limits for sex discrimination claims

In the context of **annulment actions**, an application must be filed after two months of publication of the contested measure at latest.³⁸⁷ This is a relatively short period of time, especially taking into account the necessity to establish the imminent adverse effect of the measure on a particular applicant. After two months, the measure might not even have been applied yet.

In **preliminary reference procedures**, parties are granted a period of two months after notification of the order for reference to submit written observations.³⁸⁸ This period is extremely short, especially since interventions before the CJEU will most likely require a different argumentation strategy than before national courts.

The short time limits are especially problematic if there is a lack of familiarity with EU law and/or sex discrimination law on the part of the litigants or their representatives. National experts have identified this as a problem in **Bulgaria, Estonia, Italy, Lithuania** and **Poland**. In the **UK**, for example, some CSOs do not dispose of expert knowledge regarding EU law provisions.

3.2.4 Duration of proceedings

The judicial statistics released by the CJEU show that the average duration of proceedings has decreased in 2018, but it still is considerable: the ECJ takes around a year to 16 months to rule in cases of preliminary references, and about a year and a half for direct actions.³⁸⁹

Considering that in the case of preliminary references, the national trial is interrupted and will be continued after the decision by the CJEU, this means that such litigation requires a substantial time commitment. This will be especially true if the proceedings at the national level are already lengthy, as described above.³⁹⁰

3.2.5 Judicial fees and legal aid

Proceedings before the General Court (GC) and the ECJ are free of charge. However, the costs for representation are not covered by the Court. Applicants may apply for legal aid.

Apart from this, the costs incurred by preliminary references also depend on the national situation, since national lawyers that have been involved in the case from the outset might also be involved in submitting observations to the CJEU.

³⁸⁴ Case C-116/06, *Kiiski v Tampereen kaupunki* ECLI:EU:C:2007:536 [2007] ECR I-7643.

³⁸⁵ Case C-188/15, *Asma Bougnaoui & Association de défense des droits de l'homme (ADDH) v Micropole SA* ECLI:EU:C:2017:204 [2017].

³⁸⁶ *Minister for Justice and Equality and Commissioner of the Garda Síochána* (Case C-378/17) [2018].

³⁸⁷ Article 263 TFEU.

³⁸⁸ Article 23, Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210.

³⁸⁹ Court of Justice of the European Union, Press Release No 39/19 of 25 March 2019 on Judicial Statistics 2019.

³⁹⁰ See *supra*, section 2.5.

3.3 Specific functions of strategic litigation agents at the CJEU level

Strategic litigation requires a high degree of expert knowledge, for instance regarding legislative and case law developments. This is particularly true for a sector that is as deeply infused with EU law requirements and standards as anti-discrimination law. Therefore, the existence of networks that gather and distribute knowledge is highly relevant in this area.

While **organisations carrying out strategic litigation** will often be anchored at the national level (due to the fact that, as mentioned previously, litigation often starts at the national level), **organisations providing additional support to strategic litigation projects** are of particular significance at the EU level.

Anagnostou and Millns point out that transnational coalitions of activists, lawyers, bureaucrats and experts with a feminist orientation were the basis for the creation of EU-level organisations, such as the European Women's Lobby (EWL) or the European Network of Women (ENOW), and also the Committee of Women's Rights in the European Parliament.³⁹¹ Such networks have adopted strategies that include both the national and the European level in order to develop maximal efficiency.³⁹²

Awareness of EU law and readiness of courts and state institutions to refer cases to the CJEU will particularly influence the emergence and success of strategic litigation at the European level. Transnationally operating advocacy organisations, such as the umbrella organisation expertise networks such as the EWL, the Network of Legal Gender Experts (which has developed into the gender stream of the EELN),³⁹³ consultancy firms such as ENGENDER³⁹⁴ or (more recently) the equality body network EQUINET³⁹⁵ have been essential in spreading the knowledge about landmark CJEU decisions in the area of gender equality among their members,³⁹⁶ even if they do not litigate themselves.

Other entities, such as civil society organisations or activist lawyers, can then use this knowledge to create strategic litigation projects, which in turn contribute to the integration and harmonisation of EU law. In this regard, Ronald Holzacker points out that:

[t]he processes of Europeanization and transnationalization are highly linked and influence the strategies pursued by ... equality organizations. [Civil Society Organizations (CSOs)] may use European policies and institutions to assist their efforts in pressing for domestic change. For example, groups may remind governments of their obligation to transpose EU directives in a timely and correct manner. CSOs may also point to resolutions of the European parliament, for example calls for the recognition of same-sex partnerships, to back their call for domestic change in family law. CSOs may also use arguments related to existing case law of the European Court of Justice or attempt to bring new cases before the court to argue for the protection of fundamental rights.³⁹⁷

Clearly, these considerations apply also to litigation on European Union sex discrimination law.

Importantly, the multi-level governance structure of the European Union (meaning that within the EU, there are multiple hierarchies and authority structures involved in decision- and policy-making) means that social activism is also fragmented and usually contains a number of different approaches and addressees.³⁹⁸ In this sense, litigation strategies will seldom be the only action taken by an agent of

391 Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', 116.

392 Ibid, 116.

393 European Equality Law Network (EELN) <https://www.equalitylaw.eu/>.

394 ENGENDER <https://www.engender.org.uk/content/organisations/>.

395 EQUINET <http://equineteurope.org/2019/03/19/equality-bodies-and-equinet-promoting-equality-in-europe/>.

396 Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 203.

