Private-Interests Actors as Catalysts for Actions under Public Law

Towards a Research Agenda for Legal Mobilisation of Private-Interests Actors in the Preliminary Ruling Procedure

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Abstract

For more than two decades now, scholars of European legal mobilisation have looked at the role of litigants and their lawyers in the 'judicial construction of Europe' through the preliminary ruling procedure before the Court of Justice of the EU (CJEU). Looking at who are these actors that have raised claims based on EU law before national courts, the literature has focused predominantly on the area of EU non-discrimination, migration and environmental law. Scholars wrote on the essential role of equality bodies, trade unions and NGOs in pushing for the development of EU law and policy in these fields through preliminary questions to the CJEU. The role of private-interests actors in EU legal mobilisation – undertakings, companies, business, industry and other for-profit actors – has, by contrast, been neglected.

Building on five main arguments – the origin of the EU as an economic organisation, the economic focus of EU legislation, the concentration of referrals in regions with a strong commercial/trade focus, the role of transnational activity on the referral rates, and commercial/trade focus of preliminary questions – this article demonstrates that private-interests actors are overlooked yet extremely important catalysts for actions under public law. The aim of this article is to set a research agenda on the role of private-interests actors as important Repeat Players in EU legal mobilisation via the preliminary ruling procedure. Questions that this article raises are as follows: who are these private-interests actors that mobilise EU law? What are their motivations and strategies? And how do these differ from those of public-interests actors? This article aims to identify a critical role that private-interests actors play in shaping legal mobilisation and (ultimately) legal integration in the EU.

Keywords: legal mobilisation, private-interests actors, preliminary ruling procedure, CJEU, interest groups.

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'Wo da keen Kläger, da kein Richter' –
'Where there is no litigant, there is no judge'.

1 Introduction

The preliminary ruling procedure established by Article 267 of the Treaty of the Functioning of the European Union (TFEU) has been central to the constitutionalisation of EU law. Giving national judges the power to ask the Court of Justice of the European Union (CJEU) questions on the interpretation and validity of EU law paved the way for the legal, political, social and economic integration of Europe. Yet while scholars agree on the importance of the procedure for the construction of the EU as we know it today, they tend to disagree on what drives national judges' participation in the process.[1]

National judges' participation in Article 267 TFEU proceedings has captured the attention of scholars from different disciplines – law, social-, political science, sociology and economics – for more than three decades already. While early explanations draw on the plain meaning of Article 267(3) TFEU and courts' obligation to refer,[2] scholars later found an explanation in the empowerment of lower courts.[3] Later research drew empirical conclusions based on a large-scale data set on Member States' referral rates. The variations in referral rates across time, Member States, legal areas and levels of judiciary hierarchy were attributed to, among others, in-

1 A.S. Sweet and T.L. Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95', 5(1) *Journal of European Public Policy* 67 (1998).

2 M. Claes, *The National Courts' Mandate in the European Constitution* (2004), at 247.

3 J.H.H. Weiler, 'The Transformation of Europe', 100 *The Yale Law Journal* 2403-2483 (1991); J.H.H. Weiler, 'A Quiet Revolution: "The European Court of Justice and Its Interlocutors"', 26(4) *Comparative Political Studies* 510-34 (1994); K.J. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in A.-M. Slaughter (ed.), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context* (1998) 227-52; K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *Oxford Studies in European Law* (2001).

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tra-EU trade,[4] Member States' legal tradition,[5] public support for EU integration[6] and population size.[7]

One factor, in particular, has sparked a new area of research on legal mobilisation. In the last two decades, a research agenda emerged on the role of private and public-interests actors (litigants and their lawyers) in mobilising EU law and contributing to the judicial construction of Europe. This agenda builds on the idea that the more judicialised a Member State is,[8] the more opportunities there are for judges to turn to the CJEU with a preliminary question.[9] After all, without individual litigants, there would be no cases presented to a national judge and no opportunities to submit preliminary questions to the Luxembourg Court.[10] Because, as the German saying goes: *Wo da kein Kläger, da kein Richter* (Where there is no litigant, there is no judge).

Indeed, some of the most iconic rulings of the CJEU were delivered as the result of legal mobilisation,[11] that is – of the strategic use of EU law to promote societal and political changes. There is not a single EU law student who is not familiar with the CJEU's landmark *Costa v ENEL* ruling,[12] where the Court established the principle of EU law primacy. Yet only a few know that the ruling came as a result of a carefully assembled lawsuit that mobilised EU law to challenge electricity nationalisation in Italy during the Cold War.[13] Examples such as these inspired scholars to look at who are these actors who bring cases to the CJEU, what motivates their actions under EU law, what political, societal or other type of change they pursue, and what are the strategies they employ to achieve their goals.

Looking at the literature on legal mobilisation in the EU, however, one can notice that the research agenda so far has focused on how legal mobilisation (including strategic litigation) of civil society actors complemented and pushed for some of the most important legislative and executive policy changes in the field of equality law, environment law and migration law. Some of the most prominent names in the field include Lisa Conant,[14] Rachel Cichowski (gender discrimination and environment),[15] Claire Kilpatrick and Elise Muir (gender and racial discrimination),[16] Karen Alter and Jeannette Vargas (gender discrimination),[17] Angelina Atanasova and Jeff Miller (disability discrimination),[18] Virginia Passalacqua (migration law),[19] and Jasper Krommendijk (environment and migration law).[20] The basic idea behind their claims is that civil society and interest groups facilitate the pursuit of legal rights by providing information and financial support which are both necessary to assist litigation before courts.[21] Once the national judge is persuaded to make a referral under Article 267 TFEU, the CJEU will act as an ally to the civil society,[22] pushing for deeper integration.

Thus, when looking at the literature on judicial construction of EU law, there has been extensive research on the role of actors that pursue public interests, either non-discrimination, equal treatment or the protection or environment, which in this research I refer to as public-interests actors. These include NGOs, equality bodies, trade unions, human rights associations and other similar bodies. How private-interests actors, that is –

4 Sweet and Brunell (1998), above n. 1.

5 C.J. Carrubba and L. Murrah, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union', 59(2) *International Organization* 399-418 (2005).

6 W. Mattli and A.-M. Slaughter, 'Law and Politics in the European Union: A Reply to Garrett', 49(1) *International Organization* 183-90 (1995).

7 M. Vink, M. Claes & C. Arnold, *Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis* (2009); but see M. Wind, D.S. Martinsen & G.P. Rotger, 'The Uneven Legal Push for Europe Questioning Variation When National Courts Go to Europe', 10(1) *European Union Politics* 63-88 (2009): for opposite conclusion.

8 The term 'judicialised Member State' comes from the research by Vink et al., who rely on countries' litigation rates, that is, the number of first instance civil and administrative litigious incoming cases, per 100,000 inhabitants.

9 Vink, Claes & Arnold, above n. 7; Wind, Martinsen & Rotger, above n. 7.

10 W. Mattli and A.-M. Slaughter, 'Revisiting the European Court of Justice', 52(1) *International Organization* 186 (1998).

11 E.g. Case 6/64 *Costa* v. *ENEL 6/64*, [1964] ECR 585; Case 43/75 *Defrenne* v. *Sabena*, [1976] ECR 456; Case 184/83 *Hofmann* v. *Barmer Ersatzkasse*, [1984] ECR 3048; Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn NV*, [2008] ECR I-5187.

12 Case 6/64 *Costa* v. *ENEL 6/64*, [1964] ECR 585.

13 See A. Arena, 'How European Law Became Supreme: The Making of Costa v. ENEL', *Jean Monnet Working Paper Series* 2018 for the explanation of how Costa became the perfect plaintiff for a lawsuit against ENEL.

14 L.J. Conant, *Justice Contained: Law and Politics in the European Union*, 2018, www.degruyter.com/doi/book/10.7591/9781501722646.

15 R.A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (2007), https://doi.org/10.1017/CBO9780511491924; R.A. Cichowski, 'Integrating the Environment: The European Court and the Construction of Supranational Policy', 5(3) *Journal of European Public Policy* 387-405 (1998); R.A. Cichowski, *The Institutionalization of Sex Equality for Europe: Women Activists and the European Court* (2000); R.A. Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism', 38(3) *Law & Society Review* 489-512 (2004).

16 E. Muir and S. Kolf, 'Belgian Equality Bodies Reaching out to the CJEU: EU Procedural Law as a Catalyst', in E. Muir, C. Kilpatrick & B. De Witte (eds.), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum*, vol. 2017 (EUI Working Paper, 2017) 21-33.

17 K.J. Alter and J. Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', 33(4) *Comparative Political Studies* 452-82 (2000).

18 A. Atanasova and J. Miller, 'Collective Actors and EU Anti-Discrimination Law in Denmark', in E. Muir, C. Kilpatrick, J. Miller, and B. De Witte, *Collective Enforcement of Anti-Discrimination in Denmark. How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination and Other Examples. European University Institute*, vol. 17 (2017) 43-54.

