Lobbying versus litigation: political and legal strategies of interest representation in the European Union
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ABSTRACT Interest groups’ many and varied attempts to influence EU public policy are well documented. Research on EU interest politics has made considerable progress in the analysis of both the access and voice strategies they use as they seek to influence the policy process. Other scholars have focused on the legal strategies that private actors deploy when they endeavour to shape public policy by bringing cases before the ECJ. Although both lobbying and litigation strategies have been well studied in the context of European integration and are, in principle, available to most business interest groups, few scholars have asked what determines actors’ selection of one or the other in their pursuit of policy change. This paper attempts to bridge these two strands of research and theory by offering a framework in which private actors’ choice between lobbying and litigation can be understood and hypotheses about their behaviour derived.

KEY WORDS Commission; ECJ; interest group; litigation; lobbying.

1. INTRODUCTION
The strategies that interest groups bring to bear in their attempts to influence public policy are well studied. The range of targets, resources and actions that they engage through lobbying has been extensively detailed in both national politics and, increasingly, at the European level (Coen 1997; Beyers 2002; Bouwen 2002, 2004a; Mahoney 2004; Eising and Kohler-Koch 2005; Mazey and Richardson 2006). Similarly, the ways in which interest groups take to the courts in order to prompt policy change and the behaviours that underpin their success before the bench have long been studied in national systems (Epp 1998; Galanter 1974) and often presented as a key part of the story of European integration (Stone Sweet and Brunell 1999; Stone Sweet and McCown 2004).

Indeed, the European Union (EU) is relatively distinctive in terms of the number of opportunities that it presents to interest groups seeking to shape policy and regulation. What has never been examined in the EU and only cursorily in other contexts is the interaction between these two choices: what
underpins the decision of an interest group to pursue policy change through lobbying or litigation? Do they tend towards one over the other? Is one a dominant choice? Although it has been exhaustively established that interest groups engage in both activities and that they have been centrally involved in the on-going process of European integration through these means (Haas 1958), next to nothing is known about the relationship between these two principal modes of interest group action.

It is, however, an important question. Interest groups are differentially able to take advantage of a variety of lobbying and litigation strategies, as will be discussed below. External events can also push them to pursue one over the other. Famously, during the period of the Luxembourg Compromise, when the dominance of unanimity-based decision-making slowed legislative output nearly to a standstill, interest groups pursued policy change through the courts to the extent that it was almost the sole vehicle of European integration at that time (Stone Sweet and Caparaso 1998: 116). The accession in May 2004 of ten new member states to the EU, absent any particularly effective decision-making mechanisms to accommodate this increase, is quite likely to increase legislative deadlock again. This would have the potential to push the EU into a second era in which policy-making through the European Court of Justice (ECJ) dominates. This could have important consequences for the relative influence of various interest groups.

This paper sketches a theoretical perspective for understanding this unstudied question. It introduces the relevant literature and theory, examining the activities of interest groups engaging in lobbying and litigation as means of seeking policy change and those factors that contribute to their efficacy. On the basis of this discussion, it analyses variables relevant to both the individual-level attributes of interest groups and the strategic environment in which they operate that influence their choice to lobby, litigate or both. It then develops some hypotheses about which would push them to litigate or lobby and explores these propositions in the context of a series of exploratory case studies.

2. THE POLITICAL STRATEGIES OF EU INTEREST GROUPS

Over the last decade, the literature on EU interest representation has made considerable progress by systematically studying the political strategies of various interests seeking to influence the policy-making process in the EU multi-level system. Two major political strategies can be distinguished at the EU level and have been characterized by the labels ‘access’ and ‘voice’ (Bouwen 2002; Beyers 2004). While some studies have focused on access strategies undertaken by interests to participate directly in the EU decision-making process, others investigated the voice strategies of interests seeking to influence policy-makers indirectly through media attention and political campaigns.

The ‘voice’ strategies of private actors can be characterized as public political strategies. In contrast with the existing US literature (Gais and Walker 1991; Kollman 1998), these strategies have only been marginally studied in the field
of EU interest politics (Reising 1998; Imig and Tarrow 2001). Public political strategies relate to the lobbying activities that take place in the public sphere in which the debate between societal interests and policy-makers becomes visible to the broader public. The rather technocratic conception of EU policy-making promoted by the dominant theories of European integration may be one reason for the scant attention paid to public political strategies in the EU literature. European integration was considered to be driven by functional spill-over and/or technocratic policy-making rather than by public debate at the EU level (Haas 1958). It is therefore not surprising that while recent empirical research has established the importance of voice strategies in EU interest politics, it also confirmed the predominance of access vis-à-vis voice strategies (Beyers 2004). Because of this predominance, this article focuses solely on access strategies in its analysis of lobbying and litigation strategies. Moreover, based on the agreement in the literature that business interests are much better represented in Brussels than other societal groups (Coen 1997; Mazey and Richardson 1999: 121), the theoretical and empirical part of this article studies the behaviour of business interest groups only.

