



# Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level

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# Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level

Sophie Jacquot and Tommaso Vitale

**ABSTRACT** This article is interested with the legal mobilization of transnational interest groups at the European level (European Union and Council of Europe). It compares the legal and political lobbying strategies of two umbrella organizations – the European Women's Lobby (EWL) and the European Roma and Travellers Forum (ERTF), which seek respectively to promote the rights of women and those of Roma – focusing on their interactions with European institutions and law. The article analyses the contrasted relationship of these groups to legal mobilization as a rights advancement strategy, shedding new light on how law can be strategically used by both strong and weak civil society actors. Beyond classical factors linked to organizational characteristics and identity, the differential usages of law by the two groups are explained by the role of strategic actors who adapt to the specificities of the system of governance in the two policy sectors – gender equality and anti-discrimination.

**KEY WORDS** European Union; interest groups' strategies; lobbying; Roma's rights; transnational legal mobilization; women's rights.

The European Union (EU) can be defined as a 'community of law'; it exists by virtue of law and through its usages. EU and the Council of Europe (CoE) have played a significant role in the international development and diffusion of a 'language of rights' (De Bùrca 1995; Scheingold 2004), which is an increasingly central aspect of its identity as a common polity constitutive of a singular ethical standard (Kelemen 2011). European treaties have progressively developed the defence and promotion of many categories of rights, including Roma and women's rights. Since the 1970s, policies have also been developed in order to implement these rights, and funding programmes have been launched to support these policies.

By virtue of these instruments, the European Union has contributed to the empowerment of civil society groups based on these rights categories. This article compares two European-level interest groups—the European Women's

Lobby (EWL) and the European Roma and Travellers Forum (ERTF), which seek respectively to promote the rights of women and those of Roma – on the basis of their diverse and sometimes ambiguous interactions with European institutions and law. Law is here understood both as a resource (the EU as alternative to national venues, law as a source of legitimization, case law as a source of rights promotion) and as a constraint (the strict and even restrictive perimeter of EU competencies, and the definition of who is/who is not legitimate with respect to this perimeter).

These groups were selected following the principle of paired comparison (Tarrow 2010). Since they operate in the gender equality and anti-discrimination fields, it entails that both groups can be considered as relatively weak groups within the framework of the European system of interest representation: they are transnational public interest groups; with a small-scale budget and staff; directly engineered and financially maintained by the European institutions. They differ, however, in their approach to law as a rights advancement tool. This point is particularly interesting as it allows to link together two different bodies of literature, i.e., the authors who characterize law as a tool often mobilized to the advantage of strong actors – such as private companies, or broad actor coalitions built on public–private machines (Börzel 2006; Harding 1992; Stone Sweet and Brunell 1998), together with socio-legal studies, where law is represented more frequently as a weapon of the weak (Guiraudon 2001; Scheingold 2004; Zackin 2008) or as an effective way to increase the power of weak actors (Vanhala 2011).

So, is law a weapon of the strong or of the weak? In this article, we show that law can be a weapon of both strong and weak civil society actors. The EWL and ERTF *adapt* to the changing institutional context of anti-discrimination and gender equality policies in a highly reflexive manner. Our approach is embedded in the studies on European-based civil society organizations which are willing to analyse their strategies to promote causes and seek political leverage.<sup>1</sup> We are contributing to this strand of literature not only by focusing on how forms of mobilization reflect the logic and structure of EU institutions (Marks and McAdam 1999), but also by looking at how the organizations interact with each other ‘while competing over resources and positions as well as co-operating and forging alliances’ (Johansson and Lee 2013: 4). Thus, in order to solve our puzzle and explain the different ways in which the EWL and ERTF bring into play law as an instrument, we will mobilize three main sets of variables: organizational resources; collective identity; the positions within the European political system.