19 V. Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights', 58(3) *Common Market Law Review* 751-776 (2021); V. Passalacqua, 'Who Mobilizes the Court? Migrant Rights Defenders before the Court of Justice of the EU', 15(2) *Law and Development Review* 381-405 (2022), https://doi.org/10.1515/ldr-2021-0102.

20 J. Krommendijk and K. van der Pas, 'To Intervene or Not to Intervene: Intervention before the Court of Justice of the European Union in Environmental and Migration Law', 26(8) *The International Journal of Human Rights* 1394-1417 (2022), https://doi.org/10.1080/13642987.2022.2027762; J. Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration', 10 *European Journal of Legal Studies* 101 (2017).

21 C. Lisa, 'Europeanization and the courts: Variable patterns of adaptation among national judiciaries', Transforming Europe: Europeanization and domestic change, 98-99 (2001), in M.G. Cowles, J. Caporaso, and T. Risse, *Transforming Europe: Europeanization and domestic change*. Cornell University Press, 2019.

22 For a notion of the CJEU as a 'potential ally' for the litigants, see Mattli and Slaughter (1995), above n. 6.

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those that have their private, self-interests in the core of their legal actions (i.e. undertakings, companies, businesses, industry and other for-profit-bodies), mobilise EU law to protect their prerogatives and which strategies they use has received less attention. This article engages with several reasons concerning why the role of private-interests actors in legal and judicial construction of EU law should be theoretically and empirically covered by research on legal mobilisation in the EU. These reasons include the origin of the EU as an economic organisation, the subject matter of EU legislation, the subject matter of the preliminary questions submitted to the CJEU so far, the geographical origin of the preliminary questions, as well as the role of translational activity on the number of referrals by national courts.

This article is structured as follows. Section Two starts by exploring the notion of legal mobilisation and its role in the process of European integration. Section Three presents previous literature on the role of public-interests actors – NGOs, civil society, trade unions and other non-profit organisations – in the preliminary ruling procedure and discusses their motivations and strategies for reaching the CJEU. Section Three further introduces the role of private-interests actors – undertakings, companies, business, industry and other for-profit-organisations by looking at some most important, albeit limited, literature on the topic. Section Four lists five main reasons why private-interests actors should be covered by the literature on legal mobilisation in the EU. Finally, building on the literature on legal mobilisation, Section Five looks at the questions of who these private-interests actors that mobilise EU law are, what motivates their actions, what strategies they use to enhance their rights and, most importantly, how these incentives, motivations, and strategies compare with those developed by public-interests actors. By doing so, Section Five sets a research agenda on the role of private-interests actors in EU legal mobilisation, more specifically, the preliminary ruling procedure.

The added value of this research lies in setting a research agenda on the role of private-interests actors in shaping legal mobilisation and (ultimately) legal integration in the EU. While research on the role of private-interests actors in EU integration does exist, most notably the work of Mattli and Slaughter,[23] Claes and De Witte,[24] Kelemen[25] and Pavone,[26] this research does not provide a full understanding of motivations and strategies of private-interests actors in light of the legal mobilisation literature.

23 Mattli and Slaughter (1998), above n. 10, at 177-209.

24 M. Claes and B. De Witte, 'The European Court and National Courts, Doctrine and Jurisprudence: Legal Change in Its Social Context, Report on the Netherlands', *Working Paper* 1995, https://cadmus.eui.eu/handle/1814/1401.

25 R.D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (2011).

26 T. Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa', 53(3) *Law & Society Review* 851-88 (2019), https://doi.org/10.1111/lasr.12365.

2 The Origin of Legal Mobilisation in the EU

The concept of legal mobilisation was first coined by the US political science literature. One of the earliest (and today's most cited) definitions states that the law 'is mobilized when a desire or want is translated into a demand as an assertion of one's rights'.[27] In a narrow sense, legal mobilisation involves high-profile litigation efforts for (or sometimes against) social change. In a broader sense, it involves any type of process by which individuals and/or collective actors invoke legal norms to influence policy, culture or behaviour.[28] In a narrower sense, legal mobilisation includes action that is conducted or supported by collective actors 'that seek to implement a change in the status quo that transcends the individual interest of the parties'.[29] In that sense, civil society is an important element of legal mobilisation.[30] Legal mobilisation should be distinguished from other similar terms which are often used as synonyms. The most common one is strategic litigation, a term which is narrower from legal mobilisation and falls under the legal mobilisation umbrella. This is because strategic litigation is one way through which the law can be mobilised.[31] Furthermore, the 'strategic' is not the necessary element for an action to be considered legal mobilisation.[32] The term legal mobilisation is preferred over strategic litigation 'because of the rich conceptual and analytical framework underlying it'.[33] Finally, I would like to stress that, even though both private- and public-interests actors often use lobbying in their work, lobbying should not be confused with legal mobilisation. The difference is in the target of the effort: while lobbyists attempt to influence the legislature (or the government), legal mobilisation targets the judiciary as a main median of legal (but also social, political and economic) change.

Scholarly interest in how individuals and collective actors mobilise law to spark societal or political change has long featured in the US political science and socio-legal literature.[34] In Europe, by contrast, the ques-

27 F.K. Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System', 77(3) *American Political Science Review* 700 (1983); in L. Vanhala, 'Legal Mobilization', in *Oxford Bibliohraphies* (2011), https://doi.org/10.1093/obo/9780199756223-0031.

28 Vanhala, above n. 27.

29 *Ibid.*

30 Passalacqua (2022), above n. 19, at 381.

31 K. van der Pas, 'Conceptualising Strategic Litigation', 11(6[S]) *Oñati Socio-Legal Series* S116-45 (2021).

32 See Passalacqua (2022), above n. 19; based on M. Baumgärtel, 'Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability', 20(3) *Human Rights Law Review* 602-6 (2020).

33 Passalacqua (2022), above n. 19, at 381.

34 M. McCann, 'Litigation and Legal Mobilization',, in G.A. Caldeira, R.D. Kelemen, and K.E. Whittington, *The Oxford Handbook of Law and Politics* (2008), 522-540 ; M.W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994); Zemans, above n. 27; L.B. Nielsen, R.L. Nelson & R. Lancaster, 'Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States', 7(2) *Journal of Empirical Legal Studies* 175-201 (2010).

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tion of how litigants mobilise EU law to promote their rights and to achieve desired policy changes is of a more recent date. It started during the 1990s when, in the words of Mattli and Slaughter, 'political scientists have discovered the European Court of Justice'.[35] The most heated debate at that time on what drives the process of European integration arose between neofunctionalists and intergovernmentalists. While intergovernmentalists emphasised the leading role of Member States' governments in the process of European legal integration,[36] neofunctionalists saw the CJEU as the main motor behind legal, political and economic integration of the continent.[37] The power behind the expansion of EU law has, according to neofunctionalists, been the cooperation between Member States' judges, lawyers, litigants and the CJEU – a relationship that has not been foreseen by national governments.[38] This was the first time that litigants and their lawyers received recognition in the literature on European integration.

This marked a further shift in a perspective: from top-down to bottom-up. By contrast to the top-down, the CJEU-centric perspective, which takes the Court's case law as a point of departure, the bottom-up approach looks at the litigants, their motivations and strategies.[39] However, while EU law has arguably presented new opportunity structure for litigants,[40] the bottom-up approach has one important obstacle: access to the Court. EU Treaties make it difficult (or do not foresee it at all) for an individual to access the Court. The right of initiative in Article 258 and 259 TFEU actions for infringement of EU law has been given to a narrow set of applicants: the Commission and the Member States' governments. Actions for annulment (Art. 263 TFEU) and actions for a failure to act (Art. 265 TFEU) are similarly reserved for privileged applicants (EU institutions and Member States' governments), with individuals (natural and legal persons) who are not the addressees of an EU act having to prove either 'direct'[41] or 'direct and individual concern', with these latter criteria further toughened by the Court in Plaumann.[42]

There is, however, an indirect action before the CJEU through which natural and legal persons can protect their rights and interests under EU law: the preliminary ruling procedure under Article 267 TFEU. It is, thus, unsurprising that the role of litigants' and interest groups received most attention in the context of this procedure. Already in 1994, Weiler wrote that

> the overwhelming number of preliminary references arise in the context of litigation before national courts in which individuals seek to enforce, to their benefit, Community obligations against their own governments or other national public authorities.[43]

In a similar vein, Slaughter et al. argued that 'litigants, whether in the form of individuals … or pressure groups, have played a significant part in the development of substantive [EU] law'.[44] What motivates litigant's actions and interest in Article 267 proceedings is the prospect of being afforded more rights under EU law than they would otherwise get under national law. Litigants and their interests have been seen as providing 'fuel for the machine'.[45]

Tridimas and Tridimas wrote that the demand for preliminary rulings can best be understood as an involving interaction among litigants, national courts and the CJEU.[46] Litigants are the primary source of demand for preliminary rulings and their ultimate recipients.[47] Conant even challenged the predominant view that it was the CJEU's activism that brought important policy and institutional changes in the Member States. Instead, she argued that, because policymaking capability of the CJEU is limited by a number of institutional constraints (such as the Member States' disregard of policy implications of the CJEU's judgments), the CJEU depends heavily on the support of powerful institutional and organisational actors who will respond to its decisions. In other words, the ability of the CJEU to make policies will depend on the capacity of different actors to mobilise legal and political pressure against governments to either support or oppose a CJEU's ruling.[48] Alter and Vargas, for example, wrote how the Equal Opportunities Commission in the UK used the preliminary ruling procedure and the CJEU's case law to force a Conservative British government to make considerable changes in their equality policy, even in the time of British resistance towards the EU and EU social policy.[49] This once again highlights the importance of bottom-up approach

35 Mattli and Slaughter (1998), above n. 10, at 177.

36 G. Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market', 46(2) *International Organization* 533-60 (1992); G. Garrett, R.D. Kelemen & H. Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union', 52(1) *International Organization* 149-76 (1998); A. Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community', 45(1) *International Organization* 19-56 (1991).