2.1 The logic of access strategies

The access strategies of private actors focus on the EU institutions that play an important role in the EU decision-making process, i.e. the European Commission, the European Parliament (EP) and the Council of Ministers. In the literature on EU interest politics, the European Commission has until recently often been identified as the most important lobbying target (Coen 1997; Mazey and Richardson 1999: 11). However, the additional powers acquired by the EP over the last fifteen years have led to the elevation of the supranational assembly’s importance as a lobbying target. While it was still possible at the time of the co-operation procedure to argue that the Parliament was relatively weak, the situation has changed dramatically as the EP’s formal powers have widened. Since the Treaty of Maastricht, the co-decision procedure has provided the EP with real veto power in the legislative process. The rise of the Parliament’s powers coincides with a relative decline of the Council of Ministers’ influence. Not only has the increased use of qualified majority voting removed the veto of individual member states in the decision-making process, the Council has also increasingly had to share its residual power with the EP. Nevertheless, the Council remains a crucial player in the EU decision-making game.

A number of systematic studies of EU interest politics have investigated the direct access of interest groups to the three main EU institutions, i.e. the Commission, the Parliament and the Council (Pappi and Henning 1999; Beyers 2002; Bouwen 2004a; Eising 2004). Frequently, private interests undertake combined access strategies to the three main EU institutions in order to exert influence at the various stages of the EU legislative process. Other studies have limited their analysis to the access strategies of private interests to a specific EU
institution (Kohler-Koch 1997; Bouwen 2004b). In that case, a single EU institution is analysed in order to reveal its crucial access points for private interests. All these investigations focus their analysis on access instead of influence, as more traditional lobbying research tends to do, because they seek to avoid the methodologically problematic enterprise of trying to measure influence (Huberts and Kleinnijenhuis 1994). Nevertheless, it should be emphasized that access does not automatically mean influence. Political actors might gain access to the policy-making process without being able to translate this advantage into concrete policy outcomes. Moreover, as the preceding discussion of voice showed, influence does not always require that actors have direct institutional access.

There is agreement in the literature that access strategies are related to an exchange process between private and public actors at the EU level (Levine and White 1961: 578; Pfeffer and Salancik 1978). In return for ‘access’ to the EU agenda-setting and policy-making process, the EU institutions want certain goods from the private actors. Private interests have to provide these goods, called ‘access goods’ (Bouwen 2002: 370), to the EU institutions in order to gain access. The EU institutions need these goods in order to fulfil or expand their role in the EU decision-making process. The access goods that can be identified have a common characteristic: information. The direct interaction between private and public actors allows the transmission of complex technical information. However, political information is also exchanged. Depending on the interest group’s constituency, more or less representative political information can be provided to the EU institutions.

2.2 Resources, organizational form and capacity to gain access

Private interests’ supply of technical and/or political information and the EU institutions’ demand co-determine the access pattern (Bouwen 2002: 372). While individual companies’ superior capacity to provide technical information gives them a high degree of access to the technocratically oriented European Commission, the ability of national and European associations to supply representative political information explains their high degree of access to the EP (Bouwen 2004a: 358). As these examples show, the organizational form of interest representation (i.e. individual firms, national associations, European associations) is the crucial variable that determines the private interests’ capacity to supply access goods and thereby to gain access to different EU institutions (Bouwen 2002: 375). In addition to their organizational characteristics, the material resources that interest groups have at their disposal are another important variable. The resource variable is particularly important when taking the complex multi-level structure of the EU into account. Material resources determine to a large degree the extent and kind of strategies that interests use.
3. THE LEGAL STRATEGIES OF EU INTEREST GROUPS

Another means of effecting policy change, well documented in EU politics, is litigation. Seeking to have a court rule on the unconstitutionality or otherwise improper nature of legislative provisions in order to change policy is a long-standing tactic of interest groups seeking to stimulate policy change. In the EU, pro-integrative rulings of the ECJ, institutionalized as precedent (McCown 2004), have underpinned profound changes in EU law, including the ‘constitutionalization’ of the treaties (Weiler 1999), trade liberalization (Stone Sweet and Brunell 1999; Stone Sweet and McCown 2004), evolution of the separation of powers rules (McCown 2003a) and, indeed, the creation of entirely new policy areas (Cichowski 1998, 2001). The Court’s preliminary reference case law, those cases filed by private parties, has been the major source of these rulings (Slaughter et al. 1998).

3.1 The logic of litigation strategies

EU law and the activist case law of the ECJ provide interest groups with potentially powerful legal tools for promoting policy change. As early as the 1960s, the ECJ declared that EU law ‘does not impose only obligations on individuals, it also confers upon them rights’ (ECJ 26/62 Van Gend en Loos). Establishing that EU law applies to individuals as well as member states opened the door for private interest litigation, of which interest groups have made much use.