## **LAW AS A LEGITIMIZING AND RESTRICTIVE TOOL: EUROPEAN INSTITUTIONS AND THE EMERGENCE OF TWO EUROPEAN-LEVEL PUBLIC INTEREST GROUPS**

As ‘guardian of the treaties’ and initiator of EU law, the European Commission has begun to finance European civil society groups as a way of bolstering its

supranational stature. This was seen as a means to develop a stable system of influence to boost the integration process, and it provided a remedy to the Commission's lack of expertise and information in some fields. The EWL and the ERTF are paradigmatic examples of the way in which this functionalist logic plays out in the field of rights promotion for women and the Roma people. Furthermore, the Commission has developed incentives to spur the creation of umbrella groups (Pierson 1996). With the help of more activist elements within the Commission, law has indisputably allowed these groups to exist. At the same time, it has had the effect of circumscribing whom exactly these groups can and should represent. In other words, it has defined the legitimate categories of Roma people and of women protected under European law. This circumscription has introduced dividing lines within the interest groups themselves.

All interest groups – transnational groups especially – constitute political arenas in which actors must formally and informally negotiate the political, cultural and social meaning and orientation of their collective action. To make it possible, a political process of collective identity construction must take place, in which common interests are unified into a singular 'interest group'. While Roma and women's groups can be defined as relatively weak actors within the European interest representation system, their creation has been synonymous with the empowerment of *some* Roma people and of *some* women, because of the restrictive power of the law, in accordance with these internal lines of division.

### **The EWL: engineering the representation of some 'women of Europe'?**

Sonia Mazey has underlined the extent to which the Commission has 'encouraged the growth of a transnational European women's lobby to support and legitimize Commission initiatives in this sector' (Mazey 1995: 142). The most remarkable aspect of the creation of the European Women's Lobby in 1990 lies in its late arrival if we consider: that the Treaty of Rome included an article on equal pay (Art. 119, now Art. 157); that the first directive on the equal treatment of women and men dates from 1975; and that the first ruling from the European Court of Justice (ECJ, now the Court of Justice of the European Union [CJEU]) dates from 1976. In the light of this long process, two main characteristics should be emphasized. Firstly, the creation of the EWL was an exercise in engineering, supported and even sustained throughout by dedicated femocrats (McBride Stetson and Mazur 1995), whose 'dream' was to enable 'women's organisations to co-ordinate in order to be able to influence institutions' (Man 1997: 127). Secondly, the diversity of women's and feminists' movements throughout Europe also delayed the process. Ten years went by before a European-level élite of specialized women's representatives – meeting the standards and requirements of the Commission (i.e., participating in the gender equality policy process) – finally emerged in 1990. Since then, the operating grant allocated each year by the

EU to the EWL has represented around 80 per cent of its total budget (from 300,000 ecus in 1992 to around 910,000 euros in 2012).

Since this conflicting start, individual members of the EW have tended to tell a teleological and glorious story in which the construction of a 'We, the Women of Europe' finally overcomes various differences, especially political ones. However, this process was anything but automatic, and was certainly not aided by the constraining nature of EU gender equality law.

In 1989, with the *Achterberg* case, the ECJ ruled that Community competences consisted in realizing equal treatment between men and women, not in a general fashion, but only as workers. In this manner, the Court provided a restrictive definition of the legitimate boundaries of Community action, and thereby also restricted the frontiers for collective action aimed at the promotion of women's rights. According to this interpretation, the Community's mandate only concerned gender equality in the labour market. This interpretation influenced the definition of the EU gender equality policy, narrowing the group of potential policy recipients to wage-earning female European citizens, thus neglecting women subjected to multiple discriminations (poor women, migrant women, etc.).

This restrictive conception influenced the way the interest that the EWL represent and defend was understood. The group's initial years of existence were marked by conflict over, first, whether or not to recognize the restrictive conception of gender equality imposed by the EU mandate and, second, over the question of the substantive representation of the 'women of Europe' within the EWL's decision structures – the inaugural conference being notably criticized for bringing together exclusively white, middle-aged, mostly professional women, thus mirroring the EU gender equality policy constituency (Hoskyns 1996).

In the end, these inner tensions were only resolved when the perimeter of EU gender equality law and policy was extended. This was made possible thanks to gender mainstreaming in particular (i.e., the integration of the gender dimension across all sectors of EU policies and actions), which used soft law to push the perimeter of the EU gender equality policy further and loosen legal constraints (Jacquot 2010).