37 A.M. Burley, and W. Mattli, 'Europe before the court: A political theory of legal integration', 47(1) *International organization*, 41-76 (1993).; Sweet and Brunell (1998), above n. 1; W. Sandholtz and S. Sweet, *European Integration and Supranational Governance* (1998); Carrubba and Murrah, above n. 5.

38 Burley and Mattli, above n. 37, at 53.

39 J. Hoevenaars, *A People's Court? A Bottom-up Approach to Litigation before the European Court of Justice* (2018); Passalacqua (2021), above n. 19; Passalacqua (2022), above n. 19.

40 Conant, above n. 14.

41 In the case of acts of general application falling into the category of 'regulatory act' that does not entail implementing measures, individuals have to only prove direct concern.

42 Case 25/62 *Plaumann & Co* v. *Commission*, [1963] ECR 95.

43 Weiler (1994), above n. 3, at 518.

44 A.-M. Slaughter, A.S. Sweet & J.H.H. Weiler, eds., *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context* (1998), at 222.

45 *Ibid*., at 310.

46 G. Tridimas, and T. Tridimas, 'National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure', 24(2), *International review of Law and Economics*, 125-145 (2004).

47 *Ibid*., at 142.

48 L.J. Conant, *Justice contained: Law and politics in the European Union*. Cornell University Press (2002): 23-24.

49 K.J. Alter, 'The European Union's Legal System and Domestic Policy', 54(3) *International organization*, 489-518. (2000); Alter and Vargas, above n. 17, at 489.

and the role of litigants in the process of European integration.

The next section will discuss some of the most important literature on legal mobilisation in the EU, which has focused primarily on the role of public-interests actors: civil society, NGOs, trade unions, equality bodies and other non-profit organisations. However, in line with the aim of this article, the section will also introduce private-interests actors – undertakings, businesses, companies, industry and other for-profit organisations – as important catalysts for actions under the preliminary ruling procedure.

3 Legal Mobilisation in the EU: From Public-Interests to Private-Interests Actors

Socio-legal literature on legal mobilisation distinguishes between two types of players: One-Time-Shooters and Repeat Players. The first category, One-Time-Shooters, are those that typically bring one claim before a court and, irrespective of whether they win or lose the case, their litigation stops there. These actors can also be seen as more isolated, inexperienced and equipped with limited resources and narrow network. Repeat Players, by contrast, are actors with active litigation strategies, sufficient financial and human resources, broad network, high familiarity with the law, judicial systems and processes and strong links with other institutions (judicial, executive, private).[50]

It is the Repeat Players that have played an especially important role in the process of deepening and broadening of EU law. As noted by Mattli and Slaughter, there are two categories of Repeat Players: public-interests pressure groups and large corporate players.[51] It is the first category that has dominated the literature on European legal mobilisation since the late 1990s. The pioneer in the field, Rachel Cichowski, looked at the role of legal mobilisation in two legal domains: in the development of the EU's sex equality law through the constitutionalisation of Article 119 EEC[52] and the construction of European environmental law.[53] Based on the comprehensive empirical and historical analysis of gender equality and environmental protection law across fifteen Member States and over thirty years, Cichowski uncovered complex linkages between strategic litigation, legal mobilisation and decision-making in the EU. According to Cichowski, EU law rules and the case law of the CJEU offer to social activists the opportunities to bring new claims. Social activists then mobilise and exploit these opportunities, giving the CJEU means to clarify and construct new EU law rules. Once the Court grants access to new areas of litigation, actors will push for greater inclusion.[54] This is referred to in political science literature as the spillover effect.[55]

Interest groups' power lies not only in mobilising opportunities offered by EU law but also in facilitating the pursuit of legal rights by providing information and financial support which are both necessary to assist litigation before courts.[56] The Feryn case on the discriminatory recruitment policy, for example, was completely driven by the Belgian equality body CGKR.[57] Following the interview result with lawyers, Muir and Kolf demonstrated that the Feryn case was so complex and financially demanding that it could never have been brought by an average citizen.[58] Instead, it was the equality body which provided expertise and financial support that prompted the request for the preliminary ruling.[59]

Furthermore, by exploring the origin of preliminary rulings in Feryn,[60] Rosselle[61] and Achbita,[62] Muir demonstrated that Belgian equality bodies had a 'a very strong influence on the very drafting of the preliminary questions brought before the Court'.[63] Similar conclusions were reached by Chalmers and Chaves, who wrote that although it is the national court which formally makes a referral to the CJEU, references are often drafted by litigants. 'It is highly unusual [...] for a national court to refer without one litigant pushing for it.'[64] National courts are, thus, only the gatekeepers of the procedure who respond to litigants' demands.[65]

In the field of migration law, Passalacqua uncovered and mapped collective actors, which she refers to as 'migrant rights defenders' that embraced the potential of the preliminary ruling procedure as a mean to challenge restrictive national laws and to create a fundamental rights- oriented approach to EU migration law.[66] Finally,

50 M. Galanter, 'Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change', 9(1) *Law & Society Review* 95-160 (1974), https://doi.org/10.2307/3053023; in M.-P. Granger, 'States as Successful Litigants before the European Court of Justice: Lessons from "Repeat Players" of European Litigation', 2(1) *Croatian Yearbook of European Law & Policy* 27-49 (2006).

51 Mattli and Slaughter (1998), above n. 10, at 187.

52 R.A. Cichowski and A.Stone Sweet and, 'Sex Equality', in A. Stone Sweet, *The Judicial Construction of Europe* (2004) 147-98.

53 Cichowski (1998), above n. 15; Cichowski (2007), above n. 15.

54 Cichowski (2007), above n. 15, at 7.

55 See Sweet and Brunell (1998), above n. 1.

56 Conant (2001), above n. 21, at 98-99.

57 Centre for equality of chances and the combat against racism.

58 Muir and Kolf, above n. 16, at 26.

59 See more examples in Muir and Kolf, above n. 16.

60 Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn NV*, [2008] ECR I-5187.

61 Case C-65/14, *Charlotte Roselle* v. *INAMI and UNM*, [2015] ECR I-339.

62 Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *G4S Secure Solutions NV*, [2017] ECLI-203.

63 E. Muir, 'Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices', in E. Muir et al. (eds.), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (2017) 125-6.

64 D. Chalmers and M. Chaves, 'The Reference Points of EU Judicial Politics', 19(1) *Journal of European Public Policy* 33 (2012). This was very recently confirmed by Glavina. See M. Glavina, 'To Refer or Not to Refer, That Is the (Preliminary) Question: Exploring Factors Which Influence the Participation of National Judges in the Preliminary Ruling Procedure', 16(1) *Croatian Yearbook of European Law & Policy* 25-59 (2020).

65 Chalmers and Chaves, above n. 64, at 33.

66 Passalacqua (2021), above n. 19; Passalacqua (2022), above n. 19.

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Atanasova and Miller examined a curious case of Denmark, a Member State not known for a high referral activity of its courts, that stands out with references in the field of gender and disability rights. What drives the number of preliminary references in these fields, authors concluded, are trade unions, who play a very active role in legal mobilisation in Denmark.[67]

What is common to these actors is using the opportunities offered by EU law, particularly indirect access to the Court offered by the preliminary ruling procedure, and using the CJEU as an ally, giving it the means to clarify and construct new EU law rules that will either push for more inclusion throughout the EU or grant access to new areas of litigation, ultimately broadening the scope of EU law. The strategy employed by the public actors is most typically choosing a pilot case: *Costa v ENEL*,[68] *Defrenne I*,[69] *Bilka*,[70] *Eldridi*,[71] to cite a few examples.