Although cases can come before the ECJ by a variety of means, private parties’ disputes are brought to the Court through the preliminary reference mechanism of Article 234 of the treaties. Article 234 allows national courts to refer a case that they are reviewing to the ECJ wherever they think that it may implicate a relevant point of EU law, the applicability of which is unclear or where they question the validity of European secondary legislation. All courts may send such references and courts of final appeal must refer them. From the point of view of interest groups, litigation is, thus, a strategy for targeting EU policy that begins at the national level, by bringing a case in a national court, based on a point of EU law.5

Although litigation is often viewed as a means of removing national rules that inhibit some aspect of European integration (Scharpf 1999: 50), ECJ decisions often have an impact more akin to law-making. The ECJ’s rulings can be quite prescriptive and when it makes rulings that strike down national rules, and widen the applicability of EU ones, it is often rather explicit about what the amended national or European rules should look like in order to be in conformity with the treaties. In this way, interest groups that successfully litigate in order to shape EU policy not only effect the removal of national rules, on the basis of EU law, but also shape the form of future legislation.
3.2 Resources, organizational form and capacity to litigate

Characteristics intrinsic to interest groups shape their recourse to litigation strategies just as they do their choice of access strategies. At the most basic level, the initiation of litigation strategies is costly and, thus, interest groups with more material resources are advantaged, relative to those with fewer, in using this approach.

Successfully pursuing a litigation strategy requires that an interest group be able to maintain focus over the long term. Interest groups’ greatest successes come as a product of fairly sophisticated litigation strategies that usually bring not one, but planned sets of cases, taking advantage of the precedent-based decision-making of the Court. Litigants have enjoyed success at changing legislation through legal means, even in the face of significant member state hostility, by deploying strategies of rapid repeat litigation (McCown 2003b). This is essentially a strategy whereby litigants, once they have won a case, rapidly bring a subsequent suit before the Court. This has the effect of locking in the earlier, favourable ruling, by having it applied as precedent in later decisions. Writers have long pointed to the advantages that accrue to repeat litigators (e.g. Galanter 1974) and private actors have found that being repeat litigators is particularly effective in EU judicial politics. The strategy works most effectively where a very organized interest group with a narrow mandate and well endowed with resources is able to swiftly bring several cases. This strategy has proved effective for actors even where it has been quite difficult to obtain any legislative changes to complement and support legal rulings (McCown 2003b).

In order to effectively use strategies of rapid repeat litigation, however, interests must be organizationally structured so that they can maintain focus and consistent preferences over complex policy issues over long periods of time. Large individual companies and specialized associations have often the required organizational characteristics and resources to engage in such litigation strategies.

4. LOBBYING VERSUS LITIGATION: HOW TO DECIDE?

It is well established in the interest group literature that private interests seek to effect policy change both by lobbying and litigation (Baumgartner and Leech 1998: 152). A number of survey studies in the US have established some basic empirical facts regarding private interests’ use of lobbying and litigation strategies (e.g. Schlozman and Tierney 1986; Knoke 1990). These studies show that private interests more frequently employ access than litigation strategies. When actors do litigate, some work suggests that factors such as groups’ resources and the institutional environment in which they operate are motivating factors in the choice (Olson 1990; Wanemaker 2002; Krishnan 2002). Very little is known about what affects private interests’ choices to pursue one strategy over the other, however.
There is only a small theoretical literature which addresses this issue. It is common for authors to examine lobbying and litigation as a sequential choice, in which interest groups’ strategic challenge is to decide how best to allocate resources over the actions as two stages in the policy cycle (De Figueiredo and De Figueiredo 2002; Holburn and Vanden Bergh 2002). Although the question of resources is confirmed by this article, it is not always appropriate to conceptualize the choice this way. Interest groups do not inevitably wait until the end of the policy cycle to litigate, reserving it as a ‘threat’, but do so also as another way of initiating policy change. There is also a great tendency in the literature to focus on how features of government institutions shape the choice to litigate or lobby, but to overlook how the features of interest groups influence this choice. (But see Rubin et al. 2001, who argue that firms may have a ‘technological advantage’ for litigating or lobbying that influences their choice.)

In the EU literature relevant to litigation and interest group mobilization, several writers point to the dynamic relationship between lobbying, interest group formation and litigation. Some scholars see a mutually reinforcing dynamic between ECJ output, legislation and interest group formation where increases in one promote increases in the others (Fligstein and Stone Sweet 2002). Others identify litigation as most, or even only, effective where it is backed up by effective interest group lobbying, (Alter and Vargas 2000; Conant 2002). Nevertheless as Conant notes, the ‘factors that empower actors to coordinate legal and political resources require greater attention in the literature’ (Conant 2002: 23). What factors intrinsic to interest groups and what issues inherent in the institutional environment guide how they choose between lobbying and litigation has rarely been considered. Indeed, the basis on which variables private interests make this choice is far from clear and is therefore analysed in the next section.

4.1 The impact of interest group characteristics

The discussion earlier in this paper of lobbying and litigation strategies has shown that private interests are differentially advantaged depending on their organizational form and resources. Given the impact of these two variables on the shape of both access and litigation strategies, whether they also influence private interests’ choice to pursue one strategy over another becomes a compelling question.