### **The ERTF: giving voice to a forgotten European minority?**

The European Roma and Travellers Forum was created in 2004. For a long time, political discussions concerning the Eastern enlargement of the EU have all but ignored the issue of the Roma. At the end of the 1990s and in the early 2000s, however, it gained in prominence. The EU started to develop a more explicit public policy towards Roma, with the Commission becoming increasingly involved, and the CoE assuming a leading role in the framing of the issue. The CoE had initiated this process of dealing with Roma issues by holding several international meetings with Roma activists (Liégeois 2012). But it was only after the Parliamentary Assembly of the CoE wrote the

Recommendation 1557 (2002) on the legal situation of Roma in Europe, that it appeared imperative to create a formal representative body capable of participating in European policy-making.

The constitution of the ERTF took two years of discussion and negotiation. A specific policy window within the political opportunity structure enabled its creation. This window depended on two main factors: the CoE's desire to overcome Roma nationalism by creating a more functional body for the expression of concerns at the European level; and the strong will 'to create for the Roma some kind of consultative assembly to represent them on the pan-European level'<sup>2</sup> from Ms Tarja Halonen, President of Finland. Furthermore, following the 2002 Second World Roma Congress in Lodz, Poland, which triggered intense discussions around the idea of a continuous body for European-level lobbying, wide-scale participation by Roma activists constituted another motivating factor (Nirenberg 2009: 104–5). This process of creation involved the selection of an élite, which in turn entailed the inevitable exclusion of some Roma leaders. Indeed, one of the main points of contention during this period was the development of Roma nationalism, in which Roma increasingly came to be considered as a 'nation'. Significant umbrella organizations like the International Romani Union and the Roma National Congress pushed in this direction. But the EU was looking for a larger kind of representation. So, in 2004, the CoE Committee of Ministers agreed to establish close and privileged relations with the ERTF through a partnership agreement. The Finnish government helped finance its first three years of existence.

Obviously, the ERTF has not been able to include all Roma organizations, and those who do not seek membership present a constant challenge to its legitimacy. But, in comparison with other umbrella organizations, such contestations are not deeply entrenched (Nirenberg 2009). Conflicts have arisen between religious groups (Christians or Muslims) and secular groups. The scission between Eastern European Roma and the Western groups constitutes another source of tension within the ERTF, as does the division between travellers and non-travellers. The main internal cleavage, however, has grown up around the Europeanization of its activities.

The ERTF's goals are typical of other organizations of its kind. First of all, it aims to establish a 'fair and democratic representation' of Roma in Europe. Some Roma organizations, as well as some members of the European Parliament and experts on Roma working for the CoE, have insisted on a conception of Roma as a transnational minority, for whom the responsibility clearly falls on Europe. This conception has been criticized, however, as it absolved 'national states and populations from the responsibility of solving the problems that face Roma. By doing so, they have a tendency to conceive the Roma as a separate nation and thus symbolically exclude them from the existing national population' (Vermeersch 2012: 1205). The ERTF is a forum for the Europeanization of the Roma issue, for lobbying activities within the European policy-making processes and for participation in consultation. At the same time, so as to avoid national-level resistance to a perceived threat of Europeanization, the



Forum has staked a claim as a key political partner and interlocutor for national governments in matters concerning the Roma issue. Without a doubt, this constitutes a palpable division within the ERTF. On the one hand, some groups are heavily disappointed by national policies, who consequently look to Europe as the only source of fairness and reparation. On the other hand, many groups look to the European level as a way of acquiring the legitimacy to challenge national and regional policies, without withdrawing from sub-European levels entirely. The ERTF is more concerned with this second position (McGarry 2008: 462). However, in only a few years, it has been able to accommodate several different demands, to maintain a significant degree of participation, and to create a set of common interests articulated around the issue of anti-discrimination legislation and its implementation. For the ERTF, the discourse of intersectionality has become pivotal in addressing discrimination against Roma because it has made possible an exit from their relatively *marginal* position at the EU level, and has enabled coalition-building with other umbrella organizations. At the same time, it has pushed the ERTF towards a stronger focus on law and implementation.

### DIFFERENT (NON)USAGES OF LAW: A POLITICAL VS A MIXED MODEL OF LOBBYING

Law has been instrumental in the creation and shaping of the interest groups under study; it has been both and simultaneously a legitimizing and a restrictive tool. But, whereas EU law has restricted opportunities for collective action by women (because of its long-term exclusive focus on labour market and workplace discrimination), the emergence of a human rights based anti-discrimination frame at the EU level has facilitated the development of an inclusive, law-focused European Roma umbrella organization. We will now turn to a more detailed examination of the functional importance of law for the rights advancement activities of these groups and try to see the eventual feedback effects between the process of emergence of both groups and their lobbying strategies.