Motivations of these public-interests actors are also interesting, as winning the case might not be the ultimate goal. In fact, because of the duration of judicial proceedings before the CJEU,[72] the Court's ruling might not even be of use for the claimant. For example, in cases of dismissals based on race, gender or disability, the claimant might not want to return to the discriminatory employer or might have already found a new job. Or they might have already become eligible for retirement. Instead, the goal of legal mobilisation in social law and EU non-discrimination law is to make policy changes at the national level, to call for new inclusive legislation, or to provide real and effective legal protection for future claims. Even being awarded monetary compensation might not be as important as being heard and recognising unequal or unfair treatment. Thus, litigation interests by public-interests actors can be seen as polycentric in character, meaning that third-party interests and wider societal interests are at stake.[73] Because public interests lie at the heart of their mobilisation efforts, these types of actors are referred in this article to as 'public-interests actors'.

Public-interests pressure groups are, however, not the only category of Repeat Players that boosted the process of EU integration. The second category of repeated players in the EU litigation field are large corporate actors. Mattli and Slaughter reported on how large and powerful French undertakings have played an important role in forcing the Conseil d'Etat to accept the EU law supremacy and direct effect.[74] By the end of the 1980s, most of the powerful constitutional courts had finally accepted the authority of the CJEU. Ultimately, the Conseil d'Etat's reluctance to accept the CJEU's position put French undertakings at competitive disadvantage compared with companies operating in Member States that accepted EU law supremacy and direct effect. To force the Conseil d'Etat to change its mind, large undertakings involved with import and export launched systematic attacks against government's decisions that were contrary to EU law. Their goal, Mattli and Slaughter wrote, was to provoke a chain of rulings from the CJEU that would find France in breach of EU law. It was 'no coincidence that the decision by the Conseil d'Etat confirming direct effect of [EU] directives in France was initiated by Philip Morris and Rothmans—classical repeat players'.[75]

A similar thing happened in the UK with respect to Sunday trading. After the 1950 British Shops Act was passed, large retailers in the UK used the preliminary ruling procedure to challenge the law. The economic incentive for this attack, Mattli and Slaughter wrote, was clear: as much at 23% of retailers' revenue at the time came from Sunday trading.[76] Large British retailers were, however, not the only one in the game. They were a part of a coordinated Euro-wide litigation strategy by corporate actors that relied on Article 267 TFEU proceedings to create pressure and abolish national restrictions on Sunday trading.[77]

Other relevant examples are visible from the work of Daniel Kelemen. Besides exploring the emergence of the disability right movement in Germany, France, the United Kingdom and the Netherlands,[78] most notably after the adoption of the EU Employment Equality Directive,[79] Kelemen also wrote on legal opportunities brought by the EU securities regulation and competition law, which triggered litigation against companies for malfeasance and fraud[80] as well as enforcement actions seeking damages for competition law violations.[81] Similarly to Kelemen's findings, in the Netherlands, Claes and De Witte reported on several business companies seeking to enforce EU competition rules before national courts, resulting in several referrals to the CJEU.[82] These examples illustrate that there is considerable research potential in looking at the powerful corporate interests in Euro-litigation and legal mobilisation.

A most recent example includes the work of Tommaso Pavone, who reported a remarkable story of legal mobilisation based on EU law that transformed Italian port law and made Genova the largest and most important port in Italy.[83] Pavone follows the work of two Eurolawyers – Giuseppe Conte and Giuseppe Giacomini – who

67 Atanasova and Miller, above n. 18.
68 Case 6/64 *Costa* v. *ENEL* 6/64, [1964] ECR 585.
69 Case 80/70 *Defrenne I*, [1971] ECR 445.
70 Case 170/84 *Bilka*, [1986] ECR 1607.
71 Case C-61/11 PPU, *El Dridi*, [2011] ECR I-3015.
72 The duration of the proceedings before the CJEU currently takes up to a year and a half. On its peak at the turn of the century, the time for the CJEU to deliver its judgment took as long as two years. See A. Dyevre, M. Glavina & M. Ovádek, 'Raising the Bar: The Development of Docket Control on the Court of Justice', 76 Zeitschrift für öffentliches Recht 523 (2021).
73 C. Harlow, 'Towards a Theory of Access for the European Court of Justice', 12(1) *Yearbook of European Law* 213-48 (1992).
74 Mattli and Slaughter (1998), above n. 10, at 188.
75 *Ibid.*
76 *Ibid.*, at 188-9.
77 R. Rawlings, 'The Eurolaw Game: Some Deductions from a Saga', 20(3) *Journal of Law and Society* 309-40 (1993).
78 Kelemen, above n. 25, chap. 6. Disability Rights.
79 EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
80 Kelemen, above n. 25, chap. 4. Securities Regulation.
81 Kelemen, above n. 25, chap. 5. Competition Policy.
82 Claes and De Witte, above n. 24.
83 Pavone, above n. 26.

used EU competition law as a basis to challenge a centuries-long monopoly over the Genova port by the dockworkers' union.[84] Having already pioneered several preliminary references from Genoese courts, the two Eurolawyers were well aware of the potential impact of the CJEU's rulings. The problem, Pavone writes, was 'to find a client willing to take on the most powerful labour union in the city'.[85] The client was ultimately a ship named Wallaroo that transported steel from Hamburg to Padova. This example is remarkable because while it involves a typical private interests' actor – a commercial vessel – mobilising EU law to remove barriers to trade and free competition based on actions of Giuseppe Conte and Giuseppe Giacomini is a typical example of a public-interests action.

Thus, with the notable exception of Pavone's article, the contributions discussed previously share one important limitation: they do not discuss the role of private-interests actors from the perspective of literature on legal mobilisation via the preliminary ruling procedure. In other words, what these contributions lack is a more theoretically (and empirically) driven discussion on who exactly are these private-interests actors that mobilise EU law, what are their motives and what litigation strategies they employ to reach the CJEU by means of the preliminary ruling procedure. Most importantly, how do their interests and strategies differ from the ones employed by public-interests actors.

To address these points, the next section lists and discusses in detail four main reasons why private-interests actors should be included in the research on legal mobilisation in the EU. In other words, it sets a research agenda for legal mobilisation of private-interests actors through the preliminary ruling procedure.

4 Setting a Research Agenda: Legal Mobilisation of Private Actors in the EU

As I showed in the previous section, the literature on legal mobilisation in the EU is dominated by research on the role of public-interests actors, that is civil society, NGOs, equality bodies, trade unions and similar non-profit organisations. The role of the private-interests actors (undertakings, business, companies, industry) in the construction of EU law by means of Article 267 TFEU proceedings has, by contrast, been much less explored. This section lists five main reasons why private-interests actors should be covered by research on legal mobilisation in the EU, focusing particularly on their (potentially) leading role in the construction of EU legal order. By doing so, this part sets the research agenda on private-interests actors as catalysts for actions under Article 267 TFEU.

84 *Ibid.*

85 *Ibid.*, at 16.

First, the EU was established primarily as an economic rather than a human rights organisation. The focus of the European Community back then was on free trade and market regulation. Questions of fundamental rights and equality were deliberately left for its sister organisation, the Council of Europe (CoE), with the European Court of Human Rights (ECtHR) as its main judicial body. It was not until the Lisbon Treaty (2009) that the EU started being seen also as a global human rights actor.[86] Yet, even after the Lisbon Treaty, EU legislation continues to be dominated by economic integration topics. This finding was confirmed by Dyevre et al.'s analysis, which uncovered a large discrepancy in legal scholarship, on the one side, and EU legislation, on the other.[87] Based on the analysis of more than 200,000 legislative acts produced by the EU from 1963 onwards, Dyevre et al. show that the most prevalent topics in the EU legislation are related to Common Agricultural Policy (CAP) and the single market. By contrast, an analysis of 4,000 articles from a leading EU law journal (Common Market Law Review, 'CMLR') reveals a considerably lower attention for CAP and single market issue. What legal scholars tend to emphasise are constitutional and fundamental rights issues. Thus, a reader going through a legal journal such as the CMLR might get the impression that the EU has moved away from the economic integration focus, while the legislative trends show otherwise. This creates a distorted picture of what the EU legislation is about.

This problem has not passed unnoticed. Some scholars criticised doctrinal research for overfocusing on the issues of human rights, citizenship and non-discrimination law and for not providing an accurate picture of what the bulk of EU law is about. For example, before joining the CJEU as an Advocate General, Michal Bobek wrote:

> The normal life of EU law is not defined by grand constitutional battles on the question of EU law supremacy over national law that reach the courts once in every ten years, but rather by thousands of dull tax cases, consumer protection actions, common customs tariff classification disputes, trans-border enforcement of small civil claims, companies' shareholders quarrels and so on.[88]

Thus, if we start from the understanding that EU law offers opportunity structures that are mobilised by litigants to remove national obstacles and are used to give the CJEU means to clarify and construct new EU law rules, the focus of EU legislation on economic matters (CAP and single market) suggests that there are more

86 See A. Dyevre, M. Glavina & M. Ovádek, 'The Voices of European Law: Legislators, Judges and Law Professors', 22(6) *German Law Journal* 956-82 (2021).