(a) Resources

It has become clear that the resources which private interests have at their disposal have an important impact on the access and litigation strategies they can employ. The level of available resources influences the extent to which private actors can combine access strategies to the different EU institutions (Bouwen 2002). It also determines, to a large extent, the degree to which interest
groups are able to deploy resource-intensive long-term litigation strategies (McCown 2004; Conant 2002; Harlow and Rawlings 1992).

The level of resources available to a private interest also plays an important role in its choice between lobbying and litigation strategies. Nevertheless, it is difficult to argue that private interests prefer one strategy to the other because of an absolute difference in resource requirements. Like the elaboration of a litigation strategy, the development of a fully-fledged access strategy requires a substantial resource-investment. However, the resource-threshold to initiate some form of influence strategy is different for lobbying and litigation. Whereas a basic lobbying strategy can be initiated with a minimal level of resources, this is not the case for a litigation strategy. Over a decade ago, Harlow and Rawlings (1992) estimated that the minimum cost for initiating a European legal case in the UK was £40. The initial resource-level required both in terms of material resources and knowledge is lower for lobbying than for litigation: it suffices to call your local Member of the European Parliament (MEP) or the responsible Commission service to initiate an access strategy. It is therefore hypothesized that there is an inherent bias in favour of lobbying and against litigation in the EU because of the differential initial resource-threshold between the two influence strategies.

H: Because of the different initial resource-thresholds required, business interests will choose lobbying more often than litigation.

(b) Organizational form

The previous discussion has shown that the organizational characteristics of interest groups have an important impact on their capacity to deploy lobbying and litigation strategies. Based on the insight that there is a relationship between the organizational form of interest representation and its capacity to provide access goods (and consequently gain access), it has been demonstrated that private interests gain access to the EU decision-making process by managing the organizational forms of their interest representation (Bouwen 2004a: 359). It has become equally clear that the organizational form variable influences the extent to which interest groups are able to deploy long-term litigation strategies bringing multiple cases to court.

In addition, the organizational form of private interests — whether they are an individual firm, a national association or a European association — also shapes their decision to lobby or to litigate. Interest groups with a narrow mandate and constituency are more likely to turn to a litigation strategy. The broader and more encompassing the interest group’s mandate and constituency, the less likely it will choose a litigation strategy (Alter and Vargas 2000: 473). It is more challenging for these groups to opting for litigation because they find it more difficult to reach the necessary consensus over a relatively specific set of preferred policy outcomes for the longer periods of time necessary to execute an effective multi-case litigation strategy. Moreover, the broader the group, the greater the risk that any ruling may go against the interests of some of its elements. This is less likely to happen to narrowly focused interest groups.
Following this reasoning, individual companies should turn to litigation strategies more often than associations. In addition, national associations are expected to litigate more frequently than European associations that represent a broader constituency.

However, narrowly focused interests do not enjoy a similar advantage when they seek to deploy access strategies. While individual companies have a relatively high degree of access to the European Commission, national and European associations have the highest degree of access to the EP (Bouwen 2004a: 358).

When these insights are combined with those on litigation discussed above, the following hypothesis can be generated:

\[ H: \text{While business interest groups with a narrow mandate or constituency are more likely to undertake both lobbying and litigation strategies, interest groups with a broader mandate are more likely to turn to lobbying strategies alone.} \]

4.2 The impact of EU decision-making output

The EU decision-making process, both in terms of its organization and output at any given time, also shapes interest groups’ relative incentives to litigate or lobby. For the purposes of this paper, it can vary in terms of how swift and efficient the supranational institutions are at producing legislation and how prompt the ECJ is at delivering rulings. For both institutions these vary across policy sector and have varied a great deal over time.

(a) The legislative branch

Although the legislative process in the EU is subject to far less deadlock than one would imagine, given its decisional processes (Héritier 1999), how easy it is to propel legislation through the supranational bodies varies across issue area and time. Where deadlock delays legislation considerably or makes it unlikely that the EU will produce particularly effective legislation, interest groups may turn their attention to litigation.

(b) The judicial branch

Structural factors in the ECJ can also make it more or less attractive from the litigant’s point of view. The ECJ is generally quite slow at delivering rulings. The average time it takes to decide a case has only increased over time and currently averages several years. As with legislative deadlock, this will decrease litigants’ inclination to pursue policy change through this strategy.

The ECJ also has some marked decision-making biases. It is conventional to attribute a pro-integration preference to it (Garrett 1995; McCown and Jun 2003) and a liberal economic bias (Maduro 1999). Actors hoping to roll back European integration or institute trade protectionist measures would be rather unlikely to press these interests before the Court.

It can be concluded that changes in the volume and pace of output from either the legislative or judicial branches of government are likely to have an
impact on actors’ choice of strategy for promoting policy change. We therefore propose these hypotheses:

*H*: Increasing deadlock in one branch of government will encourage interest groups more to pursue strategies targeting the other branch.