397 Holzacker, R., 'Transnational Strategies of Civil Society Organizations Striving for Equality and Nondiscrimination: Exchanging Information on New EU Directives, Coalition Strategies and Strategic Litigation' in Bruszt, L. and Holzacker, R. (eds), *The Transnationalization of Economies, States, and Civil Societies New Challenges for Governance in Europe* (Springer 2009), 227.

398 Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', 126.

strategic litigation; usually, social change litigation will be embedded in a larger strategy, including political, public and other campaigns and approaches.³⁹⁹

³⁹⁹ Ibid, 128.

Chapter 4 – Conclusions and recommendations

4.1 Preliminary observation: lack of research

Law and its application cannot be understood merely as hegemonic top-down processes; indeed, the legal arena rather presents itself as a complicated net of cross-influences and interactions between a number of different players, such as courts, legislators, lawyers, social movements, activists and institutions, as well as media and other civil society actors, among others.⁴⁰⁰ Strategic litigation as a subject of academic research highlights the contributions of civil society actors within legal processes.

However, the present study shows that strategic litigation is still widely under-researched in Europe. This is especially true since legal analysis is often limited to the examination of a court decision or a legal text, neglecting the *processes* that led to such decision or text.

Out of the 31 **national legal gender experts** who were given questionnaires for this study, 29 stated that ‘strategic litigation’ was not a common term in their country’s legal academic discourse. Only the expert from the **UK** said that the term was used regularly in academic contexts, whereas the experts from the **Czech Republic, Hungary, Italy**, the **Netherlands, Norway** and **Poland** noted an increasing (but still fairly infrequent) engagement with this subject. Therefore, it is not surprising that even cases that could have been the products of strategic litigation might not be recognised as such.

RECOMMENDATIONS:

- Support of research regarding strategic litigation in the area of gender equality, such as empirical/ qualitative studies on the occurrence of strategic litigation, legal scholarship on the matter, etc.
- Support and funding of publications on these issues

4.2 Conclusions of the present report

This report furthermore shows that three factors are particularly influential in the area of strategic litigation on sex discrimination: the legal environment (including existing laws as anchor points for strategic litigation efforts; adequate fora as addressees of strategic litigation; access to justice including standing rights, etc.); the existence of adequate agents of strategic litigation (i.e. entities carrying out strategic litigation projects, or providing support for such projects, which dispose of adequate resources); and the socio-legal environment (i.e. incentives and disincentives for strategic litigation, such as awareness of strategic litigation and sex discrimination laws, the fear of re-victimisation, etc.).

From this, a number of obstacles to strategic litigation – as well as remedies – can be deduced.

4.2.1 *Legal factors impeding strategic litigation*

Rules on lawyer fees / pro bono practice.⁴⁰¹ In a number of countries, providing legal services pro bono is not possible due to laws or chamber rules determining **binding** minimum fees for lawyers. The absence of flexible remuneration schemes enabling success-based and/or contingency fees can also deter litigation, because it increases the risk for victims of discrimination to engage (commercial) lawyers as their representatives and might decrease the motivation of law firms to engage in such litigation.

⁴⁰⁰ Della Porta and Caiani, ‘Europeanization from below? Social movements and Europe’.

⁴⁰¹ See *supra*, section 2.3.4.

Lack of availability of suitable claims.⁴⁰² Lack of adequate procedural actions to address discrimination at court – either in support of a victim, or in the absence of a victim – can be an obstacle to strategic litigation. Granting standing rights to organisations (such as *actio popularis* or the ability to initiate class actions) increases the likelihood of strategic litigation, since it broadens the scope of possible action of said organisations.

Access to justice – other factors.⁴⁰³ Restrictive time limits for advancing discrimination claims, long court proceedings or high judicial fees can frustrate litigation efforts and thus, strategic litigation as well. The accessibility of legal aid also differs from country to country; particularly restrictive conditions for the receipt of legal aid can also jeopardise the access to justice and strategic litigation efforts.

RECOMMENDATIONS:

- Support for the creation and development of pro bono departments in law firms.
- Encouraging the review of minimum fee provisions for lawyers.
- Research on the effect of success-based and/or contingency fees in the area of gender equality, and consideration of the introduction of litigation-friendly fee schemes.
- Encouraging the expansion of legal aid to organisations engaging in (strategic) gender equality litigation.
- Encouraging the expansion of standing rights, *actio popularis* claims and collective actions to organisations in the area of gender equality.
- Generally: encouraging the development of strong legal rights for employees / potential victims of discrimination (including the award of damages for discrimination that actively serves as a deterrent for future wrongdoing).

4.2.2 Adequate agents of strategic litigation⁴⁰⁴

There are a number of entities that might be able and willing to carry out strategic litigation efforts, or to support such efforts. This report has attempted a (non-exhaustive) typology of such entities, including:

- Equality bodies;
- Civil society actors;
- Law (legal) clinics;
- Law firms / private lawyers.

Apart from standing rights, such organisations or persons need to dispose of the necessary expertise, structural/organisational make-up and adequate (financial and personal) resources to devise and realise strategic litigation projects.

Expertise.⁴⁰⁵ In order for strategic litigation to work, a certain expertise is needed – both with gender equality / sex discrimination law (ideally, at the national and the EU level), and with strategic litigation. Such expertise is presently (partly) lacking on the part of legal practitioners in **Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Italy, Lithuania, Luxembourg, Norway, Poland, and Spain.**

⁴⁰² See *supra*, section 2.3.

⁴⁰³ See *supra*, section 2.5.

⁴⁰⁴ See *supra*, section 2.3.

⁴⁰⁵ See *supra*, sections 2.3-2.6.