87 *Ibid.*

88 M. Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts', in M. Adams, J. Meeusen, G. Straetmans, H. de Waele, *Judging Europe's Judges: The Legitimacy of Case Law of the European Court of Justice Examines* (2014), 57.

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opportunities to mobilise for private than for public actors.

Second, there is a large body of literature linking cross-border trade with the number of preliminary questions submitted to the CJEU. For example, in one of the earliest theories of European legal integration developed by political scientists, Stone Sweet and Brunell portray the process of European integration 'as a response to the demands of those individuals and companies who need European rules, and those who are advantaged by European law and practices compared to national law and practices'.[89] Based on the theory, the number of preliminary references will depend on the intensity of transnational activity and the density of EU law. In brief, higher levels of transnational activity in a Member State (such as trade) will result in more references because more transnational actors will challenge national rules that are inconsistent with EU law. When national obstacles to trade are removed, the manner in which a new system operates will encourage more trade. Furthermore, as the quantity of EU secondary legislation grows, litigants will gain more grounds on which they can attack inconsistent national rules. In addition, to avoid judicial censor of their rules and measures, national governments and parliaments will start to adopt pro-integrative rules, which will not end up being challenged before the CJEU.[90] The mention of private actors (transnational companies, traders, etc.) as key actors in the process of EU integration is, thus, almost three decades old. Yet none of the research efforts on legal mobilisation and strategic litigation focuses on these core subjects of EU law and how they use EU law to enhance their rights and push for policy changes.

The third reason to build an agenda on the role of private actors in the process of judicial construction of Europe lies in the so-called 'hotspots for EU law litigation'. Recent large-scale data collections on spatial clustering of Article 267 TFEU referrals reveal that preliminary questions to the CJEU tend to concentrate in regions with a strong commercial and trade focus. These include regions with a large cargo port[91] and regions with higher concentrations of EU trademark registrations.[92] This is based on the assumption that regions with access to foreign markets will have more benefits from market liberalisation.[93] Trade hubs such as ports generate economic activity that EU law rules aim to facilitate. Consequently, if a dispute arises, actors involved in a cross-border trade are more likely to invoke EU law to challenge barriers to free trade and to protect their interests.[94] The pioneers of the research in the field are Keleman and Pavone, who identified the so-called 'hotspots for EU law litigation'.[95] EU litigation is, according to their study, not evenly distributed throughout a Member State but is rather spatially clustered by issue area. Genova, for example, emerges as an important hotspot for EU free movement litigation. This is unsurprising as Genova is Italy's largest port and the heart of large transnational trade activity.[96] EU law hotspots may, according to Kelemen and Pavone, generate knowledge spillovers to nearby areas. A city that hosts a court which refers cases to the CJEU very frequently may, for example, 'attract a cluster of specialised EU legal practitioners to locate in its proximity, and these practitioners may then apply their legal expertise before other (lower) courts in the area'.[97] A high volume of EU law litigation in Genova, for example, can be explained by the fact that lawsuits were initiated by the same law firm.[98]

Furthermore, building on the work done by Kelemen and Pavone, Dyevre and Lampach explored spatial disparities in the use of the preliminary ruling procedure by national courts. Covering 28 EU Member States in the period between 1961 and 2015, Dyevre and Lampach found that the referral activity of national courts tends to be concentrated in a relatively small subset of regions within a Member State: in regions that host a peak/apex court (e.g. the Hague, Brno, Tartu), regions that are home to the country's capital, and/or regions that host a large cargo port (e.g. Genova, Hamburg, Rotterdam).[99] See Figures 1-3.

Figures 1-3. Preliminary ruling procedure referrals across the EU across time, 1961-2014

Source: EUTHORITY Project, euthority.eu; based on Dyevre Arthur and Lampach Nicolas, The Unequal Reach of Transnational Legal Institutions: Mapping, Predicting and Explaining Spatial Disparities in EU Law Use, Working Paper. See also https://euthority.eu/?page_id=660

89 Sweet and Brunell (1998), above n. 1, at 72.

90 *Ibid.*

91 A. Dyevre and N. Lampach, 'The Unequal Reach of Transnational Institutions: Mapping, Predicting and Explaining Spatial Disparities in the Use of EU Law', *SSRN Scholarly Paper* 2018, https://papers.ssrn.com/abstract=3136462.

92 N. Lampach, W. Wijtvliet & A. Dyevre, 'Merchant Hubs and Spatial Disparities in the Private Enforcement of International Trade Regimes', 64 *International Review of Law and Economics* 105946 (2020), https://doi.org/10.1016/j.irle.2020.105946.

93 M. Brülhart and P. Koenig, 'New Economic Geography Meets Comecon: Regional Wages and Industry Location in Central Europe 1', 14(2) *Economics of Transition* 245-67 (2006).

94 Dyevre and Lampach, above n. 91.

95 R.D. Kelemen and T. Pavone, 'Mapping European Law', 23(8) *Journal of European Public Policy* 1134-1135 (2016).

96 *Ibid.*, 1133-1134.

97 R.D. Kelemen and T. Pavone, 'The political geography of legal integration: visualizing institutional change in the European Union', 70(3) *World Politics* 366 (2018).

98 V. Ferrari, 'La Giustizia Italiana Nello Specchio Delle', 145 *Scienze Giuridiche* 100 (2011); Kelemen and Pavone, above n. 95, at 1127.

