Altruism, Euro-expertise and open EU Legal Opportunity Structure

Empirical insights on legal mobilization before the CJEU in the migration field

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Abstract

Over the years, many theories have tried to explain the puzzle of cross-national variation in preliminary reference rates before the Court of Justice of the European Union. Some authors focused on inter-court competition, others focused on national legal culture and Euroscepticism, others highlighted the importance of judges' attributes such as their EU legal education and workload. This article, relying on a comparison of three country case studies in the field of migration law, makes the case that in order to understand the use of the preliminary reference procedure, we must also take into account national patterns of legal mobilization. Utilizing empirical qualitative research the article identifies three national-level conditions that help explain the emergence of legal mobilization through preliminary reference: Altruism, Euro-expertise and an open EU legal opportunity structure. The article makes both an empirical and a theoretical contribution by bridging the scholarship on legal mobilization and EU judicial politics.

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1. Introduction: Legal mobilization through preliminary reference

The Court of Justice of the European Union has a rather poor reputation in the field of legal mobilization and public interest litigation: scholars have denounced its "general lack of openness" towards civil society[1] and defined it as "hostile to collective action".[2] The reasons for these criticisms are twofold: first, the Court adopted a restrictive interpretation of its legal standing rules in cases of direct actions, creating "a formidable barrier of standing for private parties".[3] Second, individuals and collective actors[4] lack a judicial remedy against Member States' acts: the infringement procedure (i.e. the only remedy provided under the EU Treaties to directly challenge national acts before the Court of Justice) is a prerogative of the EU Commission that it exercises with wide discretion.[5] All this considered, the Court of Justice does not seem an ideal venue to pursue litigation for social change. And yet, this article sheds light on an emerging phenomenon: the use of the preliminary reference procedure (267 TFEU) to contest national migration law before the Court of Justice.

The preliminary reference procedure occupies a special place in the EU legal architecture: it guarantees the uniform application of EU law across the Member States and ensures judicial review of EU norms.[6] But more important for the scope of this article is the role that the preliminary reference mechanism came to assume: thanks to the judicial doctrines of supremacy and direct effect, the procedure started to be used as a "citizens' infringement procedure",[7] allowing individuals to question the compatibility of national law vis à vis EU

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[1] Effie Fokas, 'Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion', *Oxford Journal of Law and Religion* 5, no. 3 (1 October 2016): 553.

[2] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Taylor and Francis, 1992), 525.

[3] Albertina Albors-Llorens, 'Remedies against the EU Institutions after Lisbon: An Era of Opportunity?', *The Cambridge Law Journal* 71, no. 3 (November 2012): 513. Olivier De Schutter, 'Group Litigation before the European Court of Justice', in *Civil Society and Legitimate European Governance*, by Stijn Smismans, Edward Elgar Publishing, 2006, 13.

[4] The term 'collective actors' is used to refer to groups that work to achieve a collective goal, such as interest groups, NGOs, human rights organizations, trade unions etc.

[5] Art. 258 TFEU. See Court of Justice of the European Union, *Star Fruit v. Commission*, C-247/87 (14 February 1989).

[6] Under Art. 267, national judges can submit a request for preliminary ruling during national proceedings when they have a doubt regarding the validity or the interpretation of an EU law provision.

[7] Bruno De Witte, 'The Impact of Van Gend En Loos on Judicial Protection at European and National Level: Three Types of Preliminary Questions', in *50th Anniversary of the Judgment in Van Gend En Loos 1963-2013: Conference Proceedings*, ed. Antonio Tizzano and Sacha Prechal (Luxembourg: Office des Publications de l'Union Européenne, 2013), 95.

law.[8] Data on the Court of Justice's judicial activity confirm this: a large portion of the actions seeking judicial review of national legislation arrive via preliminary reference requests.[9] We can say that the 267 procedure, if initially conceived as a tool for interpretation, is today a crucial means of EU law enforcement.

Seen under this light, the preliminary reference procedure appears a unique opportunity for legal mobilization as it can be used by individuals and groups to question the legitimacy of Member States' acts. However, there is an important caveat: private parties cannot directly activate the procedure, instead being "based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary".[10] Moreover, the Court's Rules of Procedure prevent non-state actors from filing amicus curiae briefs or intervening as third parties: these are admitted only if they were already a party in the national proceedings.[11]

Maybe because of these objective difficulties, despite the huge scholarly attention devoted to the 267 procedure, we still know little regarding when it is used to achieve social change and how national-level factors affect its mobilization. The main studies in the field have left these questions unanswered, as they have either focused on macro-level institutional dynamics or on single-country analyses.[12] This article aims to fill these gaps by comparing three cross-national case studies (Italy, the UK and the Netherlands) of EU legal mobilization in support of third-country national migrants.[13] This comparison sheds light on the conditions under which civil society actors rely on a supranational legal strategy to achieve social change, and on how national patterns of legal mobilization influence the emergence of preliminary reference requests before the Court of Justice. Migration law is a very promising field for this sort of enquiry: its recent 'Europeanization' opened up new supranational venues for

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[8] Joseph H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal* 100, no. 8 (1991): 2420; Karen Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice', *International Organization* 52, no. 1 (1998): 122.

[9] Takis Tridimas and Gabriel Gari, 'Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review before the ECJ and the CFI (2001 – 2005)', *Queen Mary University Legal Studies Research Paper* 59 (2010): 10.

[10] Court of Justice of the European Union, CILFIT, C-283/81 (6 October 1982).

[11] See art. 96 of the Consolidated version of the Rules of Procedure of the Court of Justice. Also Sergio Carrera and Bilyana Petkova, 'The Potential of Civil Society and Human Rights Organizations through Third-Party Interventions before the European Courts: The EU's Area of Freedom, Security and Justice', in *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions*, by Bruno De Witte, Elise Muir, and Mark Dawson (Edward Elgar Publishing, 2013), 245.

[12] Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2007); Karen Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', *Comparative Political Studies* 33, no. 4 (1 May 2000): 452–82; Chris Hilson, 'New Social Movements: The Role of Legal Opportunity', *Journal of European Public Policy* 9, no. 2 (1 January 2002): 238–55.

[13] The term migrant in this article refers to a citizen of a country that is not part of the EU, regardless of his/her status.

migrants' claims to justice, both politically and judicially, and gave migrants new tools to contest state policies.

This article's main contribution is in its revealing the potential of adopting a legal mobilization approach to study the preliminary reference mechanism. Theoretically, the legal mobilization scholarship offers concepts and insights that can enrich the study of EU judicial politics and its analytical framework. Methodologically, the legal mobilization approach consists of looking at courts as reactive institutions, imposing a change of perspective in a field otherwise dominated by court-centric approaches.

This article is structured in the following way: the first part provides an overview of the debate over the preliminary reference procedure, where I make the case that a legal mobilization approach can fruitfully contribute to improving our knowledge on how this mechanism works in practice. Then, I outline the methodology used in this research, consisting of in-depth case-studies analysis with a qualitative approach. In the central part of the article I put forward the three factors that, I argue, influence the emergence of legal mobilization via 267 procedure before the CJEU. Finally, I draw some conclusions from these findings and highlight potential further lines of inquiry.

2. **The conceptual framework: Judicial empowerment and legal mobilization**

This article draws on and contributes to two main bodies of scholarship. The first consists of the legal and political studies on the functioning of the preliminary reference procedure, especially those addressing cross-national variation in referral rates. The analyses hereby produced are revisited and enriched by relying on a second body of scholarship, that of legal mobilization studies, which refuses court-centric perspectives and shifts the focus onto the litigants and the socio-political context in which they act. This section gives a brief overview of the most relevant contributions in these two fields, as they constitute the theoretical framework underpinning this study.