Most of the literature on EU interest politics tends to consider that litigation strategies using EC law are a useful and even powerful tool for interest groups, but that law is mainly a tool used by domestic groups to circumvent national governments and influence national policies (i.e., Alter and Vargas 2000; Börzel 2006; Vanhala 2009). This conception implies the existence of some sort of division of labour between domestic and transnational groups working in the same domain, with litigation being handled by the former, and the latter concentrating on political lobbying towards the European institutions. However, the distribution of tasks is not so clear-cut. Some transnational public interest groups also invest in litigation strategies. Whereas the ERTF promotes legal activism and strategic litigation, the EWL has never included this type of action in its repertoire. Whereas law is considered and used as a *resource*

for collective action for the ERTF, law remains a framework of *reference* to be influenced by alternative means of action for the EWL.

Another hypothesis which would account for the resort to legal mobilization by interest groups at the European level lies in the development of litigation capacities over time and along the development path of the groups. However, here again the EWL and the ERTF differ. The ERTF is indeed developing its expertise in litigation procedures, as we will see, while an involvement in such procedures has never been on the agenda of the EWL since its creation.

### **Law as a reference: the EWL and the paradox of litigation**

The history of the expansion of gender equality rights at the EU level under the auspices of litigation, and especially the genesis of this process in the *Defrenne* rulings (1971, 1976, 1978), has become 'legendary' (Cichowski 2007: 247) among academics and gender activists. It even constitutes a well-cited textbook case used to exemplify, variously: the effectiveness of the 'test case' method; the political role of the CJEU; the influence of women's groups in developing gender equality; or the role of private interests in promoting the integration of the EU legal system.

In 1966, Belgium had not yet adopted a single measure included in Article 119 on equal pay between female and male workers. In response, Eliane Vogel-Polsky, a Belgian lawyer, academic and feminist activist, adopted a deliberate strategy of litigation, recruiting Gabrielle Defrenne as a test case, a former Sabena stewardess pushed to retire at 40. Defrenne's judicial saga entailed three different trials and three ECJ rulings, following claims which were put forward by three different Belgian jurisdictions over a period of 10 years. The second *Defrenne* ruling established the direct effect of Article 119, while the third ruling established that equal treatment is a fundamental EU principle; both provided the legal basis for the development of EU secondary legislation on gender equality during the 1970s and 1980s (Hoskyns 1996). Since *Defrenne*, EU case law linked with gender equality has been extensive, comprising no less than 201 rulings enacted between May 1971 and May 2011 (European Commission 2011). Between 1971 and 2003, over a third (36 per cent) of preliminary rulings in the area of social provisions involved equality directives and 25 per cent of the total amount referred to equality provisions in the treaty (Cichowski 2007: 81–94). Both in absolute and relative terms, case law in the field of gender equality is important and has significantly contributed to the development, deepening and extension of an EU gender equality policy and to gender equality rights.

With such a well-known heritage at its back, it appears, if not paradoxical, at least somewhat surprising that, until now, the EWL has never used litigation strategies in order to advance women's rights at the EU level. The EWL repertoire mixes corporatist features (granted participation as member or observer in expert, advisory or parliamentary groups and committees; granted participation in policy consultation; management of EU-funded projects) with pluralist

features (informal contacts; building of coalitions; position papers; awareness-raising; expertise and counter-expertise) (Balme and Chabanet 2008). This repertoire does not, however, include legal mobilization other than an occasional monitoring of some of major case law trials. The handling of litigation procedures, neither direct nor indirect (i.e., through expertise or awareness-raising towards member organizations), has never been part of the modes of action and lobbying activities developed by the group.

### **Law as a resource: the ERTF and the promotion of strategic litigation**

Strategic litigation is not the main goal of the ERTF; formally speaking, it is not even credited as one of the Forum's priorities. But strategic litigation is always included in the ERTF speeches, as well as in its annual reports. The ERTF shows the outcomes of case law, and the benefits of strategic litigation. Together with the CoE, it promotes handbooks and training for lawyers on strategic litigation. It combines participation in the policy-making process with a more contentious type of activities. The promotion of strategic litigation is seen as a means to establish transparent systems, and thus to enforce the desired outcomes of lobbying. In this manner, it can be viewed as a classical instrumentalization of the court system as a way of correcting democratic deficits, and to provide accountability through the law (Dehousse 1998).