99 Dyevre and Lampach, above n. 91.

Figure 1 *Left: 1961-1972 | Right: 1973-1985*

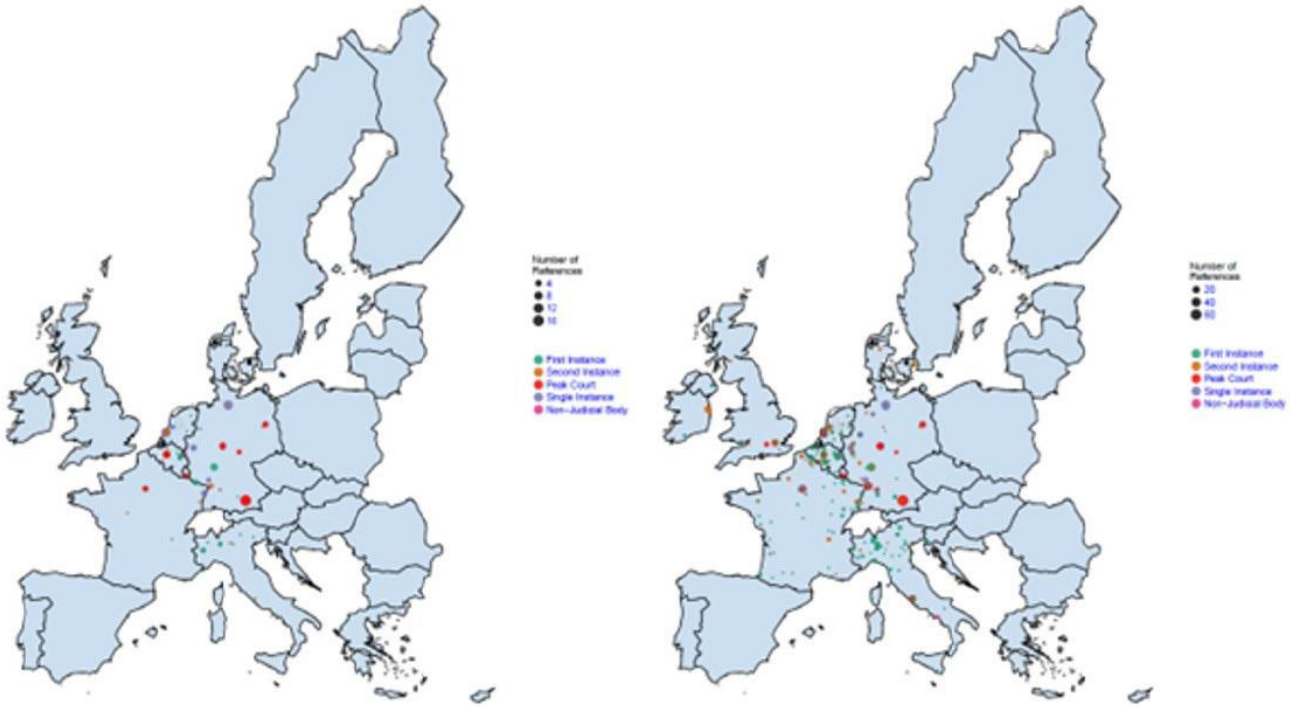

Figure 2 *Left: 1986-1994 | Right: 1995-2003*

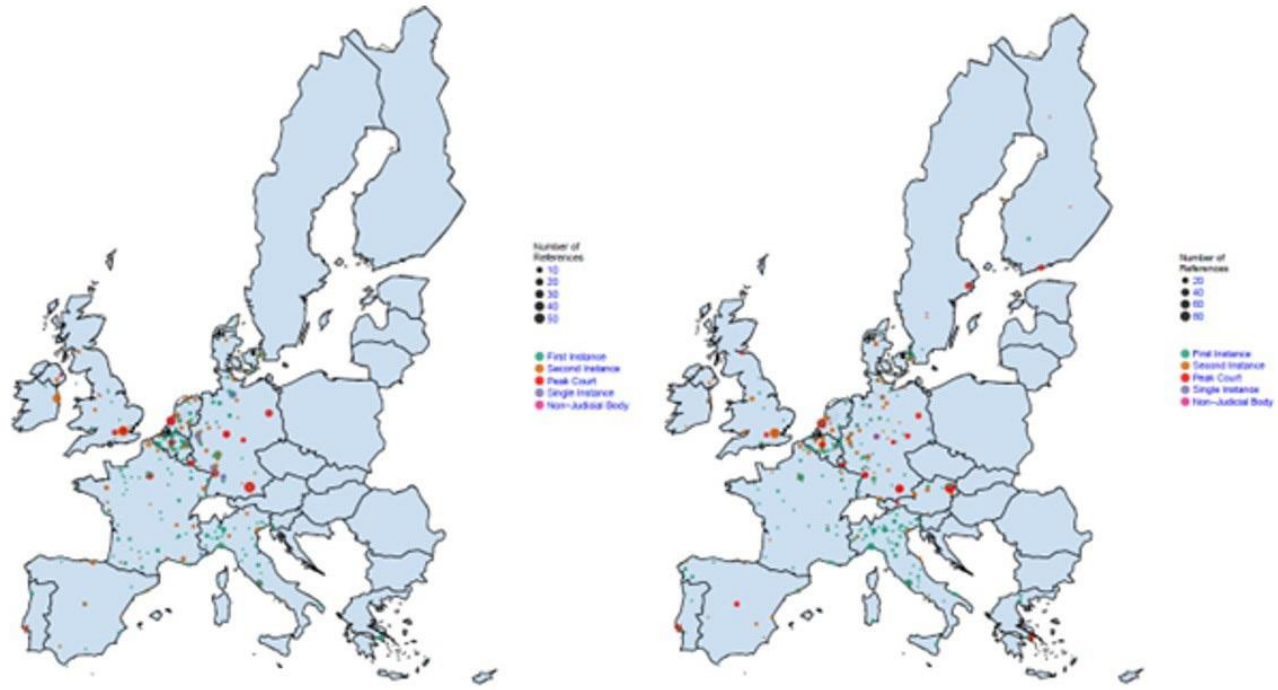

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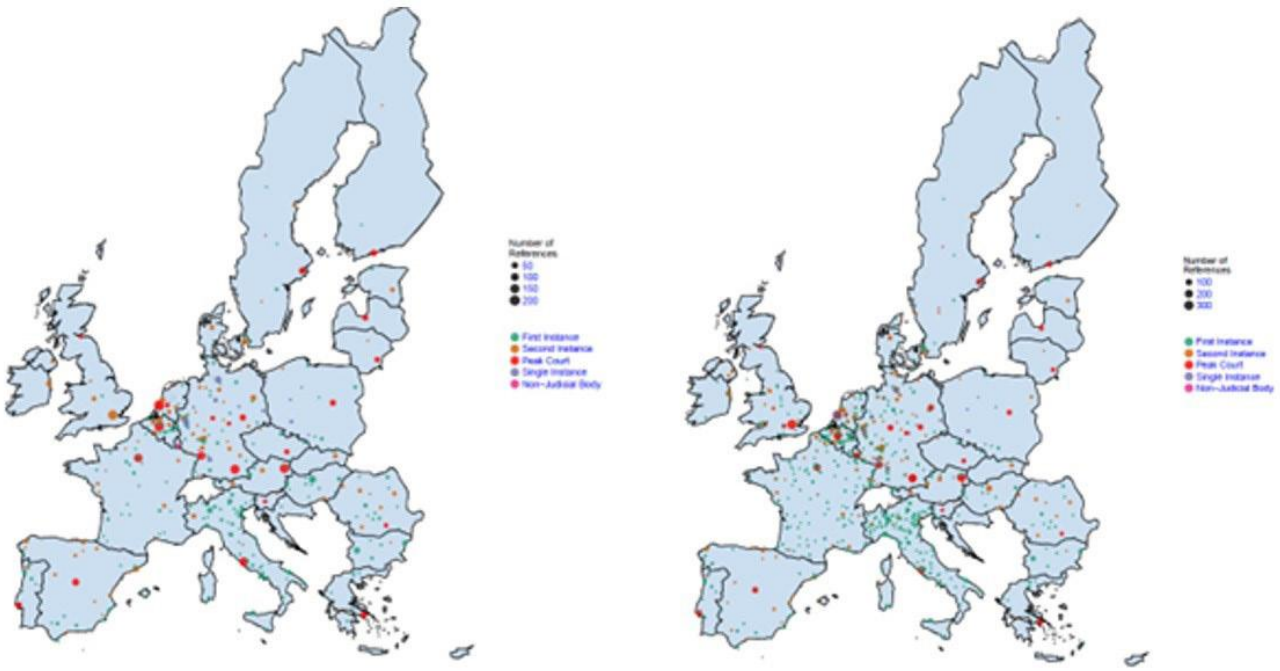
Figure 3 *Left: 2004-2014 | Right: 1961-2014*



Looking at the findings of Dyevre and Lampach (see Figures 1-3), one can, however, notice that is not only regions with cargo ports but also airports that emerge as the areas of high referral activity. Airports and ports provide a very particular concentration of commercial activities in terms of number of commercial contracts and variety of types of contracts starting from customs law over environmental concerns to competition law.[100] This once again illustrates the importance of ports/airports as guardians of EU law.

Finally, looking at the total number of preliminary rulings issued by the CJEU (see Figure 4), on average more than 50% of the rulings issued between 1961 and 2021 have a commercial or trade focus. References with commercial/trade focus, in this case, include those references with the following subject matters as identified on the CJEU's CURIA website: Free Movement of Goods ('freemove'), Competition and Dumping ('compet'); Free Movement of Establishment ('estab'); Free Movement of Workers and Persons ('movework'); Taxation ('tax'); Transportation ('transprt'); and Commercial Policy ('compolc').[101] These are the so-called 'meta-categories' that consist of a group of subject matters, which I explain more in detail in the Appendix.[102] The percentage of references with commercial/trade focus varies between 100% in 1961, when there was only one preliminary question submitted in the area of competition law, and 19.4% in 2021.

However, looking at Figure 1, one can notice that the percentage of references with a purely commercial/trade is declining. Starting in 2015, the percentage of commercial/trade references has continuously stayed under the threshold of 35%, which is significantly lower than the average of 54% held until then. This suggests that, while the EU was established primarily as an economic organisation, the entry into force of Lisbon Treaty and the EU Charter of Fundamental Rights ('Charter') marked the shift from the Union as a purely economic organisation to the Union as an organisation based on values.[103]

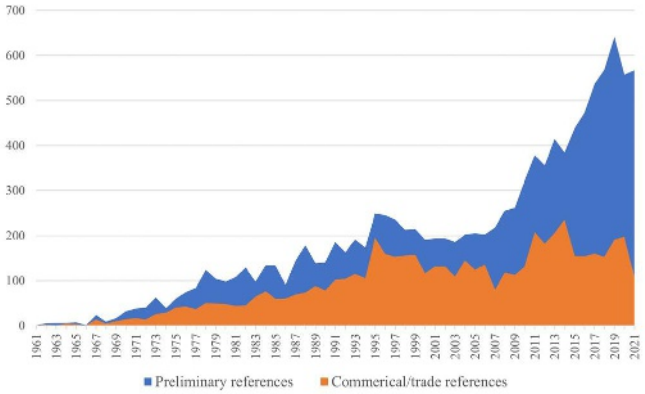
100 I am grateful to Julia Hornig, Erasmus School of Law, for this observation.

101 There was a conscious decision to remove references that have environment as their subject matter from the analysis. While these references could have a commercial focus, this is an area of law that has attracted research on legal mobilisation of public-interests actors (see Cichowski (1998), above n. 15; Krommendijk and van der Pas, above n. 20). The same could, however, be said about free movement of workers. This suggests that sometimes it is difficult to make a clear-cut distinction between the fields that have an economic/commercial (and therefore private-interests) focus and those that have a social (that is, public-interests) focus. In the continuation of this research, these references will have to be checked on a case-by-case basis to see whether they deal with public interests or private interests. I am grateful to one of the reviewers for this observation.