*H*: The congruence between an interest group’s preferences and that of a branch of government will encourage it to develop influence strategies in that branch rather than the other.

### 5. DECISIONS THAT INTEREST GROUPS MAKE OVER POLITICAL AND LEGAL STRATEGIES

In section 4, we introduced sets of variables that we expect to influence interest groups’ choice of litigation versus lobbying strategies. In the following section, we discuss the choices that interest groups make with regard to lobbying versus litigation and propose some hypotheses about what factors would point groups towards different choices.

Interest groups may construct one of several different strategies. They may choose to lobby exclusively, to litigate only, or some combination of both. With regard to combination strategies, there may still tend to be a dominance of either lobbying or litigation over the other — these choices exist on a continuum (see Figure 1). We hypothesize that the variables we introduced in the previous section relating to interest groups’ characteristics and the EU decision-making output can be argued to primarily determine the choice of strategy.

#### 5.1 A lobbying-only strategy

Interest groups may choose a strategy that relies exclusively on lobbying. This may, in fact, be the most common strategy choice. This finding can be understood on the basis of the resource-variable. We hypothesized that there is a bias in favour of lobbying and against litigation in the EU because of the differential initial resource-threshold between the two influence strategies. It is less costly in almost every way to initiate a lobbying strategy. Particularly where an interest group seeks only marginal changes to a policy initiative or where its preference is close to the status quo, it is likely to lobby only. The organizational form of the interest group will also influence the choice of a lobbying-only strategy. As

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**Figure 1** Variables influencing strategy selection

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Narrowly focused groups, well endowed with resources, less legislative output

Groups with broader mandate or constituency, less well endowed with resources, slower judicial output
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**Litigation Predominates**

**Lobbying**
hypothesized earlier, associations are much more likely to favour lobbying over litigation, relative to firms. We expect that the decision-making output variable ought also to play a role – how speedy either the legislative institutions or the judiciary are at producing laws or rulings and the nature of this output will play into groups’ calculations.

5.2 A litigation-only strategy

In the past, interest groups have pursued strategies of primarily litigation, typically in eras or policy areas marked by significant legislative deadlock. The ECJ has proved an invaluable source of rules promoting European integration in periods when the other institutions have been simply unable to produce any legislation. Even interest groups which are not as inclined to litigate, can be pushed in that direction by the decision-making output. It is very likely that the interest groups choosing litigation-only strategies are individual firms with the resources and focus to bring cases, but because of their narrow focus and constituency they have difficulties accessing the EP and to a lesser extent the European Commission.

5.3 Combined strategies where lobbying predominates

It can also be the case that interest groups devote the preponderance of their time, resources and action to lobbying and still support some litigation activities. Even if there is a strong bias in favour of lobbying, interest groups with sufficient resources might still attempt to undertake a litigation strategy after a lobbying strategy has failed or to strengthen a lobbying strategy by bringing additional pressure on certain member states or to raise the saliency of the issue to EU-level institutions. The organizational form variable leads us to expect that firms would be more successful at litigation strategies, and so perhaps quicker than associations to take them up.

5.4 Combined strategies where litigation predominates

In contrast with the previous case, here litigation dominates but is complemented by some lobbying activity. The lobbying here follows the litigation but is not considered as a new influence strategy but rather as a kind of follow-through strategy after the Court has reached a decision. Where a litigant knows that it is unlikely that legislation will be speedily forthcoming, it may try to consolidate its litigation wins with a lobbying strategy in order to raise the saliency of the issues. Nevertheless, the emphasis of interest groups will remain on litigation rather than on lobbying. In this case, interest groups are likely to invest in strategies like rapid repeat litigation because it has the strongest effect of consolidating previous policy changes in precedent, insulating them better against later challenges. It is the most effective strategy for cumulatively building policy change through litigation.
6. CASE STUDIES

In this section, we examine examples of each of the four strategies we identified in the previous section to investigate the extent to which they exhibit the constellations of variables that we predict will be associated with each type. From a methodological point of view, one might argue that this leads us to sample on the dependent variable. However, since the aim of this paper is to explore how the variables we propose might individually and through interaction with each other influence the variation in litigation and lobbying strategies that we assume exists in the EU, we feel this is appropriate. This is an exploratory article which sets forth some propositions that we expect might have an influence over actors’ choices. We explore several cases in order to investigate if the variables we identified are present, the direction of their influence on actors and how they might modulate, or not, each other (Eckstein 1975). We choose case studies from the relevant secondary literature.