The ERTF has shed significant amounts of publicity on cases such as *KH and others v. Slovakia* and *DH and others v. The Czech Republic*, ruled on by the European Court of Human Rights. In 2011, however, the ERTF shifted to a particular form of direct engagement in strategic litigation. The European Social Charter includes a protocol that enables the European Committee of Social Rights to review collective complaints on rights violations. In February 2011, the ERTF submitted its first complaint. It accused France of violating Articles 16, 19§8, 30, 31§3 of the revised European Social Charter (rESC), alone or in conjunction with the non-discrimination clause in Article E. In the complaint, the ERTF requested that the European Committee of Social Rights review the facts, and that they subsequently urge the French government to apply the rESC directly and adopt a long-term national strategy. This first experience was very fruitful for the ERTF, which effectively worked to put forth several other complaints regarding various national states. Because the ERTF was unable to carry out strategic litigation systematically, it focused rather on the very emblematic and highly visible issues. In this way, the ERTF was able to push its member organizations to employ this form of action more intensively. Through its first case, the ERTF highlighted the national responsibility to address problems of a transnational nature, such as European internal migration. This issue resonated with the organization's main objective (and central internal division). It allowed the ERTF to address the discrimination faced by Roma as a group, rather than consider cases only on an individual basis.

Table 1 Different usages of law by the EWL and the ERTF

	EWL	ERTF
Influencing law <i>a priori</i> – corporatist repertoire	Direct granted participation in the policy-making process	
Influencing law <i>a priori</i> – pluralist repertoire	Indirect participation in the policy-making process	Indirect participation in the policy-making process
Transforming law <i>a posteriori</i> – legal repertoire	Monitoring of (occasional) case law	Monitoring of case law Promotion of strategic litigation Strategic litigation training Carrying out of strategic litigation

EXPLAINING CONTRASTED PATTERNS OF LEGAL MOBILIZATION

The EWL and the ERTF have been created in order to provide a representative body capable of lobbying. However, the ERTF has gone further, adopting a more contentious form of action that views strategic litigation as a means to challenge national policies. Thus, they contradict the literature on this subject which suggests, first, that litigation at the EU level is synonymous with the ‘empowerment of the already powerful’ (Börzel 2006: 130) and, second, that transnational groups tend to concentrate on political lobbying while domestic groups could focus on litigation. The two groups are operating under similar conditions: both are boasting a large membership of national and transnational organizations and scarce resources; both are (apparently) weak public interest groups. How can we understand these diverging strategies? Our argument is that this puzzle can be explained by three main variables: group resources; group identity; and group position within the European system of governance and of interest representation.

Adapting to and using available resources

The first set of factors – i.e., the organizational dimension – has proportionally received the largest amount of attention by the literature explaining the strategic decision-making of interest groups that seek to influence the policy process (Alter and Vargas 2000; Bouwen and McCown 2007; Conant 2002; Harlow and Rawlings 1992; Hilson 2002; Vanhala 2009).

The EWL is a good case confirming the hypotheses of the literature highlighting the importance of group resources in the recourse to strategic litigation. In