Structure.⁴⁰⁶ Whether strategic litigation is a feasible approach for an organisation also depends on its structure. For instance, certain equality bodies do not have the mandate to pursue strategic litigation, or do not receive funding for such activities.

Another impediment to strategic litigation might be the institutional entanglement of potential agents of strategic litigation with state authorities and a following lack of independence.

Resources / funding.⁴⁰⁷ Next to an absence of necessary expertise, a major – if not the biggest – obstacle to strategic litigation is a lack of adequate financial (and personal) resources for strategic litigation projects.

RECOMMENDATIONS:

- Supporting the creation and development of expertise regarding strategic litigation in the area of gender equality; e.g. by supporting gender equality organisations / law clinics / other organisations willing to build up this expertise.
- Providing extensive resources (i.e. grants, programmes or funding) specifically for civil societal / academic organisations willing to engage in strategic litigation / willing to build up strategic litigation expertise in the area of gender equality / willing to act as multipliers in this area.
- Creation of ‘strategic litigation expertise hubs’ within Member States – i.e. organisations/networks/ academic institutes that are specifically designed:
 - to build up country-specific strategic litigation expertise in the area of non-discrimination;
 - to engage in strategically disseminating this knowledge across advocacy organisations and other interested entities within their Member State;
 - to build up and maintain Europe-wide networks on this particular issue, also by connecting to already existing networks that work in related areas (such as EQUINET, ENCLE, EELN, etc.);
 - to build up and maintain communication with other organisations and networks engaging in strategic litigation in other areas, such as ILGA Europe (engaging in strategic litigation on LGBTIQ rights) or Greenpeace, in order to learn from each other’s experience;
 - to maintain close communication with the European Commission and other stakeholders to provide updates and exchange on recent developments and best practice examples.
- Supporting the creation of (strategic litigation) law clinics that (also) engage in gender equality issues.
- Supporting (transnational) exchange on strategic litigation, i.e. by providing resources/platforms/ knowledge on such practices.

4.2.3 Socio-Legal Environment

Awareness.⁴⁰⁸ As mentioned previously, a lack of awareness regarding the existence and usefulness of strategic litigation has negative effects on its development. Similarly, limited knowledge of discrimination laws on the part of legal practitioners and/or victims will frustrate litigation.

Lack of trust / fear of negative consequences.⁴⁰⁹ A lack of trust in institutional structures or the fear of negative consequences (such as re-victimisation) can prevent strategic litigation, since it might make it difficult for potential strategic litigators to find potential clients for strategic litigation projects.

⁴⁰⁶ See *supra*, sections 2.3-2.4.

⁴⁰⁷ See *supra*, section 2.4.

⁴⁰⁸ See *supra*, section 2.6.

⁴⁰⁹ See *supra*, section 2.6.

High risks / better alternatives.⁴¹⁰ Strategic litigation will not be a viable route for civil society organisations if the risks connected to litigation are particularly high (such as generating backlash, high costs in the event of losing a case, etc.), or if better avenues for implementing a social change agenda exist – such as formal/informal channels of communication with (political) decision makers. The latter deterrent to strategic litigation, however, is not an obstacle *per se* and does not need to be amended.

RECOMMENDATIONS:

- Support awareness-raising measures in the area of gender equality / strategic litigation.
- Encourage reducing the risks for (strategic) litigation, e.g. by erecting funds to take over litigation costs and judicial fees.

4.3 Summary of recommendations

Research:

- Support of research regarding strategic litigation in the area of gender equality, such as empirical/ qualitative studies on the occurrence of strategic litigation, legal scholarship on the matter, etc..
- Support and funding of publications on these issues.

Legal factors:

- Support for the creation and development of pro bono departments in law firms.
- Encouraging the review of minimum fee provisions for lawyers.
- Research on the effect of success-based and/or contingency fees in the area of gender equality, and consideration of the introduction of litigation-friendly fee schemes.
- Encouraging the expansion of legal aid to organisations engaging in (strategic) gender equality litigation.
- Encouraging the expansion of standing rights, *actio popularis* claims and collective actions to organisations in the area of gender equality.
- Generally: encouraging the development of strong legal rights for employees / potential victims of discrimination (including the award of damages for discrimination that actively serves as a deterrent for future wrongdoing).

Agents of strategic litigation:

- Supporting the creation and development of expertise regarding strategic litigation in the area of gender equality; e.g. by supporting gender equality organisations / law clinics / other organisations willing to build up this expertise.
- Providing extensive resources (i.e. grants, programmes or funding) specifically for civil societal / academic organisations willing to engage in strategic litigation / willing to build up strategic litigation expertise in the area of gender equality / willing to act as multipliers in this area.
- Creation of ‘strategic litigation expertise hubs’ within Member States – i.e. organisations/networks/ academic institutes that are specifically designed:
 - to build up country-specific strategic litigation expertise in the area of non-discrimination;
 - to engage in strategically disseminating this knowledge across advocacy organisations and other interested entities within their Member State;
 - to build up and maintain Europe-wide networks on this particular issue, also by connecting to already existing networks that work in related areas (such as EQUINET, ENCLE, EELN, etc.);
 - to build up and maintain communication with other organisations and networks engaging in strategic litigation in other areas, such as ILGA Europe (engaging in strategic litigation on LGBTIQ rights) or Greenpeace, in order to learn from each other’s experience;
 - to maintain close communication with the European Commission and other stakeholders to provide updates and exchange on recent developments and best practice examples.

410 See *supra*, section 2.6.

- Supporting the creation of (strategic litigation) law clinics that (also) engage in gender equality issues.
- Supporting (transnational) exchange on strategic litigation, i.e. by providing resources/platforms/knowledge on such practices.