6.1 Lobbying-only strategies: free movement of capital

For most policy issues, interest groups more or less use lobbying-only strategies without any systematic litigation. The cost of initiating the strategy is low and it requires relatively less organizational capacity and time than litigation strategies. For many, lower level concerns, interest groups’ attentiveness will seldom go beyond lobbying. Even as issues rise in salience, certain organizational forms of interest representation may develop more intensive lobbying strategies before turning to litigation. While noting that it is likely that the majority of private interests’ influence attempts belong to this category, a particularly interesting case is the free movement of capital issue. Since the expansion and strengthening of free movement of capital provisions in the Maastricht Treaty, it has been the subject of attentive interest from financial services groups. The implications of these provisions to inter-state banking, state intervention in financial services, and so forth, are significant. Lobby groups have developed extensive access strategies targeting a range of policy issues implicated by free movement of capital provisions. Bouwen (2004a) describes an ‘intense interaction’ between private interest groups and the European Commission, the Parliament and the Council over financial services legislation. This on-going targeting of Brussels has produced a steady stream of legislation (Usher 1994).

There has, however, been very little legal activity concerning free movement of capital. This is despite the relatively high interest in these provisions, an active EU legislative agenda and the fact that the major provisions – Article 56, Council Directive 88/361 – are now over a decade old. There is a single ECJ decision in Sanz de Lera (ECJ 163/94) filed in the year in which the Article 56 provisions came into effect, in which the Court finds the articles to be directly effective, opening the way for further litigation. Surprisingly, it has not been extensively used. There have been only five subsequent cases.
brought on the basis of *Sanz de Lera*. These cases all contest the impact of Article 56 on cross-border property purchases and second residence taxation. The two latter issues could be considered relatively minor issues and not significantly connected with the major lobbying initiatives. Moreover, the cases can hardly be considered as part of a well-designed strategy because the litigants are mostly defendants in cases brought by national authorities for tax evasion.

Article 56 should be a relatively easy article to litigate. It mirrors the structure of the other three ‘freedoms’, which have been augmented by an extensive interpretative case law, and it is arguable that some aspects of the ECJ’s powerful free movement of goods precedent could be applied by analogy (Craig and De Búrca 1998: 647). Nevertheless, interest groups seem to be forgoing litigation strategies.

The observations in this case do conform to our understandings of the dynamics of the interest group choices, however. Most importantly, the supranational institutions are doing an effective job of producing EU-level legislation: financial services legislation has been proposed and adopted at an increasing pace over the last decades (Mogg 1999; Bouwen 2006). A first acceleration came in the mid-1980s with the Single Market Programme and culminated in the European Commission’s Financial Services Action Plan in 1998. This evolution seems to have pushed both firms and associations in the direction of lobbying rather than the courtroom. Although financial institutions (i.e. banks, brokers and insurance companies) are very well endowed with resources, they also enjoy an effective relationship with the Commission. They therefore seem to be inclined to invest in this intimate relationship rather than go to court.

6.2 Litigation-only strategies: EU intellectual property rights

Litigation-only strategies are observed rather more rarely than lobbying-only strategies. They are strongly characterized by exceptionally slow legislative processes in a policy area that is of interest to a set of resource-rich firms with the organizational capacity to litigate. One such example is intellectual property rights (IPRs) issues in the EU, particularly before the 1990s.

It is an area marked by an extreme lack of consensus among the member states, such that very little legislation was passed relating to IPRs at the European level. In addition, the legislation that was passed often proved ineffectual. This has changed somewhat since the mid-1990s, but the Commission has had a long track record of unproductivity and the Council one of obstructionism with regard to the issue (McCown 2003b: 8; Bentley and Sherman 2001: 16; Vinje 1994: 361). How it is that firms can use their copyright, patent and trademark rights to inhibit the import of parallel goods from other member states is, however, an issue which commands the attention of a number of large, wealthy and highly organized interests in the EU. The majority of IPR cases have been brought by either recording industry firms or pharmaceutical companies, and so litigation in this area is dominated by firms. Indeed, only one litigator in the set
of IPR references decided by the ECJ, the French Association of Recording Professionals, is an association.\(^8\)

The firms were highly successful at deploying strategies of rapid repeat litigation, such that the majority of EU-level rules on IPRs are still court-created. The substance of the rules predominantly reflects the business concerns of a small group of firms to the extent that one writer notes: ‘trademark lawyers complain that classic trademark law has been rewritten in response to the needs of the pharmaceutical industry’ (Forrester and Nielson 1997: 15). Throughout much of the 1970s and 1980s, these firms engaged in some issue-specific lobbying, but redirected their attention to their litigation strategies and enjoyed considerable success.

The history of IPR disputes conforms to our expectations about the circumstances under which litigation-only strategies will occur. Legislative output was slow, and decision-making was deadlocked because of an extreme lack of consensus among the member states. The interests affected by it were, however, largely firms relatively well endowed with resources and with a clear long-term interest in the area – companies like Hoffman La Roche and EMI Records. Their litigation strategies, while expensive and time-consuming, were highly effective: despite fervent member state opposition, an extensive set of IPR rules was constructed by the Court and, eventually, became the template for the legislative initiatives that finally began to emerge in the 1990s.

6.3 Combined strategies where lobbying predominates: EU tariff classification

In this strategic approach to seeking policy change, interest groups devote the majority of their resources to lobbying, with intermittent recourse to litigation.