102 A.S. Sweet and T.L. Brunell, *The Alec Stone Sweet and Thomas L. Brunell Data Set on Preliminary References in EC Law* (1999).

103 See Art. 2 Treaty on the European Union.

Figure 4 *Number of preliminary references with commercial/trade focus in the total number of preliminary questions, 1961-2021*



Source: For references between 1961-1998 Stone Sweet and Thomas L. Brunell Data Set on Preliminary References in EC Law, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 1999); for references between 1999-2015 Dyevre Arthur, Glavina Monika, Atanasova Angelina (2019), 'The Court of Justice of the EU and National Courts. Data Set on Preliminary References in EU law, 1958-2018', EUTHORITY Project; for references between 2016-2021 own data collections based on CJEU Annual Reports on Judicial Activity https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels.

This suggests that although the internal market topics seem to dominate at face value, they are very often correlated with non-economic topics, including fundamental rights. Because the Charter applies to all the of the Member States when they are implementing EU law[104] and acting within the scope of EU law,[105] references with a purely economic/trade focus may become rarer in the future.

This section makes a case for a research agenda on the role of private actors in the preliminary ruling procedure. Because of the economic integration focus of EU legislation, the role of translational activity on the number of referrals to the CJEU, the clustering of preliminary references in the areas of a high commercial/trade activity and because almost half of the preliminary questions submitted to the CJEU since 1961 have a commercial or trade focus, it is logical to expect that private actors – undertakings, business, companies, industry – played an equally important role in the legal, economic and political construction of Europe as did their public counterparts. Their motivations and strategies may, however, differ. The next section sets a theoretical framework for legal mobilisation of private actors in the EU.

5 Theoretical Framework for Studying Legal Mobilisation of Private-Interests Actors in the Preliminary Ruling Procedure

Building on the literature on legal mobilisation, there are four different elements that are relevant when studying legal mobilisation of an actor: when, why and how is the law mobilised and with what kind of impact. These elements will be discussed in detail, focusing, in particular, on the mobilisation of EU law by private-interests actors via the preliminary ruling procedure before the CJEU.

The first element focuses on the question of when legal mobilisation happens and tries to uncover explanations for why actors mobilise the law. The literature suggests that actors mobilise EU law when it offers more favourable conditions than national law or when national law and/or practices present a barrier to the enjoyment of rights and freedoms guaranteed under EU law. In other words, EU law will be used when actors are disadvantaged by national law or practices or when EU law and practices offer a greater advantage to them compared with national ones.[106] For example, if actors focused on transnational activities such as trade are faced with certain barriers during their operation in another Member State, they will invoke EU law rules to remove those barriers. Once the unfavourable national barriers are removed, this will attract more actors to that Member State, and the circle will go on. Eventually, EU law will grow following the CJEU's case law and the subsequently adopted EU legislation, allowing more actors to use EU law to support their claims.[107] Thus, as I have already mentioned above, what motivates actors' actions in the preliminary ruling procedure is the prospect of being afforded more rights under EU law than they would otherwise get under national law.

However, not all actors will want to go to court to challenge the national rules inconsistent with EU law. Whether an actor will engage in (or disengage from) litigation depends on macro-(EU) level factors such as the existence of European regulation on the issue and institutional arrangements (access to the Court), meso-level factors (that is, national legal opportunity structures,

104 Art. 51 of the EU Charter of Fundamental Rights.
105 Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, [2013] EU:C:2013:105.
106 Sweet and Brunell (1998), above n. 1.
107 Based on Sweet and Brunell (1998), above n. 1.

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such as legal tradition, judicial independence, court docket, standing rights and court fees) and, finally, on micro-level factors that are characteristic to actors themselves (an existence of EU legal consciousness, that is, perception and knowledge of legal opportunities available to them, resources, relations and/or network).[108] While exploring meso-level factors would require large data collections across all EU Member States, we can make come conclusions about the macro- and micro-level factors. First, as I have already mentioned, with its original emphasis on economic rights, which continue to be in the focus of EU legislation, EU law offers more opportunities to private-interests actors who could benefit from market liberalisation.[109] In other words, private-interests actors have more EU regulation at their disposal to challenge inconsistent national law and practices than public-interests actors. Certain areas of EU non-discrimination law such as disability law and sexual orientation are still very narrow and focused only on the discrimination in the workplace.[110] Second, private-interests actors, particularly large corporations and business, are usually those with more expertise and resources. They are more likely to possess sufficient financial and human resources, the network, in-house familiarity with EU law and judicial procedures, and strong links with other institutions.[111] However, additional research is needed to see to what extent micro-level factors differ between private and public-interests actors and what is their impact on the success rate of legal mobilisation.

The second element focuses on the question of how the law is mobilised. One important distinction between natural and legal persons in this respect is that natural persons (or public-interests actors that represent them) have almost no direct standing before the CJEU.[112] If we can learn anything from the grand constitutional cases that marked the EU equality and non-discrimination law, such as *Defrenne I*,[113] *Defrenne II*,[114] *Firma Feryn*,[115] *Chacón Navas*,[116] *Coleman*,[117] *Mangold*,[118] it is that none of these applicants would have a direct standing before the CJEU. Legal persons (which in this article I refer to as private-interests actors), by contrast, have more procedures at their disposal: from actions to annulment (Art. 263 TFEU) and failure to act (Art. 265 TFEU), through judgments relating to intellectual property rights by EUIPO (Regulation (EU) 2017/10001) to non-contractual liability of the EU (Arts. 268 and 340 TFEU). Yet while access to the Court in the first two procedures may be limited owing to 'direct and individual concern' and the Plaumann criteria, and with other proceedings being quite limited,[119] private-interests actors too may be dependent on the national courts' willingness to make referrals to the CJEU. Thus, future research should look at when the direct actions before the CJEU are preferred over the preliminary ruling procedure and to what extent the preferences of these actors are dependent on national courts' and judges' willingness to engage with Article 267 TFEU proceedings.[120] Furthermore, additional research is needed on the extent to which private actors have developed litigation strategies and connections with national courts to support their claims, similar to what we have seen in the case of public actors.

The third element of legal mobilisation focuses on motivations for litigation. If the litigation interests by public-interests actors can be seen as polycentric[121] (having third party and wider societal interests in mind), does this mean that the litigation interests of private-interests actors are monocentric and individualistic? As I have already mentioned, for civil society actors, winning a case might not be the ultimate goal. Instead, the litigation has wider societal interests in mind and is focused on societal change. In the case of corporate actors, coercing compliance with Union legislation might not be a primary issue at stake. Reasons might be more individualistic. Furthermore, since there are large monetary stakes at hand, winning the case might be more important than raising awareness. However, as Mattli and Slaughter wrote, winning a case may not be the principal aim. The true objective of litigation may be interim remedies that provide time for retaliation or cause delays due to the lengths of legal proceedings.[122] This is not to say that strategic litigation of large corporate players has no effect on smaller companies. For example, the Sunday Trading Saga demonstrated that the action of large corporations had a domino effect on smaller merchants who were under commercial pressure to start trading on Sunday, while the national law on the matter was still missing. Furthermore, large players also helped in shaping consumers' shopping habits and their expectations of the opening times of the stores. Actions of large corporate players, thus, created a social context that was more favourable for reform.[123]

Thus, it seems that private and public-interests actors have very different and sometimes opposing motivations with respect to legal outcomes they seek, 'but both

108 Lisa Conant et al., 'Mobilizing European Law', 25(9) *Journal of European Public Policy* 1376-1389 (2018), https://doi.org/10.1080/13501763.2017.1329846.

109 *Ibid.*

110 L.B. Waddington, 'Future Prospects for EU Equality Law. Lessons to Be Learnt from the Proposed Equal Treatment Directive', 2 *European Law Review* 163-84 (2011).

111 Mattli and Slaughter (1998), above n. 10.

112 Not including staff cases before the General Court.

113 Case 80/70 *Defrenne I*, [1971] ECR 445.

114 Case 43/75 *Defrenne* v. *SABENA*, [1976] ECR 455.

115 Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn NV*, [2008] ECR I-5187.

116 Case C-13/05 Sonia Chacon Navas, [2006] ECR I-6467.

117 Case C-303/06 *Coleman* v. *Attridge Law and Steve Law*, [2008] ECR I-5603.

118 Case C-144/04 *Mangold* v. *Helm*, [2005] ECR I-9981.

119 See CJEU annual reports on judicial activity.

120 For more research on the role of national judges and their experiences, knowledge and attitudes towards EU law and the EU on the referral behavior, see Glavina, above n. 64; K. Leijon and M. Glavina, 'Why Passive? Exploring National Judges' Motives for Not Requesting Preliminary Rulings', 29(2) *Maastricht Journal of European and Comparative Law* 263-85 (2022).