2.1 Judicial empowerment and cross-national variation

Scholars have devoted great attention to the study of the preliminary reference procedure. Being the crucial engine behind 'integration through law', they have sought to understand the procedure's dynamic and reasons for its success. The role of national courts emerged as particularly important: by referring "sensitive questions of interpretation", national courts are "indirectly responsible for the boldest judgments the Court has made".[14] To study their role,

[14] G. Federico Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review* 26, no. 4 (1989): 597.

scholars raised questions such as: Why do national courts refer? Why are lower courts more eager to refer than higher courts? And how can we explain cross-national variation in reference rates?

In the 1990s, mainstream accounts argued that power could be an important factor in explaining national courts' incentives to refer. According to the judicial empowerment thesis, the preliminary reference mechanism (and the judicial doctrines of direct effect and supremacy) gave domestic courts new powers to review national law and the executive's action, which in many Member States was not possible.[15] Moreover, Alter noticed that most of the references came from lower courts and explained this with her theory of inter-court competition: lower courts submit preliminary references in order to supplant higher courts' divergent case-law and have their interpretation confirmed by the Court of Justice.[16] In sum, if it is true that the CJEU could pursue its integrationist agenda thanks to national courts' support, these in exchange gained new powers to review national legislation and to circumvent higher courts' decisions.

The judicial empowerment thesis greatly advanced our understanding of national courts' reasons to refer, but does not explain why judges from some Member States are more eager to refer than others. To fill this lacuna, a growing body of interdisciplinary research is investigating cross-national variation in reference rates. For instance, Wind argued that the low number of references from Nordic countries can be explained by their lack of judicial review culture and their propensity for majoritarian democracy;[17] Golub instead focused on domestic political factors, arguing (long before the Brexit referendum) that UK courts are less prone to refer because of the 'Euro-pessimism' that dominates British public debates;[18] more recently, studies relying on surveys and interviews with national judges argued that educational and organizational (labor market) factors might have an impact on whether national judges are willing to refer or not.[19] To be sure, so far, it seems that "[g]rand theories are unlikely to explain the intricacies of different national patterns of mobilisation of

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[15] Joseph H. H. Weiler, 'A Quiet Revolution. The European Court of Justice and Its Interlocutors', *Comparative Political Studies* 26, no. 4 (1 January 1994): 523; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization* 47, no. 1 (ed 1993): 63.

[16] Karen Alter, 'The European Court's Political Power', *West European Politics* 19, no. 3 (1 July 1996): 465–66.

[17] Marlene Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review', *Journal of Common Market Studies* 48, no. 4 (2010): 1039–63.

[18] Jonathan Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', *West European Politics* 19, no. 2 (1 April 1996): 377.

[19] Jasper Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration', *European Journal of Legal Studies* 10 (2018): 101–54; Urszula Jaremba and Juan A. Mayoral, 'The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms', *Journal of European Public Policy* 26, no. 3 (4 March 2019): 386–406; Monika Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia', in *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law*, ed. Clara Rauchegger and Anna Wallerman (Oxford: Hart Publishing, 2019), 197.

Community law", as no single factor exhaustively explains the variation in judges' reference rates.[20] Rather, these studies suggest that there are a variety of interacting factors, partly structural (national legal culture, judicial organization) and partly subjective (policy preferences, education), which influence judges' decisions.

2.2 Legal mobilization, legal opportunity structure and mobilization resources

All the above-mentioned studies share a common feature: their point of departure is the national judge facing the decision to refer. This court-centric perspective risks overlooking who initiated the case at the national level and why, and what is the role of lawyers and other participants in the proceedings. An emerging body of EU scholarship is calling attention to this issue and has started exploring new avenues to study the CJEU by focusing on the role that individuals, Euro-lawyers and experts have played in the EU integration-through-law process.[21] This literature has the merit of having shed some light on the complex map of connected actors that share an agenda on the European integration project and actively promote it through litigation.

And yet, we should be wary of overstating the role of individual litigants in the 267 procedure. It is true that the CJEU, by recognizing the direct enforceability of EU rights, provided incentives to participate to private individuals.[22] But it would be wrong to assume that, because of these new opportunities for rights enforcement, individuals are automatically *able* to claim their rights before the Court. As rightly noted, if individuals lack resources and 'know-how', these opportunities would be lost.[23] There exists a vast landscape of procedural barriers, financial costs, legal awareness, etc. that separates the abstract possibility of rights-claiming from the actual litigation for rights-enforcement; in this no man's land that separates the law in the books from the law in action, collective actors can play a crucial role. For instance, studies have shown that without the knowledge and resources provided by

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[20] Harm Schepel and Erhard Bankenburg, 'Mobilizing the European Court of Justice', in *The European Court of Justice*, ed. Gráinne De Búrca and Joseph H. H. Weiler (Oxford: Oxford University Press, 2001), 36.

[21] Antoine Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity', *European Law Journal* 16, no. 1 (January 2010): 1–28; Antoine Vauchez and Bruno de Witte, eds., *Lawyering Europe: European Law as a Transnational Social Field* (London: Hart Publishing, 2013); Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011); Antonin Cohen and Antoine Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited', *The Annual Review of Law and Social Science* 7 (13 September 2011): 417–31; Fernanda Nicola and Bill Davies, *EU Law Stories* (Cambridge University Press, 2017); Tommaso Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa', *Law & Society Review* 53, no. 2 (20 December 2018).

[22] See for instance Kelemen, *Eurolegalism*, 6.

[23] Mark Dawson, Elise Muir, and Monica Claes, 'A Tool-Box for Legal and Political Mobilisation in European Equality Law', in *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi- Level European System*, by Dia Anagnostou, Onati International Series in Law and Society (Oxford and Portland Oregon: Hart Publishing, 2014), 106; Tanja A. Börzel, 'Participation Through Law Enforcement. The Case of the European Union', *Comparative Political Studies* 39, no. 1 (2 January 2006): 130.

collective actors (trade unions and the UK Equal Opportunities Commission) individuals would not have been able to bring equal pay claims before the CJEU.[24] This and other studies demonstrate that collective actors can play an essential role in supporting litigation and fostering enforcement via preliminary reference.[25]

In light of this, it is important to understand what role collective actors play in the preliminary reference procedure, under which conditions they embark on an EU litigation strategy and what obstacles they face. As mentioned above, the studies that have dealt with these issues so far have focused either on too many cases (the whole EU),[26] or on just one country (the UK),[27] with the result that we still lack an in-depth analysis on how national socio-legal and political factors shape litigation at the EU level. This study offers some empirical insights in this direction by drawing from a larger socio-legal investigation and by relying on the analytical framework provided by legal mobilization scholarship, which is understood here as the use of litigation by collective actors to achieve a political goal.[28] Importantly, the term "legal mobilization" also indicates the approach that studies courts as mainly reactive institutions:[29] as Galanter noted, courts "do not acquire cases of their own motion, but only upon the initiative of one of the disputants".[30] This shift in focus (from the courts onto the litigants) offers a new perspective on litigation, called "user perspective",[31] which constitutes the lowest common denominator of legal mobilization studies methodology; for this reason, these studies are also defined as bottom-up.

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[24] Claire Kilpatrick, 'Effective Utilisation of Equality Rights: Equal Pay for Work of Equal Value in France and the UK', in *Sex Equality Policy in Western Europe*, by Gardiner, European Political Science Series, 1997, 28; this was also noted by Sabrina Tesoka, 'Judicial Politics in the European Union: Its Impact on National Opportunity Structures for Gender Equality', Working Paper (MPIfG Discussion Paper, 1999), 24, https://www.econstor.eu/handle/10419/43287.

[25] Catherine Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission', in *New Legal Dynamics of European Union*, ed. Jo Shaw and Gillian More (Oxford: Clarendon Press, 1995), 254–72; Elise Muir et al., 'How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum' (Working Paper, 2017); Cichowski, *The European Court and Civil Society*.

[26] Cichowski, *The European Court and Civil Society*.