Socio-legale Environment:

- Support awareness-raising measures in the area of gender equality / strategic litigation.
- Encourage reducing the risks for (strategic) litigation, e.g. by erecting funds to take over litigation costs and judicial fees.

ANNEX 1 – Questionnaire

QUESTIONNAIRE

Definition of terms and focus of the questionnaire

Aid litigation. Strategic litigation can be distinguished from (socially motivated) litigation *without* a primary social change impetus, such as legal aid litigation.¹ However, legal aid litigation can turn into strategic litigation at some stage (in fact, both types of litigation can often overlap).² Aid litigation does not prioritise the social change goal, but the interests of the particular client. Usually, cases are not chosen based on their potential to elicit societal/legal/political change.

Cause lawyering / public interest lawyering / lawyering for social change: These terms describe the strategic use of law in order to create social/legal/political change.³ Historically, cause lawyering has been rooted in the progressive-left of the political spectrum.⁴ However, cause lawyering has also been employed by the right, for instance to *oppose* progressive change. Cause lawyering is not limited to strategic (or impact) litigation; however, this is one of its manifestations.⁵ Cause lawyering is moreover not restricted to activist lawyers, operating within or for a social movement; law school clinics, legal aid groups, or law firms with pro bono programmes can offer possibilities for cause lawyering.⁶

Class action lawsuits. Class actions are lawsuits that collect similar claims of a number of different individuals in a comparable situation (the ‘class’), which are joined together and represented uniformly by an organisation or firm.

Discrimination. If this term is not specified within the questionnaire, it refers to all possible forms of discrimination based on sex under the above-mentioned directives (79/7/EEC; 92/85/EEC; 2004/113/EC; 2006/54/EC; 2010/18/EU; 2010/41/EU; Work-life balance (soon-to be adopted)) and equal pay (Article 157 TFEU), as well as national law implementing said directives (including over-implementation).

Law (legal) clinics. A law clinic is usually situated at a university and is a method of practical law teaching. It provides both legal education to law students by engaging them in hands-on legal activity, and societal services by providing legal advice, legal aid and/or carrying out strategic litigation. More information is available on the webpage of the European Network for Clinical Education (ENCLE) at encle.org.

Outcomes of strategic litigation. Strategic litigation can have different outcomes. The most important outcomes for the purpose of this report are:

- Law reform. Strategic litigation can lead to law reform in different ways:
 - High Courts may invalidate certain provisions (judicial review).
 - High Courts may declare that the legislator needs to change certain provisions/laws/rules (judicial review).
 - Strategic litigation may incite political debate, which in turn leads to law reform.

1 Abel, R., ‘Law without Politics: Legal Aid under Advanced Capitalism’ (1985) 32 UCLA Law Review 474, 540-586.
 2 On the distinction of aid litigation and cause lawyering, see *ibid*, 540-586, or Cummings, ‘The Pursuit of Legal Rights – and Beyond’, 510.
 3 Sarat and Scheingold, ‘Cause Lawyering and the Reproduction of Professional Authority. An Introduction’, 4.
 4 Menkel-Meadow, ‘The Causes of Cause Lawyering’, 31-68.
 5 Other activities that may be summarised under these expressions are: legislative lobbying, public-private collaborations (e.g. supporting legislators as experts or consultants for law reform projects, etc.), data collection and analysis, and many more. Trubek, ‘Crossing Boundaries: Legal Education and the Challenge of the New “Public Interest Law”’, 460-466.
 6 Cummings, ‘The Pursuit of Legal Rights – and Beyond’, 525-543.

- At the CJEU level: the CJEU may declare that European law provisions require a certain interpretation, which in turn may mean that national laws that are incompatible with this interpretation need to be changed/disapplied.
- Doctrinal reform (i.e. change in interpretation):
 - High Courts may declare that a certain provision needs to be interpreted in a different way (i.e. the declaration that ‘family’ needs to include same-sex couples).
 - At the CJEU level: the CJEU may declare that European law provisions require a certain interpretation, which in turn may mean that national laws need to be interpreted accordingly.
- Public debate. Strategic litigation may incite public debate on an issue, i.e. by increasing popular awareness, media awareness, etc. This is often done by accompanying strategic litigation with media campaigns. ‘Public debate’ – for the purpose of this report – means heightened popular and media awareness of an issue, which may manifest through:
 - Calls for law reform by a number of experts, politicians / political parties, NGOs or other organisations.
 - An increase of media articles (or other contributions) on a particular issue
 - Proposals for law reform (even if they do not pass), etc..
- Backlash. Strategic litigation may also lead to backlash. This means that the counter-position of the agenda of strategic litigation has tried to achieve gains political and/or popular support. This may manifest through:
 - Adverse law reform, following a positive court decision.
 - Calls for law reform by a number of experts, NGOs or other organisations, contrary to the agenda of the strategic litigation effort.
 - An increase of adverse media articles (or other contributions) on a particular issue.
 - Proposals for adverse law reform (even if it does not pass), etc..

Strategic (impact) litigation. Strategic litigation is a form of cause lawyering. For the purpose of this work, ‘strategic litigation’ will be defined as:

- litigation which is carried out with the main purpose of effecting change that transcends the victory in a particular case.
- litigation which prioritises a specific (legal/social/political) agenda over the particular interests of a client (which does not always have to be a contradiction – however, contradictions can arise).

Litigation that starts out as non-strategic can, however, turn into strategic litigation in the course of the development of a case (for instance, if a case starts out as aid litigation but becomes politicised along the way, or if activists become involved who are pursuing a particular political agenda).