121 Harlow, above n. 73.

122 Mattli and Slaughter (1998), above n. 10; based on C. Harlow and R. Rawlings, *Pressure through Law* (1992); Harlow, above n. 73.

123 Mattli and Slaughter (1998), above n. 10; based on Rawlings, above n. 77.

are well placed to see the [CJEU] as a potential ally'.[124] What is interesting, however, is what type of strategy these two types of repeated players use and what is the outcome of their legal battles for the legal integration in the EU.

And this brings me to the final question of legal mobilisation: with what impact?[125] The European legal mobilisation literature has emphasised an important role that litigants have played in the development of substantial EU law and legal construction of Europe. While social integration of the EU may have been largely driven by public, civil society actors, the evidence this article offered in Section Three suggests that private-interests actors potentially played a decisive role in the development of economic integration of the EU via the preliminary ruling procedure. Future research could potentially track the origin of some of the most important CJEU preliminary rulings in the area of economic law and see to what extent they were based on legal mobilisation of private-interests actors.

6 Conclusion

The aim of this article was to establish a research agenda on the role of private-interests actors, more specifically undertakings, industry and other for-profit organisations, in legal mobilisation in the EU via the preliminary ruling procedure.

This article has demonstrated that unlike public-interests actors – civil society, NGOs, equality bodies, trade unions and other non-profit organisations – that have received a lot of attention from the EU legal mobilisation scholarship, the question of when, how and why private-interests actors employ EU law to enhance their rights and freedoms and what their role has been in the judicial construction of the EU has been largely ignored. I provide evidence that such an omission is surprising for five main reasons. First, the EU has historically been established as an economic organisation focused on market liberalisation. In fact, even today, the bulk of EU legislation continues to be market oriented. Second, as research suggests, transnational activity is an important factor influencing referral rates from national courts. Furthermore, I draw attention to the recent large-scale data collections which reveal that preliminary questions to the CJEU tend to concentrate in regions with a strong commercial and trade focus, such as cargo ports and cargo airports. These are geographical areas with a large concentration of transnational private-interests actors involved in trade and other commercial activities who are likely to challenge national laws and practices that create barriers to their free movement rights. Finally, own research efforts reveal that, in fact, the majority of preliminary questions submitted to the CJEU between 1961 and 2021 have a commercial/trade focus. It seems that both public and private-interests actors consider the CJEU as an important ally when it comes to protecting their rights and interests.

Starting with this evidence on the importance of private-interests actors in the 'judicial construction of Europe', this article further offers theoretical starting points on studying the role of private-interests actors in legal mobilisation. This includes the questions of when EU law is mobilised (when national law creates barriers or is less favourable than EU law), by whom and under what conditions (the importance of macro-, meso- and micro-level factors on litigiousness of actors), with what interests, with what kind of strategy and with what impact. The questions that this article raises are, who are these private-interests actors that mobilise EU law? What was their influence over the policy outcomes in the EU and on the process of European integration? What motivates their actions? What strategies they use to enhance their rights? Most importantly, how do these incentives, motivations and strategies differ from those developed by public-interests actors? These questions, however, require looking beyond traditional doctrinal methods. My recommendation to future researchers is to employ the combination of quantitative (large-scale data collection) and qualitative (interviews with private actors) together with the traditional doctrinal analysis (the analysis of preliminary questions and the CJEU rulings) to explore the role of private-interests law actors in legal mobilisation in the EU and, ultimately, judicial construction of Europe.

124 Mattli and Slaughter (1998), above n. 10, at 190.

125 L. Vanhala, S. Lambe & R. Knowles, '"Let Us Learn": Legal Mobilization for the Rights of Young Migrants to Access Student Loans in the UK', 10(3) *Journal of Human Rights Practice* 439-60 (2018), https://doi.org/10.1093/jhuman/huy030.

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Annex

Table 1A *Number of preliminary references with commercial/trade focus per yearFree Movement of Goods (labelled 'freemove'), Competition and Dumping (labelled 'compet'), Establishment (labelled 'estab'), Free Movement of Workers and Persons (labelled 'movework'), Taxation (labelled 'tax'), Transportation (labelled 'transprt'), Commercial Policy (labelled 'compolc').*

Year	Total number preliminary references	Freemove	Compet	Estab	Movework	Tax	Transprt	Compol	Percentage of trade/ comm. references
1961	1	0	1	0	0	0	0	0	100,00
1962	5	2	0	0	0	0	0	0	40,00
1963	6	1	0	0	0	0	0	0	16,67
1964	6	2	1	1	0	0	0	0	66,67
1965	7	1	1	0	0	1	0	0	42,86
1966	1	0	0	0	0	0	0	0	0,00
1967	24	3	2	0	0	9	0	0	58,33
1968	9	1	2	0	0	1	0	0	44,44
1969	17	4	3	0	1	2	0	0	58,82
1970	32	6	3	0	0	3	3	0	46,88
1971	38	14	3	0	0	0	0	0	44,74
1972	40	7	2	0	3	1	0	1	35,00
1973	62	15	6	1	1	0	1	2	41,94
1974	39	11	4	5	5	3	1	0	74,36
1975	59	22	6	3	6	3	0	0	67,80
1976	75	20	5	3	2	9	2	1	56,00
1977	84	20	4	3	3	3	1	3	44,05
1978	123	24	3	5	3	7	5	3	40,65
1979	104	25	9	3	5	4	2	1	47,12
1980	98	30	4	2	1	9	0	2	48,98
1981	108	24	3	3	3	10	0	1	40,74
1982	129	29	4	1	3	4	4	0	34,88
1983	98	30	9	5	9	6	3	2	65,31
1984	134	39	12	3	6	10	2	5	57,46
1985	134	27	5	8	9	6	1	3	44,03
1986	91	21	7	6	8	14	4	0	65,93
1987	144	25	10	12	9	11	0	2	47,92
1988	178	38	7	4	4	14	2	5	41,57
1989	139	44	5	12	10	14	2	1	63,31
1990	141	23	12	12	10	12	4	5	55,32
1991	185	33	21	13	9	19	6	1	55,14

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Table 1A (continued)

Year	Total number preliminary references	Freemove	Compet	Estab	Movework	Tax	Transprt	Compol	Percentage of trade/ comm. references
1992	163	27	24	11	7	20	9	6	63,80
1993	191	45	23	16	6	14	4	7	60,21
1994	173	36	14	17	7	23	5	4	61,27
1995	249	77	12	21	8	60	8	9	78,31
1996	245	40	18	39	20	36	3	3	65,90
1997	235	30	27	33	18	43	2	0	65,11
1998	213	33	15	42	20	38	4	4	73,24
1999	214	35	11	35	16	52	4	4	73,36
2000	191	29	9	31	13	26	6	2	60,73
2001	194	29	13	35	18	29	7	1	68,04
2002	194	32	4	38	21	28	3	6	68,04
2003	185	18	15	30	15	27	1	3	58,92
2004	202	29	17	46	14	32	4	3	71,78
2005	205	20	7	32	20	37	5	3	60,49
2006	202	22	15	31	10	46	10	2	67,33
2007	218	22	4	44	3	0	7	0	36,70
2008	255	26	6	63	5	0	18	0	46,27
2009	262	28	4	71	3	0	7	0	43,13
2010	322	36	2	81	0	0	12	0	40,68
2011	378	27	15	52	20	70	18	6	55,03
2012	356	20	20	62	13	54	11	2	51,12
2013	414	27	24	62	14	45	20	14	49,76
2014	385	34	24	74	9	61	27	6	61,04
2015	438	31	11	47	16	34	15	1	35,39
2016	472	3	12	15	27	68	23	6	32,63
2017	537	6	2	7	13	53	78	2	29,80
2018	568	4	4	6	16	69	39	1	26, 94
2019	641	8	12	8	40	67	51	5	29,80
2020	557	5	12	22	13	61	83	2	35,55
2021	567	3	15	9	11	52	20	0	19,40[126]

[126] The percentage is much lower in 2021 owing to the fact that many of the CJEU's rulings are still pending.

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Table 2A Meta and subcategories in the preliminary ruling procedure

Meta category	Abbreviation	Subcategories
Competition and Dumping	COMPET	Agreements, decisions and concerted practices Concerted practices Exclusive agreements Concentrations between undertakings Dominant position State aid
Commercial policy	COMMPOLC	-
Free movement of goods	FREMOVE	Customs cooperation Customs union Charges having equivalent effect Common Customs Tariff Value for customs purposes Quantitative restrictions Measures having equivalent effect State monopolies of a commercial character
Freedom of establishment	ESTAB	-
Freedom of movement for persons and workers	MOVEWORK	-
Taxation	TAX	Excise duties Indirect taxation Internal taxation Value-added tax
Transport	TRANSPRT	-

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