[27] Hilson, 'New Social Movements'; Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies'.

[28] Lisa Vanhala, 'Legal Mobilization', in *Political Science, Oxford Bibliographies Online.*, accessed 29 January 2019, http://www.oxfordbibliographies.com/abstract/document/obo-9780199756223/obo-9780199756223-0031.xml; Michael McCann, 'Law and Social Movements', in *The Blackwell Companion to Law and Society*, by Austin Sarat, Blackwell/Dartmouth (London, 2004), 506–22.

[29] Frances Kahn Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System', *The American Political Science Review* 77, no. 3 (1983): 690–703.

[30] Marc Galanter, 'The Radiating Effects of Courts', in *Empirical Theories about Courts*, ed. Keith O. Boyum and Lynn Mather (New York: Longman Inc., 1983), 122.

[31] Michael McCann, 'Litigation and Legal Mobilization', in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford University Press, 2008), 524.

The literature on legal mobilization and social movements offers two useful concepts for this article's analysis: that of mobilization resources and of legal opportunity structure.[32] The latter is the legal equivalent of the 'political opportunity structure' concept, which is based on the idea that the political environment, by providing incentives or disincentives to act, affects groups' expectations for collective action's success.[33] Since we still lack an agreed-upon definition of "legal opportunity structure", scholars have used it to indicate anything that affects opportunities for mobilization.[34] However, for the sake of conceptual clarity, we should consider part of the legal opportunity structure only the factors *external* to collective actors (i.e. legal stock, judicial receptivity and rules on access to court), while *internal* factors, such as the actors' professional background, are to be considered mobilization resources.[35] Notably, this does not mean that the LOS is static or independent from collective actors: on the contrary, it is dynamic and can be influenced by groups' actions.[36]

3. Case selection and Methodology: The puzzle of selective mobilization

This study compares legal mobilization for migrants' rights in three EU Member States with the aim of shedding light on how meso-level factors, i.e. the attributes of a legal system, and micro-level factors, i.e. the characteristics of the actors engaged in litigation, impact the emergence of EU litigation.[37] My case selection was based on the most-likely case criterion: after building up a database with all the references submitted in the migration field through May 2018,[38] I flagged peaks in references as an indicator of legal mobilization. On this basis, I selected Italy, the Netherlands and the UK as my cases, as they account for half of all the

[32] Hilson, 'New Social Movements'; Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2006), 12; Gianluca De Fazio, 'Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States':, *International Journal of Comparative Sociology*, 21 February 2012, 6.

[33] Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics*, Revised and updated third edition. (Cambridge University Press, 2011), 163.

[34] An example of a paper that blurs the distinction between opportunity structure and resources is: Rhonda Evans Case and Terri E. Givens, 'Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive', *JCMS: Journal of Common Market Studies* 48, no. 2 (2010): 224.

[35] Hilson, 'New Social Movements', 270. Tarrow, *Power in Movement*, chap. 1.

[36] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK', *Law & Society Review* 46, no. 3 (1 September 2012): 528.

[37] Lisa Conant et al., 'Mobilizing European Law', *Journal of European Public Policy*, 30 May 2017, 7.

[38] Information on preliminary references was obtained through the consultation of the CJEU's online case-law search tool and its official annual reports (https://curia.europa.eu/); the results were confronted with the NEMIS database (http://cmr.jur.ru.nl/nemis/). I excluded from my case selection the Ankara Agreement because references are too influenced by the uneven distribution of Turkish citizens on the EU territory. See Annex 1.

references submitted on, respectively, the Return Directive,[39] the Family Reunification Directive,[40] and third-country national (TCN) family members of Union citizens (Figure 1).[41]

When looking at the three countries' peaks in references, one could argue that structural factors, such as migrant population or countries' propensity to refer, can account for them. This explanation is ruled out by examples such as that of Germany, which has the highest reference rate and the biggest migrant population in Europe,[42] and yet referred comparatively little on the single migration issues examined (Figure 1). Rather than structural factors, the qualitative research conducted confirmed that the three countries' peaks in references are due to legal mobilization efforts, i.e. collective actors decided to mobilize the three EU migration provisions before national courts and the CJEU in order to achieve their policy goals. This study argues that such EU legal mobilizations were possible thanks to the presence of three conditions that will be analyzed in the next sections: altruism, experts' engagement and an open EU legal opportunity structure.

[39] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008.

[40] Council Directive 2003/86/EC on the Right to Family Reunification, OJ L 251, 3.10.2003.

[41] These are the first rights that TCN migrants acquired under EU law, and they stem from primary and secondary law provisions: Art. 20 and 21 of the TFEU; Regulation (EEC) No 1612/68 on Freedom of Movement for Workers within the Community, OJ L 257, 19.10.1968; Directive 2004/38/EC on the right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, OJ L 158, 30.4.2004.

[42] See Eurostat "Migration and migrant population statistics", 2017.

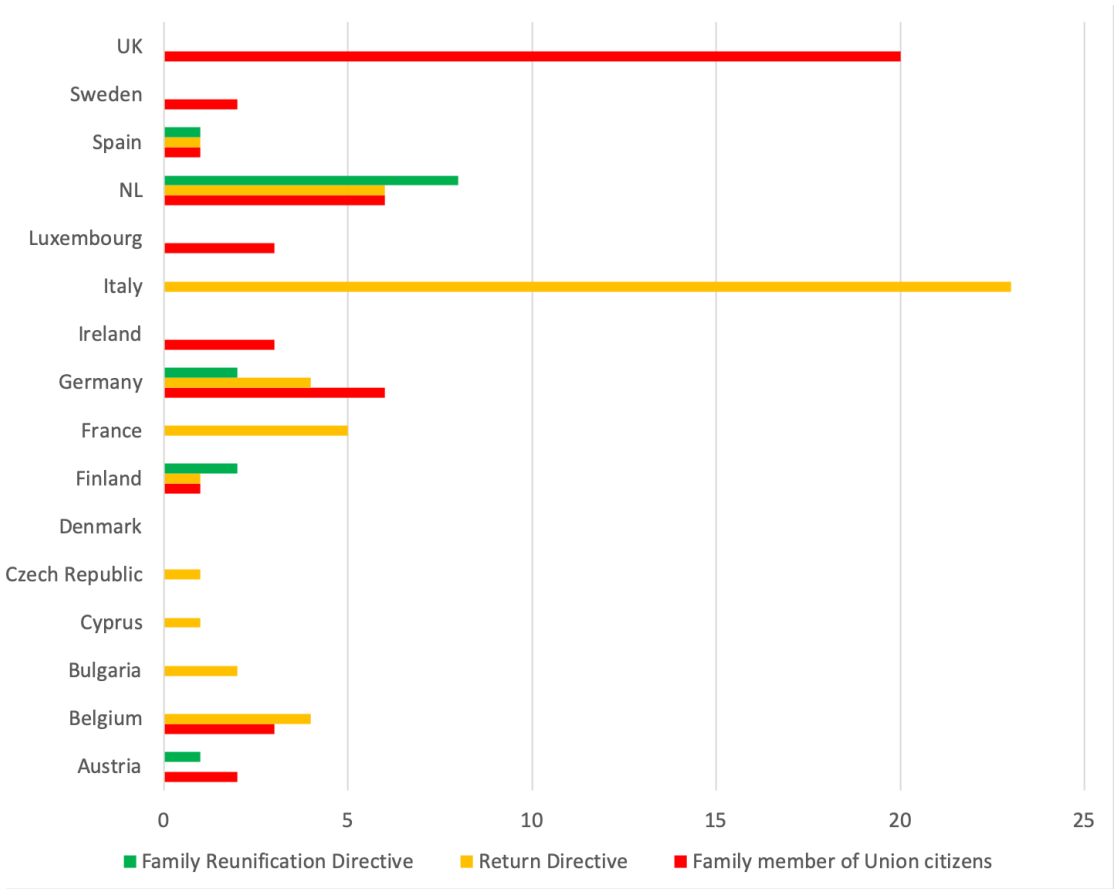

Figure 1: Preliminary references by issues and countries referred before May 2018. All referred cases were considered, regardless of their admissibility[43]

My case selection presents two advantages and one drawback. First, by holding constant the EU legal stock (migration law), we can better understand why it is selectively mobilized in different countries and how national factors shape the emergence of EU litigation. The second advantage is to fill a lacuna in the EU legal mobilization field, which has focused predominantly on antidiscrimination and environmental protection, while leaving migration rather underexplored.[44] Last, the drawback: my case selection is biased towards positive cases, i.e. the references that have been successfully made, and further research should be conducted on cases of lack of references.