terms of membership, the EWL is a large umbrella group, bringing together more than 2,500 individual groups, networks and national steering bodies. However, its general secretary is small, composed of only nine full-time employees. In line with the classical approach to resource mobilization (Kitschelt 1986; McCarthy and Zald 1997), it follows that scarcely available resources determine the EWL's strategy – i.e., limited time, money, expertise and personnel. Lobbying is then a rational choice as a mode of collective action, since the 'resource threshold' (Bouwen and McCown 2007: 429) of such a strategy is generally considered to be much lower than that required for a litigation strategy. Moreover, the EWL's decision to avoid litigation strategies appears to validate two further hypotheses from the literature on organizational factors. Firstly, the hypothesis relating to the group's participation in the policy-making system: 'The greater the political strength of a group, and the more access the group has to the policy-making process, the less likely a group is to mount a litigation campaign' (Alter and Vargas 2000: 472). As an interest group, the EWL has chosen, after a highly conflicting episode, to function as a lobby. Rather than working from outside of the system, the promotion of women's rights here entails direct co-operation with European institutions. In exchange, European institutions grant the EWL broad access to the system (in both formal and informal manners) and a quasi-monopolistic position, further decreasing the need for and desirability of litigation. In this context, judicial activism is viewed as a more conflicting mode of action and members of the EWL tend to consider that this strategy could be regarded as a violation of trust by other members of the gender equality policy community, and the European Commission in particular. Secondly, the case of the EWL lends support to the organizational hypothesis on group size: 'The more broad and encompassing the interest group's mandate and constituency, the less likely it will be to turn to litigation strategy' (Alter and Vargas 2000: 473). As indicated by the large range of its activities – from campaigns against trafficking in women to the integration of gender equality concerns in the EU 2020 Strategy – the EWL has been granted a very large mandate by its equally large constituency. Over the years, this situation has led it to develop a professional approach to lobbying, one based on 'transnational interest formation' (Helfferrich and Kolb 2001: 149). This, in turn, decreases the need for and desirability of litigation.

In comparison, the ERTF is highly influenced by powerful Transnational Advocacy Networks (TANs). On the one hand, these networks boast significant resources, which are not only monetary in nature, but cultural too (McGarry 2008). The most important networks are those promoted by the Open Society Foundation. The Open Society Foundation has a strong commitment to liberal values, and has identified strategic litigation as the most pertinent way to enforce the fundamental rights of the Roma. It is no accident that Mr Rudko Kawczynski was unanimously elected president of the ERTF in 2005 and re-elected in 2010. In the past, he had been involved in the creation of some of the most important TANs for Roma rights, and especially those financed by the Open Society Institute, such as the Roma Participation

Programme, the European Roma Rights Centre and the European Roma Information Office in Brussels. Last and not least, their political strength and breadth is higher than any Roma non-governmental organization (NGO) involved in the constituency of the ERTF. All these TANs are strongly engaged in promoting strategic litigation for Roma rights (Goldston 2010).

### Adapting to collective identity frames

The second set of factors relates to the collective identity of the group and to the frames and ideas that have contributed to the construction of its collective identity. As underlined by Lisa Vanhala:

framing processes will permeate all aspects of [an] organization: its membership, its relationships with other actors, its goals and its strategies in achieving those goals. The interpretative frames continuously being constructed and redefined within an organization may dictate courses of action or tactics that are considered more 'appropriate' than others. (Vanhala 2009: 743)

The identity of the EWL as a *women's* lobby does have cognitive and normative consequences on the types of actions favoured by the group, and litigation is not considered an 'appropriate' tactic. The EWL was founded on the idea that women constitute an exception, that discrimination based on sex has a specific character, and that it is also therefore 'exceptional', in the literal sense of being 'incomparable'. The rationale underlying this idea is that the difference between the sexes is universal, it concerns all human societies and this difference transcends other differences (social, ethnic, etc.). In short, 'women are not a category': they are half of humanity (Bereni and Lépinard 2004). This 'exceptionalism frame' (Jacquot 2010: 131) explains for example why the EWL was formerly – during the negotiation process of the Amsterdam Treaty – hostile to the inclusion of a general anti-discrimination clause, which finally mandated the EU to fight discrimination based on sex alongside 'other' discriminations based on race or ethnic origins, religion, disability, age or sexual orientation. In this respect, strategic litigation is not considered an 'appropriate' tactic with regard to the group's identity, which is based on the idea that women are not a minority like 'other' minorities, that gender equality has a specific and long-running history at the EU level, that it has been granted privileged access. Consequently, resorting to this 'weapon of the weak' would be the symbolic equivalent of giving up on this 'exceptionalism frame', of recognizing (before not only other public interest groups but also before its constituency) that the EWL no longer enjoys privileged access and treatment, that it has been weakened or marginalized within the policy process.