Victims of discrimination. If the term is not specified, it refers to individual victims of the above-mentioned discrimination.

ANNEX 2 – Questions

QUESTIONS

QUESTION 1 Strategic litigation – basic terms.

1.a. Is 'strategic litigation' a common term in your country's academic legal discourse? Since when? What does it usually refer to?

1.b. Is 'strategic litigation' a common term among your country's legal practitioners? Since when? What does it usually refer to?

1.c. **Note:** *Strategic litigation is often carried out by actors pertaining to the progressive political spectrum. In the area of sex discrimination, this means that strategic litigation will usually be employed to advance women's rights. However, in some countries, there may be an increase in strategic litigation pushing an anti-progressive agenda, meaning that strategic litigation may be employed to restrict/limit women's rights (for example, by emphasising employers' freedom over sex discrimination protections, or by pushing back on already established achievements by women's movements).*

YES/NO: Is there strategic litigation that aims to restrict/limit/push back against women's rights in the area of sex discrimination in your country?

If YES, please explain.

QUESTIONS 2 – 4: PRECONDITIONS FOR STRATEGIC LITIGATION IN THE AREA OF SEX DISCRIMINATION.

QUESTION 2 Judicial review & dissenting (concurring) opinions

Judicial review is one of the mechanisms enabling strategic litigation. Judicial review describes the power of the judiciary (often a constitutional court) to review acts by the legislative or the executive. When exercising judicial review, a (constitutional) court may, for instance, check a lower-order text or act (legal provision / executive act / other (binding) instrument) against a higher-order authoritative text (e.g. the constitution) and declare the lower-order text or act voidable or void (or in need of reform). Strategic litigation can (and does) make use of this mechanism.

2.a. Please enumerate the courts exercising judicial review within your system.

2.b. What are the legal requirements to forward constitutional claims in the area of sex discrimination? Please include the legal basis (also for different types of constitutional claims!)

2.c. YES/NO: Can the courts themselves review national law (on their own initiative)?

If YES: Please provide legal basis!

Dissenting/concurring opinions. The practice of including dissenting and/or concurring opinions provides valuable insights into the court's decision-finding process. Such opinions are a highly valuable resource for strategic litigation.

2.d. YES/NO: Do the judgments of these courts contain dissenting opinions?

If YES, please elaborate on the practice of providing dissenting opinions:

- Are dissenting opinions common or rare? (Common: most decisions contain dissenting opinions; rare: dissenting opinions are possible, but will only be included in exceptional cases)
- Are there usually only one or more dissenting opinions?

- YES/NO: Are concurring opinions also possible?

QUESTION 3 Overview of national system of remedies in the area of sex discrimination.

3.a. Judicial bodies, quasi-judicial bodies and others dealing with sex discrimination claims.

YES/NO: Are there specific courts, tribunals, quasi-judicial bodies or other entities available for deciding sex discrimination claims?

If YES: Please describe their mode of operation and provide legal basis!

3.b. Please describe briefly the judicial and quasi-judicial system in place to address sex-discrimination, including:

- What kind of legal remedies are available to victims? Please enumerate, and include the court that resides over the respective claim (i.e. labour courts, administrative courts, civil courts, equality body, etc.).
- If this information is available in your country: what is the average duration of sex discrimination lawsuits?

3.c. Please provide information on the time limits to forward discrimination claims / file motions / collect and provide evidence / statute of limitations / other relevant deadlines or time limits in the context of sex discrimination claims.

3.d. Legal fees.

YES/NO: Are there administrative/judicial fees involved in bringing a sex discrimination complaint at court?

If YES:

- Please describe (include all fees for applications, proceedings, motions, etc.). Please also describe different fees for lower instance / higher instance courts, if this is the case.
- Please describe how the fees are divided if the case is won/lost by the victim, or if the case ends in a different way (e.g. through a settlement).

3.e. Legal costs for representation.

Please describe the range of fees for lawyers operating in the area of sex discrimination. Include the following information:

- YES/NO: Is it common for victims of discrimination to seek professional representation by private law firms?
- YES/NO: Is there a legal cap to the fees of lawyers?
If YES: Please indicate the cap and the legal basis for it!

QUESTION 4 Legal aid & other forms of support for victims of sex discrimination.

4.a. Public legal aid.

4.a.i. YES/NO: Are there systems of legal aid in place in your country (i.e. court-appointed advocates, financial aid, waiver of costs, pro bono lawyers, etc.)?

If YES: Please describe the systems of state-run legal aid in your country, in detail, including the conditions to take advantage of these systems (i.e. proof of low income). Please also include information on:

- Court-appointed advocates.
- Legal representation by public entities and/or semi-public entities (please include respective laws!), such as chambers of commerce/labour, equality bodies, etc..
- Financial aid for specific types of law suits.
- Waiver of fees.
- Free legal advice by public institutions.
- Other types of public legal aid.

4.a.ii. Is there a specific public legal aid structure in the field of sex discrimination?

4.b. Legal aid by pro bono law firms.

YES/NO: Do law firms in your country provide pro bono support for victims of discrimination based on sex?

If YES: Is this a widespread practice, or do few firms provide such services?

4.c. Legal aid / support by NGOs and other organisations.

4.c.i. Please enumerate the organisations such as equality bodies / public agencies / NGOs / unions / chambers of labour and/or commerce / others that provide support to victims of discrimination (legal or non-legal), including the *type* of support they provide (i.e. non-binding legal advice, psychological support, support when negotiating with co-workers/employer, referrals to law firms and lawyers, legal representation at court, etc.).