Qualitative socio-legal research is the best suited to study legal mobilization since it offers "a fuller perspective of processes, discourses, and politics behind grasstops mobilizations."[45]

[43] E.g. of the twenty-three Italian preliminary reference requests on the Return Directive, only three led to a judgment.

[44] Two recent books addressed strategic litigation for migrants' rights, but with a different focus. Leila Kawar, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (New York: Cambridge University Press, 2016); Moritz Baumgärtel, *Demanding Rights. Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge: Cambridge University Press, 2019).

[45] Fokas, 'Comparative Susceptibility and Differential Effects on the Two European Courts', 544.

Indeed, collective actors' activity is often non-manifest, and from the official documents of a case we cannot understand whether an individual claimant was supported by an NGO, or how the case was linked to the national political debate. In light of this, I considered that doctrinal or quantitative methods are of limited use, and I instead relied on legal documents, political and policy documents, press articles, civil society reports and twenty interviews with relevant actors (lawyers, NGO members and domestic judges).

4. **The local dimension of European judicial politics**

The qualitative case-study research has shed light on the politics behind EU litigation and has traced the contours of what can be defined as a contestation through EU law. In fact, in Italy, the UK, and the Netherlands, pro-migrant groups used the 267 procedure as a weapon to contest restrictive domestic policies: more specifically, the Italian *crimmigration* policies,[46] the British curtailment of family migration,[47] and the Dutch *inburgering* (assimilationist integration policy).[48] Notably, the three instances of legal mobilization were profoundly embedded in domestic politics and were conducted by national actors: this somehow debunks the myth that behind transnational litigation there is necessarily a transnational network.

Between 2011 and 2012, Italy experienced an *en masse* mobilization of the Return Directive which involved many courts in a relatively short time (sixteen courts submitted twenty-two references in twelve months).[49] The mobilization developed in reaction to two migration

[46] Alberto Di Martino, *The Criminalization of Irregular Immigration: Law and Practice in Italy*, Pisa University Press, 2013.

[47] Jo Shaw, Nina Miller, and Maria Fletcher, *Getting to Grips with EU Citizenship: Understanding the Friction Between UK Immigration Law and EU Free Movement Law* (Edinburgh Law School Citizenship Studies, 2013).

[48] Leonard F.M. Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', in *Illiberal Liberal States: Immigration, Citizenship, and Integration in the EU*, ed. Elspeth Guild, Kees Groenendijk, and Sergio Carrera (Ashgate, 2009), 241–58.

[49] Only the references in the cases of *El Dridi* (C-61/11 PPU) and *Sagor* (C-430/11) resulted in a ruling on the merit, all the others were declared inadmissible because they asked the same questions or because of procedural errors: Tribunale di Milano, Assane Samb, C-43/11 (24 January 2011); Tribunale di Ivrea, Lucky Emegor, C-50/11 (28 January 2011); Tribunale di Ragusa, Mohamed Mrad, C-60/11 (28 January 2011); Tribunale di Rovereto, John Austine, C-63/11 (11 February 2011); Tribunale di Bergamo, Survival Godwin, C-94/11 (14 February 2011); Tribunale di Ragusa, Mohamed Ali Cherni, Case C-113/11 (7 March 2011); Tribunale di Santa Maria Capua Vetere, Yeboah Kwadwo, C-120/11 (7 March 2011); Corte Suprema di Cassazione, Demba Ngagne, C-140/11 (21 March 2011); Giudice di Pace di Mestre, Asad Abdallah, C-144/11 (24 March 2011); Tribunale di Bergamo, Ibrahim Music, C-156/11 (1 April 2011); Tribunale di Frosinone, Patrick Conteh, C-169/11 (23 March 2011); Tribunale di Treviso, Elena Vermisheva, C-187/11 (31 March 2011); Court of Justice of the European Union, Abdoul Khadre Mbaye, C-522/11 (21 March 2013); Giudice di Pace di Revere, Xiaomie Zhu and others, C-51/12 (2 February 2012); Giudice di Pace di Revere, Ion Beregovoi, Case C-52/12 (2 February 2012); Giudice di Pace di Revere, Hai Feng Sun, Case C-53/12 (2 February 2012); Giudice di Pace di Revere, Liung Hong Yang, Case C-54/12 (2 February 2012); Giudice di Pace di Revere, Ahmed Ettaghi, C-73/12 (4 July 2012); Giudice di Pace di Revere, Majali Abdel, C-75/12 (26 January 2012); Giudice di Pace di Revere, Tam, C-74/12 (13 February 2012).

reforms adopted by the Berlusconi II and III governments in 2002 and 2009,[50] which introduced coercive measures and criminal sanctions against irregular migrants, inaugurating the so-called *crimmigration* era.[51] An association of migration practitioners (ASGI) and an association of judges (*Magistratura Democratica*) decided to mobilize EU law to contest these national reforms because they considered the political choice of criminalizing a person for his/her irregular status as radically compromising the democratic identity of Italy.[52] ASGI and *Magistratura Democratica* came to the realization that the Return Directive, the symbol of "Fortress Europe", could be turned into a tool to protect migrants' rights: by detaining undocumented migrants for several years, Italian law was not only breaching their human rights, but was also undermining the Directive's goal of returning them as quickly as possible.[53] With the rulings of *El Dridi* and *Sagor,* the CJEU partially upheld their interpretation.

In the UK, the mobilization unfolded over many years, not as a result of a coherent plan but rather as a lengthy battle against the Home Office for which I could trace that at least nine references, out of the twenty-one submitted, originated from a legal mobilization.[54] Indeed, family migration has been a politically contested issue in the UK since the 1980s, when the Thatcher government started a "war on foreign husbands" aimed at curtailing the number of family reunifications; subsequent governments, both from the right and the left, granted continuity to such policy by introducing stricter requirements for incoming migrants and norms against marriages of convenience.[55] However, the advent of free movement and EU

[50] These are: the "Bossi-Fini Law", of 30 July 2002, n. 189; and the "Security Package Law", Law n. 125 of 24 July 2008 and the Law n. 94 of 15 July 2009.

[51] Ted Perlmutter, 'Italy. Political Parties and Italian Policy, 1990–2009', in *Controlling Immigration: A Global Perspective, Third Edition*, by James Hollifield, Philip Martin, and Pia Orrenius, third (Palo Alto, USA: Stanford University Press, 2014), 352; Luisa Marin and Alessandro Spena, 'Introduction: The Criminalization of Migration and European (Dis)Integration', *European Journal of Migration and Law* 18, no. 2 (17 June 2016): 147; Di Martino, *The Criminalization of Irregular Immigration*, 86.

[52] Luigi Ferrajoli, 'La Criminalizzazione Degli Immigrati (Note a Margine Della Legge n. 94/2009)', *Questione Giustizia*, no. 5 (2009): 13.

[53] Court of Justice of the European Union, *El Dridi, C-61/11 PPU*, ECLI:EU:C:2011:268; Court of Justice of the European Union, *Md Sagor, C-430/11*, ECLI:EU:C:2012:777.