Strategic litigation also constitutes a way of addressing national responsibilities, and this is a major aspect of the ERTF's identity. Returning to the example of the complaint submitted against France, strategic litigation served to articulate the national government's clear responsibility with regard



to European regulation. In a way, this is the perfect case for anyone wishing to address the main tension that underlies the division between Roma activists in the Forum. The ERTF works exclusively at the European level, while their member groups belong to and act at the national and local levels: the interplay between levels is made more difficult by the fact that some ERTF members are not active at sub-European (national and local) levels. Owing to this disconnection from the national level, such members are not always representative of some portions of the Roma community. Litigation is one of the main mechanisms they have found to reincorporate these different levels; it has allowed the ERTF to promote its own identity as an autonomous and distinct forum. Furthermore, in promoting among its members the idea of judicial recourse as a legitimate and suitable repertoire of actions, the ERTF is able to address the key problem of joining together its Eastern and Western members. In Central and Eastern Europe, public interest law has constituted a new concept in the development of post-communist legal systems. The European Convention system, and the culture and practice of public interest litigation helped encourage Roma communities to *reframe* and rearticulate the myriad of social problems experienced by their members as violations of their fundamental human rights. The ERTF's executives have used strategic litigation as a tool in order to build common ground between Roma from different countries. What is relevant in our explanation is not the ethnic identity of Roma, or the specific ancestral collective identity of the ERTF constituency. What matters in this case, as in the case of the EWL, are the strategic choices regarding the identity-building process of such groups: within a competitive environment, they seek actively to set themselves apart from other rival groups. The ERTF essentially must deal with competition from many other organizations wanting to federate and co-ordinate Roma rights groups, such as the International Romani Union (Acton and Klímová 2001), and the Roma National Congress (Klímová-Alexander 2005), as well as transnational advocacy networks such as the Open Society Institute – Roma Participation Programme, the European Roma Rights Centre (McGarry 2011) or the broader European Roma Policy Coalition (Sigona 2011). All such groups play the role of transnational representation, competing with one another, and often involving the same non-governmental organizations.

### **Adapting to an interdependent policy and institutional environment**

The third set of factors has been explored by the literature to a lesser extent, so that we want to highlight the role of the integration and position of the groups within the European system of governance, including its image and reputation within this system. Strategic actors within the groups are paramount and adapt to their lobbying environment. As pointed out by Dür and Mateo, interest groups' choices of lobbying strategies are interdependent; they select modes of action in response to those chosen by other groups in the field (Dür and

Mateo 2013: 678). We would like to add that they also opt for strategies and modes of action in interdependence with their policy environment. They adjust to the evolution of the nature and contents of policies in each sector. Actors and groups are not simple transmission belts; they develop agency independently of structural conditions and they use the resources and constraints provided by the European system of governance (Woll and Jacquot 2010), including legal resources and constraints. However, this is, of course, a realm of possibilities and all actors do not use them, and all are not in the position of doing so.

In the case of the EWL, we observe an important interplay between the group and the nature of the policies it wishes to influence. Since the mid-1990s, the EU gender equality policy has been increasingly characterized by the development of soft, non-binding instruments and new modes of governance, while hard law progressively diminished (Beveridge 2012). The weakened legal dimension of the EU gender equality policy implies a reduction in opportunities for the recourse to the law (Shaw 2000). This development increasingly relegates the CJEU to the background, and necessarily undercuts any potential legal activism by the EWL. By default, a non-binding policy based mainly on soft law instruments offers fewer footholds for activists; it provides fewer means for actors who wish to develop EU regulation and provide the attendant protection it affords to individuals (Edquist 2006). We can subsequently regard the EWL's non-adoption of litigation strategies as part of its adaptation to the evolution of the EU system of governance. In this sense, governance instruments such as gender mainstreaming tend to push interest groups such as the EWL towards lobbying rather than legal mobilization.

If we look at the evolution of European governance in the field of Roma's rights, one of the main trends to be underlined is the transformation of the system of interest representation in the field. Over the preceding years, new arenas of negotiation with the European Commission have opened up, such as the Decade of Roma Inclusion 2005–15 (once again co-funded by the Open Society), or the recent European Platform for Roma Inclusion. These platforms bring together the representatives of the EU member states, Members of the European Parliament, various organizations and Roma NGOs. It is in this context that the ERTF has sought to increase its visibility and effectiveness, distinguishing itself principally through a repertoire of action that is easily identifiable. Under this new configuration, the ERTF is losing its role as a forum for the discussion of European and national policies between European institutions and Roma NGOs. Instead, it has become a more independent lobby. Seeking to reinforce its identity in this new institutional scenario of constraints and opportunities, the reference to anti-discrimination and its link to the system of law and rights has turned out to be more systematic. The contentious side of its action (i.e., the promotion of strategic litigation) has become a precious tool designed to consolidate the membership of the Roma NGOs and burnish its external image.