The rules setting up the EU’s common customs system are among the oldest of the organization. Stipulated in the Treaty of Rome and rapidly implemented by the Commission, the member states shared a broad consensus that creating a customs union with a common external tariff for goods was a prerequisite for the establishment of the Common Market. Tariffs are, however, obvious targets of interest group activity, and traders will frequently contest the classification of goods if another, possibly applicable classification carries a more advantageous tariff rate. Moreover, it is well accepted in the literature that tariff rates and classifications are frequently reflective of relative political influence (Mayer 1984). And while a large portion of that influence is certainly exerted by lobbying, some authors note that litigating in order to change classifications in beneficial ways is so common as to be a ‘product strategy’ (Hoekman and Kostecki 2001).

Private actors’ attempts to secure changes in the tariff classifications of products are not a surprise in any market. The US Bureau of Customs and Border Patrol\(^9\) has decided some 11,000 cases since 1989, which makes the 250-odd decisions that came before the ECJ by 1998 unsurprising. What is striking is how unresponsive the ECJ was to these petitions, especially in the first 15 years of the customs union, even as it issued rulings elsewhere that
strongly favoured private litigants. The ECJ delivered decisions deferential to national customs authorities, frequently failed to cite precedent or even to discuss the positions of the private litigants very extensively and, in fact, created rather incoherent case law (McCown 2004: ch. 3). With time the clarity of its decisions increased somewhat, but litigation to change tariff classifications never proved to be a particularly fruitful approach for litigants. Most of the litigating parties were private firms as is consistent with our expectations as to which actors choose litigation strategies.

Lobbying, however, has proved to be far more effective for business interests. Subsequent to the Single European Act (SEA), when the Commission acquired much greater discretion at setting the EU’s Common Customs and Tariff (CCT) Classification Scheme, business interests shifted their attention to Brussels. Litigation of the CCT in this same period began to fall off. It has been demonstrated that lobbying explains much of the variation in tariff classification in the EU (Tavares 2005a) and that pan-European, rather than nationally based lobby, groups have been the most effective (Tavares 2005b).

It seems clear from the volume of cases filed – several hundred – and the number of interests involved – Tavares’ (2005b) study tracks 91 relevant manufacturing industries – that significant resources must have been devoted to the execution of both legal and political strategies. With respect to the organizational form variable, we also note some interesting findings. The interests which pursued litigation were, indeed, largely individual firms and those which finally effected change using a lobbying strategy appear to have been broad-based pan-European groups. Finally, the output of EU organizations appears to have mattered a great deal in this case – the ECJ was not necessarily slow, but its output was quite unhelpful to litigants, both incoherent and frequently against them. The Commission, in contrast, was effective at passing legislation and implementing it and, as soon as the SEA made it more available to be lobbied, the interest groups responded accordingly.

6.4 Combined Strategies where litigation predominates: free movement of goods

These strategies are driven primarily by litigation but supplemented or supported by lobbying efforts at the EU level. The classic example of this concerns EU rules on non-tariff barriers to trade, or ‘measures having equivalent effect to quantitative restrictions’ on trade. These are prohibited by Articles 28–30 of the treaties and now form the backbone of the common market. They were, however, most extensively articulated by the Court and ECJ decision-making has driven the development of this area of EU policy.

In the era of the Luxembourg Compromise, when legislative output enacting the common market was virtually nil, the ECJ famously delivered its Dassonville (ECJ 8/74) and Cassis (ECJ 120/78) decisions. These decisions substantially weakened member states’ capacity to enact regulations and standards that had the effect of discriminating against imports and established the principle of
mutual recognition. These cases and all of the many following decisions were preliminary references, brought by private actors. Again, the litigants are largely firms and those large enough to have a trans-European interest. Repeat litigators can be identified: one firm, Denkavit, brings 18 cases before 1988. And again, the litigants are highly successful because the Court’s decisions turn out to be foundational to the EU legal order. Nevertheless, interest groups did seek to lobby Brussels and to engage the interests of the supranational institutions. The Commission responded swiftly to the Cassis decision, trying to use it as the basis for a renewed legislative agenda, but met with little success (Alter and Meunier-Aitsahalia 1994). For a long time, the principal venue for attacking protectionist national provisions and advocating the construction of European rules was the ECJ. After the SEA reinvigorated the integration project in general and market integration in particular, deadlock quickly decreased. Now, it is a policy area characterized largely by qualified majority voting and relatively efficient decision processes. Litigation in the 1990s has slowed (Stone Sweet and McCown 2004).

For several decades, interest groups concentrated their attention on litigation, only supplementing it with lobbying. This was possible because of the availability of large numbers of firms readily able to deploy litigation strategies, and highly worthwhile because of the legislative deadlock of the time. As an area of law it still receives a fairly large number of references but, as decision-making processes have changed to make it one of the most integrated policy areas, all interest groups have shifted resources towards lobbying and more business associations have become involved.