[54] Court of Justice of the European Union, Akrich, C-109/01 (23 September 2003); Court of Justice of the European Union, Ibrahim, C-310/08 (23 February 2010); Court of Justice of the European Union, McCarthy, C-434/09 (5 May 2011); Court of Justice of the European Union, Rahman and Others, C-83/11 (5 September 2012); Court of Justice of the European Union, Alarape and Tijani, C-529/11 (8 May 2013); Court of Justice of the European Union, ZZ, C-300/11 (4 June 2013); Court of Justice of the European Union, NA, C-115/15 (30 June 2016); Court of Justice of the European Union, SM, C-129/18 (26 March 2019).

[55] Zic Layton-Henry, 'Britain: From Immigration Control to Migration Management', in *Controlling Immigration: A Global Perspective*, ed. Wayne A. Cornelius et al., Stanford University Press, 2003, 304; Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford University Press, 1999), 120; Helena Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the United Kingdom', in *The First Decade of EU Migration and Asylum Law*, ed. Elspeth Guild and Paul Minderhoud (Martinus Nijhoff Publishers, 2011), 357.

citizenship rights, as generously interpreted by the CJEU,[56] undermined the British government's ability to control family migration, and created the odd situation known as "reverse discrimination": to gain residence rights in the UK, TCN family members of British nationals had to comply with stricter requirements than those imposed on TCN family members of Union citizens.[57] This disparity acted as a catalyst, and NGOs, law centers and Euro-lawyers promoted EU litigation to stretch the boundaries of EU free movement law in order to include among its beneficiaries also formally excluded categories, like UK nationals that have not used their freedom of movement and TCN "primary carers" of Union citizens;[58] in contrast, the Home Office pushed for a restrictive interpretation of EU law. Eventually, the litigation effort brought mixed results.

In the Netherlands, the legal mobilization was smaller in scale and more targeted in focus. I could detect only three legal mobilization cases brought before the CJEU which left a long-lasting impact on Dutch case law.[59] The issue at stake was integration policy: successive governments gradually departed from the Dutch traditional multicultural approach and embraced a more assimilationist view of integration; the Balkenende government in 2005 was the first in Europe to impose on prospective migrants a pre-departure integration test, which was accused of being a tool for migration control rather than for migrants' integration.[60] By invoking the Family Reunification Directive, an alliance of legal academics, an NGO (the Dutch Refugee Council) and a practitioner could challenge the strict integration test from abroad, obtaining a rights-oriented interpretation that relaxed the requirements imposed on the perspective migrant.[61]

This brief overview of the legal mobilization cases sets the stage for the following analysis, which will focus on the three conditions that made the mobilizations possible, starting with the first one: altruism.

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[56] Court of Justice of the European Union, Surinder Singh, C-370/90 (7 July 1992); Court of Justice of the European Union, Baumbast and R, C-413/99 (17 September 2002).

[57] Court of Justice of the European Union, Metock, C-127/08 (25 July 2008).

[58] For instance Court of Justice of the European Union, *McCarthy, C-434/09*, ECLI:EU:C:2011:277; Court of Justice of the European Union, *Alarape and Tijani, C-529/11*, ECLI:EU:C:2013:290.

[59] Court of Justice of the European Union, Imran, C-155/11 PPU (10 June 2011); Court of Justice of the European Union, K and A, C-153/14 (9 July 2015); Court of Justice of the European Union, A and S, C-550/16 (12 April 2018).

[60] Ricky Van Oers, Betty De Hart, and Kees Groenendijk, 'The Netherlands', in *Policies and Trends in 15 European States*, ed. Rainer Baubock et al., vol. 2, IMISCOE Research (Amsterdam University Press, 2006), 403; Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"'; Kees Groenendijk, 'Pre-Departure Integration Strategies in the European Union: Integration or Immigration Policy?', *European Journal of Migration and Law* 13, no. 1 (1 January 2011): 1–30.

[61] Court of Justice of the European Union, *K and A, C-153/14*, ECLI:EU:C:2015:453.

	ITALY	THE UK	THE NETHERLANDS
EU migration norm mobilized	Return Directive 2008/115	Free movement and citizenship law	Family Reunification Directive 2003/86
Percentage of references submitted on that issue	50%	50%	58.82%
Mobilization goal	Stop Crimmigration	Counteract the curtail of family migration	Challenge the assimilationist integration policy
Legal Mobilization actors	Judges Association (MD) + Practitioner Association (ASGI)	Migration NGOs + Euro-lawyers	Academics + Migration NGOs
Why EU Law?	More protection of right to liberty	More protection of family reunion	More protection of family reunion

Table 1: Overview of the three legal mobilization cases

5. The first condition: Altruism

The encounter between a group's political goal and an individual's experience of injustice marks the beginning of a legal mobilization. The three case studies examined here, although heterogeneous in terms of the actors involved, share one important particular feature: the mobilization-promoters were not migrants, but rather individuals and groups who belong to the autochthonous group mobilizing *on behalf* of migrants.

When legal mobilization started, migrants in Italy, the Netherlands, and the UK, for very different historical and contingent reasons, were facing a rather hostile political and legal environment. Against this background, it is easy to understand why migrants decided to go to court: those in Italy, if found undocumented, were charged with crimes and punished with long criminal detentions; those in the UK saw their right to family reunification curtailed; and, finally, migrants in the Netherlands could not be joined by their family because of the introduction of the civic integration test from abroad (see Table 2).

	ITALY	THE UK	THE NETHERLANDS
Reform implemented	Criminalization of undocumented TCN	Curtailment of family migration	Introduction of the civic integration test from abroad
Individual grievance (Right under attack)	Long criminal imprisonment (right to liberty)	Deportation and family disruption (right to reside and to family unity)	Denied entry and family disruption (right to entry and to family unity)

Table 2: Migration reforms and migrants' individual grievances

Even if their rights were under siege, the role of migrants in the legal mobilization was very marginal at best, and sometimes completely absent. This is the case, for instance, in the Italian case study, where some litigants were prosecuted *in absentia* and never met the lawyers and civil society actors that fought for their rights.[62] This is why I inscribe the three legal mobilizations analyzed as part of the "altruistic mobilization" category, where the "beneficiary of the political goal differs from the constituency group that makes it".[63]

Given migrants' marginal role, the presence of "altruistic" collective actors from the autochthonous group that take charge of the migrants' cause is a crucial condition to have legal mobilization. Indeed, not all individual struggles become collective battles, and we can well imagine of situations in which migrants face hurdles in host societies, but nobody mobilize in their defense. Notably, although the term might suggest otherwise, "altruism" does not refer to the reason why collective actors decide to mobilize on behalf of others. Indeed, collective actors are rather moved by their activism and political beliefs; as noted elsewhere: "belief in a cause and a desire to advance that cause are the forces that drive cause lawyering actions."[64]

Even if, obviously, each collective actor is unique in its ideals and values, we can find a common belief to all of them: the immigration system treats migrants unfairly, violates their rights, and confines them to a disadvantaged position vis à vis the state.[65] Migrants'

[62] This happened in the case of *Sagor*, C-430/11which was litigated in absentia, as allowed by Italian rules of criminal procedure.

[63] Paul Statham, 'Political Opportunities for Altruism? The Role of State Policies in Influencing Claims-Making by British Antiracist and Pro-Migrant Movements', in *Political Altruism? Solidarity Movements in International Perspective*, by Marco Giugni and Florence Passy (Rowman & Littlefield, 2001), 135.

[64] Thomas M. Hilbink, 'You Know the Type: Categories of Cause Lawyering', *Law & Social Inquiry* 29, no. 3 (1 July 2004): 659.