4.c.ii. Which of these organisations can represent victims at courts and/or tribunals? Please specify the exact competences of these organisations, including:

- Can they represent victims only before specific tribunals, or before all courts, including constitutional courts?
- Do they usually employ legal professionals who are allowed to litigate at court, or do they usually employ non-litigators? **Note:** *If in your country, most legal professionals are usually allowed to litigate at court, please indicate this!*

4.c.iii. Please indicate whether in your country, equality bodies / quasi-judicial bodies / public agencies / semi-public organisations / or other entities can (also) provide non-victim-centred support, such as legislative lobbying, political lobbying, providing expertise to government and/or legislators, collecting data, writing reports, etc. Please specify the kind of support these entities give and include the legal basis.

LITIGATION IN SEX DISCRIMINATION CASES. QUESTIONS 5-13.

QUESTION 5 Litigators.

5.a. Please describe the different kinds of legal practice in your country in connection with litigation (i.e. barrister/solicitor system, specific permits or bar exams to practise one kind of law – such as criminal law, as opposed to general law, etc.), as well as the conditions to exercise such practice.

5.b. Please describe the conditions a legal professional has to fulfil in order to be able to litigate discrimination claims before your country's courts (i.e. law degree, bar exam, years of practice, etc.).

5.c. YES/NO: Can all qualified lawyers (i.e. lawyers who are admitted to your country's bar) litigate discrimination claims?

If NO: Please describe the conditions under which lawyers can litigate discrimination claims.

5.d. YES/NO: Can lawyers (or others) who are *not* admitted to the bar litigate discrimination claims *at court* under specific conditions (i.e. employment in an academic law clinic, in an equality body, etc.)?

If YES: What are these conditions?

5.e. YES/NO: Can lawyers (or others) who are *not* admitted to the bar litigate discrimination claims *at a non-judicial tribunal* (i.e. an equality commission, an administrative tribunal, etc.)?

If YES: What are the conditions for such representation?

QUESTION 6 – Standing rights in sex discrimination claims & collective litigation

6.a. YES/NO: Are *amicus curiae* (or similar constructions, such as accession as intervenors, etc.) allowed?

If YES:

- Please briefly explain the practice (including information on the legal basis for this practice, requirements for acting as *amicus curiae*, on whether interventions are only possible at certain stages of a case – e.g. the constitutional stage, etc.).
- Which are the organisations/bodies/institutions/etc. that usually act as *amicus curiae* in sex discrimination cases?
- What are the main functions of *amicus curiae* in sex discrimination cases (i.e. providing expertise, supporting the counsel of the victim, etc.)?

6.b. YES/NO: Is it possible to forward sex discrimination claims in the form of an *actio popularis* (or a similar instrument for collective claims)?

If YES: Please provide and explain the legal basis!

6.c. YES/NO: Are *class actions* or similar instruments (i.e. ‘*Musterfeststellungsklage*’ in Germany) available in your country in the area of sex discrimination?

If YES:

- Please provide the legal basis, including the requirements for bringing such claims.
- Please enumerate the organisations capable of bringing class actions or similar claims (including the legal basis)!
- YES/NO: Is it also possible for private actors (i.e. law firms or NGOs) to bring class actions?
- If YES:
 - Please enumerate the organisations that may bring actions in the area of sex discrimination!
 - Please enumerate the organisations that have brought actions in the area of sex discrimination!

6.d. YES/NO: Can *entities other than the victims themselves* address the courts on matters relating to discrimination based on sex (i.e. in the form of an *actio popularis*), such as public prosecutors / other public agencies / equality bodies / NGOs / unions / chambers of labour and/or commerce / others?

Note: This question is not meant to ask whether these organisations can intervene on behalf of specific victims at court (as would be the case in legal aid cases or class actions), but rather whether these organisations can raise claims in the absence of concrete victims, or if victims do not want to be involved themselves (for instance, act as the claimant/plaintiff) – see, e.g. *Feryn* [2008] ECR I-05187 (C-54/07) or *ACCEPT* [2013] ECLI:EU:C:2013:275 (C81/12).

If YES:

- Please enumerate the respective entities and describe their organisation and mode of operation, including legal specificities (i.e. whether they have procedural privileges – and which ones; whether they belong to a public body such as a ministry or state agency, etc.).
- Please include legal basis (i.e. laws, rules or regulations enabling these entities to forward these claims).

QUESTION 7 Strategic sex discrimination litigation. Overview.

7.a. YES/NO: Have laws pertaining to the area of sex discrimination been challenged in national courts / at the CJEU?

If YES: Does such litigation have the effect (or is meant to have the effect) of generating awareness / exerting pressure/influence on

- YES/NO: national legislators?
- YES/NO: government?
- YES/NO: the media?

- YES/NO: the public? (This is the case, for instance, if litigation is accompanied by media campaigns, interviews, etc.; if the organisation in question is open about having achieved a policy goal; and so on)

If YES to any of the above points: Please describe how!

7.b. Please describe specific obstacles / barriers for strategic litigation in your country

- Regarding the rules/codes of conduct for lawyers
- (for example: strategic litigation means prioritising a political/legal/social agenda over the client's immediate interests. This requires the lawyer to be open to the client about their intentions – and if the client is not on board, strategic litigation will not be an option.)
- Regarding transparency / access to justice: Please describe any legal impediments to the access to justice of a victim of discrimination, i.e. due to a lack of information on procedural requirements / lack of information regarding the material law / etc.
- Please describe any other impediments to the enforcement of a victim's claim and/or strategic litigation that you can think of.