7. CONCLUSION

In this paper we explored variation in interest groups’ choices of litigation and lobbying strategies for influencing policy change. We proposed two sets of variables related to private interests’ characteristics, on the one hand, and the EU decision-making output, on the other, and hypothesized that they account for much of this variation. We then investigated these variables in the context of four exploratory cases representing various strategies. We find that in the examples we drew from secondary literature, the variables we proposed present as we would expect (see Figure 2). Moreover, the interaction of the variables – the ways in which the combination of private interests’ characteristics
and the decision-making output prompt strategy choices – seemed to be relevant.

Although this is essentially an exploratory article, some findings can be highlighted. The initial preference of all interest groups towards lobbying rather than litigation was visible in all the case studies – even in the litigation-only example, firms persisted in their unsuccessful attempts to press for legislation at the EU level – and the fact that lobbying requires a lower initial resource-threshold seems to be highly relevant to this choice. In the case of the IPRs case study, it cost interest groups relatively little to continue lobbying Brussels for legislation, even when it was highly ineffective.

An important factor in the heavy recourse to litigation in both the case of IPRs and free movement of goods seemed to be the profound legislative deadlock of the 1970s, the period during which many landmark decisions were delivered. In the tariff classification case study, the EU actors’ output also appears to have been important – ‘low quality’ output of the ECJ, from the perspective of litigants and a comparatively responsive Commission, post-SEA, shaped groups’ strategies. Where interest groups were left with no choice, they pursued litigation strategies. When the SEA created a viable lobbying target, however, they switched tactics and enjoyed greater success. More generally, the efficacy of the legislative process appears to be a major factor in pushing actors away from their default tendency to favour lobbying.

The organizational form variable has turned out to be a source of interesting variance. Overall, firms tend to account for most of the litigation strategies explored here. Because of their focused organizational form, they were hypothesized to be the most involved in litigation strategies. As noted in the IPRs case study, the interest group responsible for one of the streams of ECJ cases was a national, not a European, association – SACEM, the French Association of Recording Professionals. Similarly, in the tariff classification case, the interests pursuing litigation strategies (if unsuccessfully) were by and large individual firms. As expected, it was the large, pan-European lobbying groups, typically characterized by a broad mandate and constituency, which pursued lobbying strategies alone.

In the contemporary EU, policy-making moves as smoothly as it ever has. The use of qualified majority voting has been increased with every treaty revision, and projects like the single market and competition policy have enjoyed sustained attention from the supranational actors for years. The ECJ is not particularly fast at delivering rulings, but is effective enough still to offer a useful venue to actors seeking policy change by litigation. As Héritier (1999) has pointed out, there are many formal and informal norms in place that ameliorate the potential deadlocks in the legislative process.

A change in legislative efficiency could well occur if the latest enlargement of the EU is not accompanied by significant revision in decision-making mechanisms. This concern is given all the more weight by the rejection of the proposed Constitutional Treaty in France and the Netherlands in 2004. It could have far-reaching effects on the strategies of interest group representation. A decrease in
legislative output would very likely result in a compensating increase in litigation activity. This might lead to an increasing dominance of large firms in EU interest representation as associations are relatively disadvantaged at litigation strategies in comparison with individual firms.

Finally, it should be emphasized that this is primarily a conceptual and exploratory article. It seeks to begin to fill a large gap between the literature on judicial integration and on interest group behaviour. Although both political and legal strategies of interest representation are well established as central to our understanding of the European integration process, they have been rarely analysed in relation to each other. With this paper, we hope to provide a basis for future more empirically rigorous work and to provoke some thought on the interplay between lobbying and litigation in contemporary politics.

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**NOTES**

1 The views expressed in this article are purely those of the authors and do not reflect the analyses or policies of the institutions for which they work.

2 In recent public choice approaches to lobbying in the EU (Broscheid and Coen 2003; Crombez 2002) or to interest group politics in general (Potters and Van Winden 1990), information increasingly plays a central role in the analysis. Starting with the assumption that interest groups are better informed on issues that affect them than policy-makers, this literature argues that interest groups play a crucial role in the policy process by transmitting information to the relevant policy-makers.

3 Truman already made a distinction between technical knowledge and political knowledge (1951: 333–4).
For a detailed theoretical discussion and empirical analysis of the supply-and-demand scheme for information and the resulting access patterns of private interests to the EU institutions, see Bouwen (2002, 2004a).

In addition to the preliminary reference procedure in Article 234, EU institutions and member states may bring cases directly for a number of reasons under Articles 226–30. Private actors may, and do, lobby these bodies to bring such suits, but this paper will only consider litigation choices over which private parties have a direct influence: those instances in which they can bring suit, themselves. Individuals also have a growing, but still nascent, right to bring actions for annulment of EU legislation directly to the ECJ under Article 230. Because it is still very limited in its use, it is also not examined here.

i.e. To grant rights directly to private litigants.


The association, SACEM did, however, engage in a fairly sophisticated litigation strategy, bringing cases ECJ 22/79, ECJ 402/85, ECJ 270/86, ECJ 110/88 with some success.


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