[65] This view, expressed in different terms, can be found in all the mission statements of the organizations studied. See JCWI: https://www.jcwi.org.uk; or the Dutch Refugee Council mission statement at https://www.vluchtelingenwerk.nl/over-ons/missie-en-visie.

supporters want to remedy such injustice by bringing governments to account before the EU Court. As Don Flynn, experienced NGO member and solicitor, told me:

> For many of us, it was a political commitment. We believe that a "rights-based approach to immigration" is the best way to deal with immigration law. Immigration policies didn't acknowledge that, but they felt that they could dispose of migrants, that they are subject to the discretion of the state, that rights can be taken away from them because this is under politicians' power.[66]

Instead, the reason behind migrants' low engagement in legal mobilization can be explained by their level of social and civic integration in the host society. As Ambrosini explained regarding Italy:

> [T]he defence of immigrants' rights is mounted essentially by actors from Italian civil society. Immigrant associations are still fragile and under-equipped for these battles. The absence of the right to vote compromises access to public resources, and the comparatively recent settlement of the foreign population weakens engagement and the development of professional skills, for example in the legal field.[67]

This relationship between migrants' direct engagement in legal activism and the length of their presence in the host society seems confirmed by the example of Turkish nationals in the Netherlands. Turkish nationals arrived in the Netherlands as early as in the 1970s, and since the 1990s they have had their own representative organization (the IOT, *Inspraak Orgaan Turken*). Thanks to the help of Dutch lawyers and experts, the IOT has promoted legal mobilization both before Dutch courts and the CJEU to defend Turks' rights under the EU-Turkey Association Agreement.[68] Only time will tell if other migrant groups will follow this example.

6. **The second condition: The mobilization of EU law expertise**

Socio-legal scholarship has long acknowledged that the use of courts to pursue justice and redistribution crucially depends on the availability of resources.[69] As understood here, resources include a very diverse set of goods, ranging from the money to pay for the court

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[66] Interview with NGO member and Solicitor Don Flynn, 14 December 2016, London.

[67] Maurizio Ambrosini, 'Fighting Discrimination and Exclusion: Civil Society and Immigration Policies in Italy', *Migration Letters* 10, no. 3 (5 September 2013): 321.

[68] Agreement Establishing an Association between the European Economic Community and Turkey, signed in Ankara, 12 September 1963, OJ L 361/29, 13.12.77. Jos Hoevenaars, 'A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice' (Radboud University, 2018), 178.

[69] Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review* 9, no. 1 (1974): 95–160.

fees to parties' reputation in court; resources are able to affect the right to access to justice, as many people cannot afford litigation costs, but also the outcome of the proceedings, since the better-resourced party will enjoy considerable advantage in court. In light of this, although some scholars argued that the European legal system has "shifted the domestic balance of powers"[70] and has "created increased opportunities for participation through law enforcement",[71] we should not forget that such empowerment crucially depends on whether people on the ground have the means to use EU litigation - otherwise, we will just have an "empowerment of the already powerful".[72] The three case studies confirm the importance of resources and reveal the ones needed in the particular CJEU and migration context.

Migration proceedings are characterized by a specific configuration of power structures: on the one hand, we have the 'one-shotter', the migrant, with high stakes but little experience in court; on the other hand, we have the 'repeat-player', the public administration responsible for the disputed migration decision, with extensive experience litigating similar cases.[73] Usually, the two parties will meet on an uneven playing field, not least because of different economic means. The proceedings studied offer many examples of this: when the litigation started, Mr. Sagor was illegally working as a street vendor,[74] Mrs. McCarthy was living on state benefits,[75] and Mr. Imran was doing three jobs at the same time to provide for his eight children.[76] Given the limited means of these litigants, none of them could have afforded litigation before the CJEU without legal aid and collective actors who partially compensated for the structural unbalances in litigation: they provided legal advice and legal representation for free, and helped with access to legal aid.[77]

Notably, litigation costs are a constraint in EU legal mobilization as much as they are in the national context, as they apply to domestic proceedings too. Instead, when the mobilization moves to the transnational arena, this "requires a shift in the focal point of contention, a move from familiar domestic structures of opportunity and constraint to new terrains, and the need

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[70] Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies', 453.

[71] Rachel A. Cichowski, 'Courts, Rights, and Democratic Participation', *Comparative Political Studies* 39, no. 1 (2 January 2006): 56.

[72] Börzel, 'Participation Through Law Enforcement. The Case of the European Union'.

[73] Galanter, 'Why the "Haves" Come out Ahead', 97.

[74] Court of Justice of the European Union, *Md Sagor, C-430/11*, ECLI:EU:C:2012:777 paragraph 21. Interview with the Tribunale di Rovigo Judge, 26 March 2016, Venezia.

[75] Court of Justice of the European Union, *McCarthy, C-434/09*, ECLI:EU:C:2011:277 paragraph 14.

[76] Interview with Lawyer Gerben Dijkman, 13 December 2017, Utrecht.

[77] The three countries studied have an established tradition of legal aid, see United Nations Office on Drugs and Crime, 'Global Study on Legal Aid. Country Profiles' (United Nations, December 2016), https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA_-_Country_Profiles.pdf. For the Netherlands, see https://www.rvr.org/english. However, a recent British reform has made access to legal aid more difficult for migrants and is likely to have huge consequences on their ability to claim rights (see Legal Aid, Sentencing and Punishment of Offenders Act 2012, entered into force on 1 April 2013).

to forge new alliances with different allies against different opponents."[78] This is true also for our case: collective actors had to mobilize new resources and to forge new alliances to access the CJEU. Once collective actors had secured access to domestic courts, intellectual resources proved to be the real game-changer to reach the CJEU. In particular, EU legal expertise proved to be the single most important, albeit scarce, resource: in the cases studied, this was made available by a powerful alliance between collective actors and either legal scholars or Euro-lawyers. These EU legal experts were the first to grasp the opportunities that EU law offered, they made collective actors aware of these opportunities, and elaborated a strategy to reach the CJEU.

In Italy, a great contribution to the mobilization came from legal scholars. Indeed, the idea of starting an EU litigation strategy originated from an influential academic article that argued for the incompatibility of the Italian *crimmigration* norms with the Return Directive. The article, which even suggested the text for the questions to be referred to the CJEU, was widely circulated through the collective actors' networks, and was read by judges as well thanks to its dissemination through the *Magistratura Democratica*'s mailing list.[79] One of the authors of that influential article, Professor Luca Masera, was then appointed to represent both Mr. El Dridi and Mr. Sagor before the CJEU, confirming the tight relationship between academia and legal practice before the CJEU.

In the UK, Euro-lawyers have played a very important role in the mobilization before the CJEU. The AIRE Centre has been one of the best examples of this legal activism in the field of European rights: they litigate before the CJEU and the ECtHR, file third-party interventions (equivalent to *amicus curiae* in the UK system), give legal advice, and invest in 'capacity-building' by training judges, lawyers and decision-makers.[80] More specifically in the migration field, there exists a group of solicitors and barristers specialized in EU law "who always represent immigrants and never represent the government, conscious about trying to advance migrants' rights", and often provide their work *pro bono*.[81] As Barrister Adrian Berry told me:

> What is true about free movement litigation is that we are quite involved, we are not just waiting in that kind of reactive way for clients to be in need our assistance, we are actually trying to find points to develop the law.[82]

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[78] Sidney Tarrow, *The New Transnational Activism* (Cambridge University Press, 2005), 122.

[79] Virginia Passalacqua, 'El Dridi Upside down: A Case of Legal Mobilization for Undocumented Migrants' Rights in Italy', *Tijdschrift Voor Bestuurswetenschappen En Publiekrecht* 4–5 (2016): 220; Rosa Raffaelli, 'Immigration and Criminal Law: Is There a Judge in Luxembourg?', in *National Courts and EU Law: New Issues, Theories and Methods*, ed. Bruno de Witte et al., Judicial Review and Cooperation (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2016), 229.