QUESTION 8 Organisations engaging in strategic litigation.

Which are the organisations / (public) bodies / law firms / individuals engaged in strategic litigation in the area of sex discrimination in your country?

Please enumerate them! (details in questions 9 – 13!)

QUESTION 9 NGOs as litigators.

9.a. Do NGOs in your country represent victims of discrimination based on sex? Please provide their names and include webpage links to organisations, preferably in English/German/Spanish if available.

9.b. Litigation at the national level.

YES/NO: Do these NGOs engage in litigation at the national level?

If YES: Please provide at least two examples of cases reaching national courts, including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- consequences of the cases – have they led to:⁷
 - YES/NO: law reform?
 - YES/NO: doctrinal change?
 - YES/NO: public debate?
 - YES/NO: backlash?

If YES to any of these questions: please describe what exactly happened.

9.c. Litigation at the CJEU.

YES/NO: Has a case supported by such an organisation reached the CJEU?

If YES: Please provide, if possible, at least two examples, including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used at the national level (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- the type of claim brought before the CJEU (e.g. preliminary reference);
- the decision by the CJEU;
- the outcome of the respective case at the national level, including the subsequent case history (i.e. whether the case went on to a higher instance, whether and how the decisions were implemented, etc.);

7 Please check respective definitions in the terminology section!

- consequences of the case – has it led to:⁸
 - YES/NO: law reform?
 - YES/NO: doctrinal change?
 - YES/NO: public debate?
 - YES/NO: backlash?
- If YES to any of these points: Please describe what exactly happened.

9.d. Funding.

Please include information on the funding structure of these organisations, including the respective laws and regulations (if applicable). Include also information on whether and how they can apply for / or are dependent on:

- public funding, including subventions/subsidies;
- private funding (i.e. via donations or other private contributions) – i.e. what are the legal requirements for being able to collect contributions by private donors?

9.d.i YES/NO: Are these organisations fully dependent on public subsidies?

If NO:

- Please describe the other sources of income for these organisations.
- If information is available, please also describe the percentage of funding that comes from the different sources (e.g. 60 % federal funding, 30 % state funding, 20 % funding by Foundation XY, 10 % funding by donations).

QUESTION 10 Legal representation by private law firms.

10.a. YES/NO: Do law firms in your country represent victims of discrimination based on sex?

If YES: Do they provide pro bono representation?

If YES: Please include webpage links to the firms, if available in English/German/Spanish.

10.b. Litigation at the national level.

YES/NO: Did such cases reach national (high) courts?

If YES: Please provide at least two examples (if possible) of cases reaching national courts, including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- consequences of the cases – have they led to:⁹
 - YES/NO: law reform?
 - YES/NO: doctrinal change?
 - YES/NO: public debate?
 - YES/NO: backlash?

If YES to any of these questions: Please describe what exactly happened.

10.c. Litigation at the CJEU.

YES/NO: Has a case supported by a private law firm reached the CJEU?

If YES: Please provide at least two examples (if possible), including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used at the national level (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- the type of claim brought before the CJEU (e.g. preliminary reference);

⁸ Please check respective definitions in the terminology section!

⁹ Please check respective definitions in the terminology section!

- the decision by the CJEU;
 - the outcome of the respective case at the national level, including the subsequent case history (i.e. whether the case went on to a higher instance, whether and how the decisions were implemented, etc.);
 - consequences of the case – has it led to:¹⁰
 - YES/NO: law reform?
 - YES/NO: doctrinal change?
 - YES/NO: public debate?
 - YES/NO: backlash?
- If YES to any of these points: please describe what exactly happened.

10.d. If publicly available, please include information on budget allocations of law firms for pro bono activities (e.g. percentage of the total budget available).

QUESTION 11 Law (legal) clinics.

‘Clinical legal education is a legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time.’¹¹

11.a. YES/NO: At one or more universities in your country, are there law clinics operating in the area of gender equality?

If YES: Please name them and describe their modes of operation! (include webpage links to organisations, if available in English/German/Spanish)

11.b. Litigation at the national level.

YES/NO: Do the law clinics in your country engage in litigation at the national level?

If YES: Please provide at least two examples (if possible) of cases reaching national courts, including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- consequences of the cases – have they led to:¹²
 - YES/NO: law reform?
 - YES/NO: doctrinal change?
 - YES/NO: public debate?
 - YES/NO: backlash?

If YES to any of these questions: Please describe what exactly happened.

11.c. Litigation at the CJEU.

YES/NO: Has a case supported by a law clinic reached the CJEU?

If YES: Please provide at least two examples (if possible), including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used at the national level (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- the type of claim brought before the CJEU (e.g. preliminary reference);
- the decision by the CJEU;

¹⁰ Please check respective definitions in the terminology section!

¹¹ European Network for Clinical Legal Education (ENCLE).

¹² Please check respective definitions in the terminology section!

- the outcome of the respective case at the national level, including the subsequent case history (i.e. whether the case went on to a higher instance, whether and how the decisions were implemented, etc.);
 - consequences of the case – has it led to:¹³
 - YES/NO: law reform?
 - YES/NO: doctrinal change?
 - YES/NO: public debate?
 - YES/NO: backlash?
 If YES to any of these points: Please describe what exactly happened.

11.d. Please include information on the funding structure of these organisations, including respective laws and regulations or university budget plans (if publicly available).

QUESTION 12 Equality bodies / unions / political bodies / etc.

12.a. YES/NO: Do equality bodies / unions / workers' organisations (such as chambers of labour/commerce) / political parties/organisations or other entities represent victims of discrimination based on sex at court, AND/OR forward discrimination claims on their own accord?