Table 2 The EWL, the ERTF and usages of legal mobilization

	<i>EWL</i>	<i>ERTF</i>
Resources	Low necessity and desirability of litigation	Availability of litigation models and expertise
Identity	Identity based on an insider position rather than outside litigation	Reinforcement of a multilevel (European <i>and</i> national) identity through litigation
Strategic environmental adaptation	Adaptation to a 'softer' gender equality policy	Litigation as a means of differentiating and positioning the group within a competitive interest groups environment
Usages of legal mobilization	No direct investment in strategic litigation	Increasing investment in strategic litigation

CONCLUSION

While EU studies tend to underline law and litigation as major instruments for affluent and powerful corporate groups, our research pleads the case for nuance in the matter. It confirms that law can also be framed as *a sort of* weapon of the weak (Scheingold 2004): the ERTF has promoted strategic litigation not just to reward individual victims but also to apply pressure to member states so that they change their social and urban policies. This has also helped put institutional and political discrimination in the light. At the same time, this article has shown that recourse to litigation is never an automatic or obvious choice for weak advocacy groups (see also Guiraudon [2001]). The case of the EWL clearly demonstrates this point. We have described the different sets of choices and the different repertoires of action that the EWL and the ERTF have adopted in order to improve their political efficacy. We have used the same set of variables to explain the (non-)recourse to litigation: (1) organizational variables; (2) the group's identity, and political culture; and – not unrelated to these former two – (3) the role of the integration and position within the EU political system, including the group's image and reputation within this system. At the intersection between these last two variables, we have highlighted the identity-building choices that have strategically distinguished these actors within the European system of interest representation. On the whole, these three main variables make the analysis of civil society agency possible. Those are constrained – though not determined – by the institutional configuration of law and the configuration of the policy communities. These results underline the relevance of a relational approach taking into account the positions of the actors, and their competition for resources and visibility.

It is well known that the circulation of fashionable policy ideas and instruments develops at the global scale and is not based on certain sectors

(Dobbin *et al.* 2007); and that the same is true for the diffusion of social movements' repertoires of action (Della Porta and Caiani 2011). But when we consider such movements in the context of highly structured institutional environments, the convergence that they exemplify on the street or in public campaigns is nowhere to be found. The manner in which lobbying is used to influence the goals and means of public policy – especially with regard to the selection of instruments and their implementation – seems to be highly related to the normative context in which this interaction is situated, tested and evaluated. Whereas the frame of anti-discrimination is common to both the cases under scrutiny, as is the institutional context of the European Commission (EC), we have observed different kinds of strategies. The strategies that the two umbrella groups use to influence EU policy-making are only partially influenced by their genesis, and they evolve and adapt in a relational manner. The three main sets of variables we highlight here suggest a dynamic and relational neo-institutional interpretation of the groups' agency: in the different policy subsectors, EU-based umbrella organizations use law in a reflexive manner, taking into account the competition of other actors and platforms, the power and limit of the transnational level on the national and local ones, the symbolic and normative constraints, their own resources and their identity strategy. At the EU level, the main weapon of the weak is less legal mobilization or strategic litigation than adaptation to the specificities of the system of governance and interest representation. Rather than weak or strong, the EWL and ERTF are cases of survival of the fittest (to their political environment)!

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## NOTES

- 1 This article is based on qualitative analysis and the empirical material has been gathered in the two cases according to the principle of triangulation between secondary sources, documentary sources and semi-structured interviews. Eighteen interviews have been conducted with EWL and ERTF members (both grassroots members and members of the secretary generals in Brussels). This specific article being part of larger long-term research, interviews have also been conducted with members from other transnational EU-level interest groups, administrative officials from European institutions (CoE and EU) and members from the European Parliament and experts participating to the European policy process over a period of more than 10 years. We analysed the data in a within-case qualitative research tradition, following the guidelines developed by Beach and Brun Pedersen (2013) on how to use secondary sources, and on inference and causal mechanisms in case centric process-tracing.
- 2 CoE, Committee of Ministers, GT-ROMS(2003)4, 4 March 2003.

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