[80] Catharina Harby, 'The Experience of the AIRE Centre in Litigating before the European Court of Human Rights', in *Civil Society, International Courts and Compliance Bodies*, ed. Tullio Treves, 2005, 41–46.

[81] Interview with Barrister Simon Cox, London, 18 November 2016.

[82] Interview with Barrister Adrian Berry, London, 23 November 2016.

Finally, in the Netherlands, the support of legal scholars was crucial in elaborating a successful litigation strategy to reach the Court of Justice. For instance, in the *Imran* case, the lawyer used a prominent academic's legal opinion to persuade the judge to refer:

> I thought, I can do two things: I can copy-paste Professor Groenendijk's argument in my own pleading for a referral, and then the judges would think: 'Ok, this is what Mr. Dijkman thinks, shall we take him seriously?' Or, I can just say explicitly: 'here is a letter for you from Professor Groenendijk'. Officially it shouldn't matter for the court who puts down the argument, but in practice it does matter. Groenendijk is recognized as an authority, even in Europe, on this specific [Family Reunification] Directive.[83]

Mobilizing EU law knowledge is particularly crucial in the context of a procedure like the preliminary reference, which is mastered by a very small group of people. The availability of legal expertise was granted by the fact that the experts involved in the three case studies shared the collective actors' cause and they often provided legal advice for free; as Professor Groenendijk told me: "I never got a penny for what I did. Just cute paintings from Mrs. Imran's children."[84] To be sure, reputation and career can also play a role as incentives for making lawyers and experts willing to collaborate in a mobilization effort. This seems especially true for the UK, where NGOs have a long tradition of intervening as third parties in the proceedings, and they avail themselves of barristers who might offer their services for free to increase their visibility and reputation.[85]

The active involvement of EU legal experts and scholars in (strategic) litigation before the CJEU is not news, but rather seems to be fully in line with the EU tradition in which "academics divide their time between participation as private consultants on cases before the Court and extensive commentary on the Court's decisions."[86] However, there is an important caveat: these Euro-lawyers do not belong to the sort of exclusive and elite club of legal entrepreneurs that contributed to the *Van Gend and Loos* and *Costa* legal revolutions and which "constructed for themselves a powerful position in the continuous reformatting of the European construction".[87] Instead, the three case studies witness the emergence of a new type of EU legal expert that operates mostly far from Brussels's headquarters and plays the crucial

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[83] Interview with Lawyer Gerben Dijkman, Utrecht, 13 December 2017.

[84] Interview with Professor Kees Groenendijk, Nijmegen, 20 February 2018.

[85] Interview with Barrister Simon Cox, London, 18 November 2016.

[86] Burley and Mattli, 'Europe Before the Court', 59.

[87] Mikael Rask Madsen, 'The Power of Legal Knowledge in the Reform of Fundamental Law: The Case of the European Charter of Fundamental Rights', in *Lawyering Europe: European Law as a Transnational Social Field*, ed. Bruno De Witte and Antoine Vauchez (London: Hart Publishing, 2013), 210; See also Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity'.

role of "translator":[88] he/she makes EU law intelligible for social movements and NGOs that work on the ground and, by doing so, contributes to bringing migrants' struggles to the attention of the supranational Court, with the aspiration of transforming EU law from below.

7. The third condition: An open EU Legal Opportunity Structure

The third, and last, condition posits that to have a mobilization before the CJEU, altruistic collective actors, supported by legal experts, are not enough: they need to operate in a context of an open EU legal opportunity structure (LOS). As mentioned in Section 2, the concept of LOS refers to factors external to the movements, albeit not immune to their influence, that can be subsumed under three categories: the available legal stock, access to court and judicial receptivity. In the context of the 267 procedure, I argue that the LOS takes a peculiar form, which I label "EU LOS": first, EU law must be perceived by collective actors as comparatively more advantageous than national law (legal stock); second, collective actors need to encounter a national judge who is willing and able to refer (judicial receptivity).

7.1 The comparative advantage of EU law

We have seen that, in the three case studies, migrants and their allies relied on courts to contest restrictive immigration rules. But when do they decide to rely specifically on the CJEU? According to a formalistic outlook, art. 267 of the TFEU is a tool for interpretation and for judicial cooperation. However, scholars noted that the CJEU transformed it into a tool that national courts can use to challenge the validity of Member States' acts vis à vis EU law (see Section 2). This more realist outlook is further refined by the present study: in the legal mobilization cases analyzed, the idea to refer did not originate from national judges but was rather promoted by migrant supporters that understood that a certain interpretation of EU law could offer higher protection to migrants than national law. This aspect is central to understand the logic behind EU law selective enforcement: to activate the 267 procedure, the parties must perceive in EU law an added value as compared to national law. Absent such comparative advantage, even if there is a problem of EU law enforcement or interpretation, collective actors will have no incentive to raise the issue in court.

In the three case studies, EU law and the CJEU represented new windows of opportunity for migrant supporters. In the Italian case, migrant support networks were trying to invalidate the laws criminalizing undocumented migrants since they entered into force in 2002. Their first strategy was to uphold the unconstitutionality of the laws before the Italian

[88] Sally Engle Merry, *Human Rights and Gender Violence Translating International Law into Local Justice* (The University of Chicago Press, 2006), 193. "The translators were people who helped the members of one layer reframe their grievances in the language of others."

Constitutional Court, with limited results.[89] In 2008, when the Return Directive was adopted, legal experts perceived that there was a change in the opportunity structure (in the legal stock) and decided to invest in that new possibility for contestation: shortly after the Directive entered into force, the Italian judges submitted twenty-two requests for preliminary rulings.

In the UK, the denial of the right to family unity and to family reunification remained a constant over the last three decades. The UK does not have a written constitution or a Constitutional Court, therefore migrant supporters tried to challenge British laws invoking the ECHR in national proceedings and before the ECtHR, with little success.[90] The advent of free movement and EU citizenship rights represented a major turning point: these norms, and their expansive interpretation by the CJEU in cases such as *Levin*, *Surinder Singh* and *Carpenter*,[91] conferred new rights to Union Citizens and their TCN family members. This meant that EU law opened up new possibilities to achieve family reunification and to challenge the legitimacy of British laws.

Finally, in the Netherlands, when the new integration policy, the *inburgering,* was introduced, it was immediately subjected to preliminary scrutiny by the *Raad van State* (the Council of State), which issued four opinions stating its partial unlawfulness under international standards.[92] The problem for pro-migrant movements was how to strike down the remaining part. Under the Dutch Constitution, national judges cannot engage in judicial review of national legislation, but they can review it under international legal standards, which enjoy primacy over national law. Again, thanks to the help of experts, migrants' rights supporters understood that the EU Family Reunification Directive bore some potential to challenge national law and practice.

In all three cases, we see a similar pattern in the contestation: first, collective actors filed a legal challenge domestically with little success, and then they 'shifted the scale of contention'[93] to the supranational level, in a sort of subsidiarity dynamic. In light of this, we can conclude that migrant supporters will never embark on an EU litigation strategy first, but

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[89] Italian Constitutional Court, Judgments n. 249 and 250 of 8 July 2010. Luca Masera, 'Costituzionale il reato di clandestinità, incostituzionale l'aggravante: le ragioni della Corte costituzionale', *Diritto, Immigrazione e Cittadinanza* Fascicolo 3, no. 3 (2010): 37–58.

[90] European Court of Human Rights, Abdulaziz, Cabales and Balkandali, No. 9214/80; 9473/81; 9474/81 (28 May 1985); Harlow and Rawlings, *Pressure Through Law*, 503. After the introduction of the 1998 Human Rights Act, British courts acquired the power to review legislative acts under human rights standards, but they still cannot strike them down, they can only issue a 'declaration of incompatibility'.