If YES: Please provide their names (include webpage links to organisations, if available in English/German/Spanish).

12.b. Litigation at the national level.

YES/NO: Do these organisations engage in litigation at the national level?

If YES: Please provide at least two examples (if possible) of cases reaching national courts, including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- consequences of the cases – have they led to:¹⁴
 - YES/NO: law reform?
 - YES/NO: doctrinal change?
 - YES/NO: public debate?
 - YES/NO: backlash?

If YES to any of these questions: Please describe what exactly happened.

12.c. Litigation at the CJEU.

YES/NO: Has a case supported by such an organisation reached the CJEU?

If YES: Please provide at least two examples (if possible), including:

- the history of the respective cases (who are the plaintiffs, what are the facts of the case, etc.);
- the type of action used at the national level (e.g. class action / *actio popularis* / etc.);
- the actors involved in the case, including their role (e.g. law firm acting as counsel to victim, equality body giving legal advice, organisations acting as *amicus curiae*, etc.);
- the type of claim brought before the CJEU (e.g. preliminary reference);
- the decision by the CJEU;
- the outcome of the respective case at the national level, including the subsequent case history (i.e. whether the case went on to a higher instance, whether and how the decisions were implemented, etc.);
- consequences of the case – has it led to:¹⁵
 - YES/NO: law reform?

13 Please check respective definitions in the terminology section!

14 Please check respective definitions in the terminology section!

15 Please check respective definitions in the terminology section!

- YES/NO: doctrinal change?
- YES/NO: public debate?
- YES/NO: backlash?

If YES to any of these points: Please describe what exactly happened.

12.d. Please include information on the funding structure of these organisations, including the respective laws and regulations.

QUESTION 13 European / Transnational Networks.

YES/NO: Are any of the entities mentioned in Questions 8-12 participating in transnational / European networks that also engage in / are interested in strategic litigation (i.e. the European Network of Equality Bodies)?

Note: *Transnational / European networks are networks that are comprised of a number of different NGOs/ institutions / equality bodies / other organisations in multiple countries, working in the same field (i.e. gender equality). Usually, these networks operate as ‘umbrella organisations’. They provide a platform for exchange on the organisations’ activities, information on European issues in the field of expertise of the participating organisations, support and expertise for their members, etc.*

‘Interested in strategic litigation’ means that these networks provide information and exchange/expertise/ support for member organisations that engage in strategic litigation (or plan to engage in strategic litigation). It can also mean that these networks engage in strategic litigation themselves, i.e. by acting as amicus curiae in sex discrimination cases before the CJEU.

If YES: Please explain!

QUESTIONS 14-15: ANALYSIS

QUESTION 14 Best practice examples – national level / CJEU level

14.a. From the cases mentioned above, please pick two best-practice-examples of strategic litigation at the *national* level and include information on factors which contributed to the success of these cases.

14.b. From the cases mentioned above, please pick two best-practice-examples of strategic litigation at the *CJEU* level and include information on factors which contributed to the success of these cases.

14.c. Please describe at least one case at the *national* level that was *not* successful in terms of strategic litigation (if available) and include information on factors which contributed to the failure of this case (e.g. limited funding, popular backlash, etc.).

14.d. Please describe at least one case at the *CJEU* level that was *not* successful in terms of strategic litigation (if available) and include information on factors which contributed to the failure of this case (e.g. limited funding, limited awareness of EU law, popular backlash, etc.).

QUESTION 15 Awareness of EU law

15.a. YES/NO: Is the CJEU’s reasoning on issues related to sex discrimination usually taken into consideration by judges in their own decisions in the area of sex discrimination?

If NO, please explain!

15.b. YES/NO: Are lawmakers / government officials aware/respectful of CJEU decisions on sex discrimination (also regarding CJEU decisions arising in other countries)?

If NO, please explain!

15.c. YES/NO: Is the CJEU's reasoning on these issues usually taken into consideration by lawmakers / government officials? If no, please explain!

If NO, please explain!

QUESTION 16 Referral patterns

16.a. In your country, which courts are

- most likely to refer (questions to the CJEU)?
- less likely to refer?

16.b. YES/NO: Do courts usually follow litigants' suggestions to refer?

16.c. YES/NO: Are there particular difficulties with obtaining referrals at the CJEU from national courts in the field of gender equality?

If YES: Please describe these difficulties!

ANNEX 3 – Index & Bibliography

CJEU – cases (chronological order)

- Case 26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1
- Case C-6/64, *Costa v ENEL* [1964] ECLI:EU:C:1964:66
- Case C-80/70, *Gabrielle Defrenne v Belgian State (Defrenne I)* [1971] ECLI:EU:C:1971:55
- Case C-43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne II)* [1976] ECLI:EU:C:1976:56
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- Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECLI:EU:C:1997:533
- Case C-321/95 P, *Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* [1998] ECLI:EU:C:1998:153
- Case C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECLI:EU:C:2000:163
- Case T-191/99, *David Petrie, Victoria Jane Primhak, David Verzoni and Others v Commission of the European Communities*, ECLI:EU:T:2001:284 [2001] ECLI:EU:T:2001:284
- Case C-224/01, *Gerhard Köbler v Republik Österreich* [2003] ECLI:EU:C:2003:513
- Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECLI:EU:C:2004:584
- Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECLI:EU:C:2005:709
- Case T-36/04, *Association de la Presse Internationale ASBL (API) v Commission of the European Communities* [2007] ECLI:EU:T:2007:258
- Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECLI:EU:C:2008:397
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