[91] Court of Justice of the European Union, Levin, C-53/81 (23 March 1982); Court of Justice of the European Union, Surinder Singh, C-370/90, ECLI:EU:C:1992:296; Court of Justice of the European Union, Carpenter, C-60/00 (11 July 2002).

[92] Ricky Van Oers, *Deserving Citizenship: Citizenship Tests in Germany, the Netherlands and the United Kingdom* (Martinus Nijhoff Publishers, 2013), 55; Besselink, 'Integration and Immigration: The Vicissitudes of Dutch "Inburgering"', 248.

[93] Tarrow, *The New Transnational Activism*, chap. 7.

they do so only when there is a comparative advantage: national remedies have to prove inadequate to protect migrants' rights and collective actors must perceive EU legal opportunities as potentially more protective.

7.2 Reaching the CJEU: National judges' ability and propensity to refer

The second dimension of the EU LOS is the national judge's attitude to references: for collective actors, securing access to a national court is only the first step, as they also need to encounter a judge who is willing and able to refer their question to the CJEU. This is all but easy, and a national court's refusal to refer has marked the end of many EU legal mobilization plans. In the words of one of the lawyers I interviewed: "You need to have the good case, at the good time, with the good judge."[94] Even if stated in these terms it seems a matter of luck, the case studies show that judges' propensity and ability to refer is often conditioned by structural factors (e.g. political environment, judicial culture, workload and EU legal knowledge) on which collective actors can exercise some influence. Below I will give three examples from the case studies.

The Italian case shows how one structural factor, e.g. judges' excessive workload, which is often mentioned as an explanation for non-referral,[95] can play unexpectedly in favor of the EU legal mobilization. In fact, the Italian government's *crimmigration* policy created an important shift in courts' competences: many migration cases got transferred from the administrative courts to the criminal ones, which soon became overwhelmed with large numbers of cases dealing with migrants' irregular status.[96] Since Italian courts are chronically overloaded with casework, this use of criminal justice for migration control purposes made criminal judges rather unhappy, but also more ready to challenge the *crimmigration* norms via preliminary reference.[97] This partially explains the mass referrals from criminal judges in Italy.

Another structural factor often overlooked in preliminary reference studies is the political environment.[98] My study has found that this can play a relevant role, at least in the highly

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[94] Interview with Lawyer Gerben Dijkman, Utrecht, 13 December 2017.

[95] Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia', 199; Jasper Krommendijk, 'Why Do Lower Courts Refer in the Absence of a Legal Obligation? Irish Eagerness and Dutch Disinclination', *Maastricht Journal of European and Comparative Law* 26, no. 6 (1 December 2019): 774.

[96] Di Martino, *The Criminalization of Irregular Immigration*, 69.

[97] Italian judges voiced their discontent through their self-governing body. See http://www.associazionemagistrati.it/doc/517/audizione-pacchetto-sicurezza.htm This was also confirmed in my interview with Luca Masera, 26 January 2016, Brescia.

[98] One exception is Golub, who argued that the UK's 'Euro-pessimism' had an influence on judges' attitude to referrals. However, he received harsh critics in response. Golub, 'The Politics of Judicial Discretion', 377; Stone Sweet and Brunell, 'The European Court and the National Courts', 88.

politicized migration domain. Exemplary in this sense was the case of *Zhu and Chen*: here the Court of Justice recognized the right of the Chinese mother of an Irish national to reside in the UK, although her daughter never exercised her free movement rights.[99] British Euro-skeptics did not like the judgment, which generated a strong political backlash. This led the President of the Immigration Upper Tribunal to publish a circular stating that, from that moment on, first-instance immigration judges should abstain from making references to the CJEU.[100] Notably, not only *Zhu and Chen*, but many other cases that have shaped our laws on EU citizenship and free movement were referred by first-instance immigration judges, *Carpenter*, *Baumbast* and *Akrich* to name a few.[101] The circular of the Tribunal's President marked the end of this fertile judicial dialogue, as British first-instance immigration judges never referred again.

When it comes to judicial propensity to refer, it seems that the single factor that most affects the emergence of preliminary references is again EU legal knowledge. As other studies have noted, judges' knowledge of EU law and procedure, and their experience with the preliminary reference procedure, can be central to explain variation in reference rates.[102] In the Dutch case, we can see how EU legal expertise strongly impacts on judges' ability and propensity to refer. In 2008, the Raad Van State (Dutch Council of State) experienced a 'European turn', meaning that EU law professors and experts (e.g. Mortelmans, former EU law professor at Utrecht University, and Wissels and Sevenster, two former Dutch agents before the CJEU) were recruited as members of the Court to strengthen its expertise in the field.[103] As a consequence of this new trend, the Raad Van State significantly increased the number of references to the Court of Justice and initiated new internal practices aimed at improving the quality of Dutch referrals to the CJEU.[104] This renewed attention to EU law and to the preliminary reference mechanism transformed the Dutch Court, which became one of the most frequently referring courts in the EU in the migration field.

Drawing some conclusions from these examples, we can affirm that, to have a legal mobilization before the CJEU, collective actors and resources are not enough. The EU law's

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[99] Court of Justice of the European Union, Zhu and Chen, C-200/02 (19 October 2004).

[100] Interview with Barrister Adrian Berry, London, 23 November 2016. See also Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law – Making European One', in *EU Law Stories*, by Fernanda Nicola and Bill Davies (Cambridge University Press, 2017), 218.

[101] Court of Justice of the European Union, *Carpenter, C-60/00*, ECLI:EU:C:2002:434; Court of Justice of the European Union, *Baumbast and R, C-413/99*, ECLI:EU:C:2002:493; Court of Justice of the European Union, *Akrich, C-109/01*, ECLI:EU:C:2003:491.

[102] Juan Mayoral, Tobias Nowak, and Urszula Jaremba, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge', *Journal of European Public Policy* 21, no. 8 (May 2014): 1120–41.

[103] Interview with Sadhia Rafi, 14 December 2017, Amsterdam. See also Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration', 138.

[104] Interview with Raad Van State judge, 22 February 2018.

(albeit only perceived) comparative advantage and national judges' ability and propensity to refer are necessary conditions for the mobilization, even though structural factors can significantly hamper the success of a legal mobilization. Further research should consider testing the three conditions identified in this paper against cases of non-mobilization, or non-reference, in order to understand whether they amount to necessary and sufficient conditions.

8. *Conclusion*

The article shows that a legal mobilization approach can enrich both empirically and theoretically the studies on the preliminary reference procedure. By drawing on the findings of an in-depth and cross-country analysis of three case studies of legal mobilization, it provides new insights on the use of litigation before the Court of Justice with the aim of contesting national migration laws. By answering to the call for a more thorough analysis of power structures and resources in EU legal mobilization, the paper delved into micro-dynamics of contention and shed light on the many obstacles that collective actors face in their paths to the CJEU. In particular, the paper identifies three factors that contribute to the emergence of an EU legal mobilization: 1) The presence of "altruistic" collective actors that take charge of migrants' individual grievances of injustice and initiate litigation on their behalf; 2) The availability of EU legal expertise, provided by academics and Euro-lawyers sympathetic to (or part of) the movement; 3) An open EU LOS that features EU law's (perceived) comparative advantage and national courts' ability and propensity to refer. This article upholds the critique made of other studies on legal mobilization, having been accused of assuming that the 267 procedure somehow automatically affects the distribution of power in national societies and constitutes a mechanism to further participation.[105] On the contrary, this article shows that migrants have a very marginal role in the legal mobilization, to the extent that often they are not even aware of it. Their autochthone supporters, however, thanks to European legal experts, can seize the new opportunities for rights-claiming offered by EU law and have an impact on the Court's agenda.

[105] Antoine Vauchez, 'Democratic Empowerment Through Euro-Law?', *European Political Science* 7, no. 4 (1 December 2008): 447.

1. ANNEX 1

Preliminary references by migration law and country through May 2018.