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

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Abstract
This paper compares two European-level interest groups—who seek respectively to promote the rights of women and those of Roma—on the basis of their ambiguous interactions with European institutions and law. Law is understood both as a resource (EU as an alternative venue, law as a source of legitimisation, case law as a source of rights promotion) and as a constraint (restrictive perimeter of EU competencies, definition of who is / who is not legitimate with respect to this perimeter). It analyses these groups' contrasted relationship to litigation as a rights advancement strategy, shedding new light upon the debate between EU studies specialists (who see litigation as a weapon of the strongest) and socio-legal studies specialists (who view litigation as a weapon of the weak). In the context of the European system of governance, the weapon of choice appears to be adaptation to the specificities of this system of interest representation.

Keywords:
European Court of Human Rights; European Union; Lobbying; Roma; Strategic Litigation; Women.

The European Union (EU) can be defined as a "Community of right"; it exists by virtue of law and through its usages. The EU has played a significant role in the international development and diffusion of a "language of rights" (Scheingold 2004; De Bùrca 1995), which is an increasingly (Kelemen 2011) central aspect of its identity as a common polity constitutive of a singular ethical standard (Weiler 2009). European treaties have progressively developed the defence and promotion of many categories of rights, including those of Roma and women. 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 (or has at very least enabled the existence of such groups). This paper compares two European-level interest groups—the European Women's Lobby (EWL) and the European Roma and Travellers Forum (ERTF), who 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 legitimisation, 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). Have EU institutions played an instrumental role in the creation of these groups, and if so, how? How have such institutions helped to manufacture these groups' identities and to shape their repertoires of action? What role do law and its usages by the EWL and the ERTF play in these groups' attempts to influence EU policies and decision-making?

These groups were selected due to the similarity of the policy areas in which they operate (antidiscrimination) and due to their relative weakness within the framework of the EU system of interest representation (they operate transnationally, in the public interest, with a small-scale budget and staff). They differ, however, in their approach to law as a rights advancement tool. This point is particularly interesting as it provides a possible watershed in a major point of contention between different bodies of literature. While in EU studies most authors characterise law as a tool mobilised almost exclusively to the advantage of strong actors—such as private companies, or broad actor coalitions built on public-private machines (Stone, Sweet and Brunell 1998; Börzel 2006; Zackin 2008)—in socio-legal studies law is represented more frequently as a weapon of the weak (Scheingold 2004) or as an effective way to increase the power of weak actors (Vanhala 2011).

1. The emergence of the EWL and the ERTF: who's in and who's out?

As a "purposeful opportunist" (Cram 1993), the European Commission has worked to increase its competencies, and began financing 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 provided a remedy to the Commission's lack of expertise and information in some domains. The EWL and the ERTF are paradigmatic examples of the way in which this functionalist logic plays out in the field rights promotion for women and for the Roma people. Furthermore, the Commission has developed incentives to spur the creation of umbrella groups. This is viewed as a way to increase its competencies and legitimacy as "guardian of the treaties" and as initiator of EU law. In a sense, such groups are thus born of the law; and in turn, the law and its perimeter have shaped them. Through the intermediary of more activist elements within the Commission, law has indisputably allowed these groups to exist. Yet at the same time, it has had the effect of circumscribing exactly whom these groups can and should represent; it has defined, in other words, the legitimate categories of Roma people and of women protected under European law. This circumscription

has introduced dividing lines within the interest groups themselves: 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, in accordance with these internal lines of division.

1.1. Supporting the development of the law: EU institutions and the creation of a specialised elite

The EWL: engineering the representation of the "women of Europe"

Sonia Mazey, in describing the role of the European Commission as an "active policy entrepreneur" in the field of gender equality policy, has underlined the extent to which the Commission has "encouraged the growth of a transnational European women's lobby to support and legitimise Commission initiatives in this sector" (Mazey 1998: 142).

The most remarkable aspect of the creation of the European Women's Lobby is its lateness. Indeed, 1990 appears remarkably late in the life of the European Community (EC) 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 to 1975; and that the first ruling from the European Court of Justice (ECJ, now CJEU) dates to 1976. In light of this long process of creation, two main characteristics should be emphasised. Firstly, the creation of the EWL was an exercise in engineering, supported and even sustained throughout by dedicated "femocrats" (McBride, Stetson and Mazur, 1995) within the Commission. Secondly, the diversity of women's and feminists' movements throughout Europe also delayed the process. Some ten years went by before an EU-level elite of specialised women's representatives—meeting the standards and requirements of the Commission (i.e. participating in the gender equality policy process)—finally emerged.

The EWL was founded at a conference in Bonn in 1982, at the initiative of a handful of European femocrats whose "dream" was to enable "women's organisations to coordinate in order to be able to influence institutions" (Deshormes La Vallée 1997, p. 127). However, during the Bonn conference traditional women's associations (such as the *Deutsche Frauenrat*) and feminist associations were unable to decide on a common platform. Following several conciliation meetings, a common platform was finally drafted in London in 1987; the inaugural conference of the EWL took place in Brussels in 1990 (Strid 2009). Even then, the EWL only became fully functional from 1992 onwards, following an initial phase of consolidation and the arrival of Barbara Helfferich as Secretary general, who initiated the gradual professionalisation of the EWL. Since then, the operating grant allocated each year by the EU to the EWL represents around 80% of its total budget (from 300,000 euros in 1992 to around 910,000 euros in 2012).

The ERTF: giving voice to the forgotten minority

The European Roma and Travellers Forum was created in 2004, following two years of consultation, with significant involvement by the Council of Europe (CoE). Of all the different European institutions, the CoE has sustained the most intense engagement with the Roma issue, playing a pioneering role in this regard. For a long time, political discussions concerning the Eastern enlargement of the EU 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[i]. The CoE had initiated this process of dealing with Roma issues by holding several international meetings with Roma activists (Liégeois 2010). 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. This process involved the selection of an elite, 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 a sort of Roma nationalism, in which Roma increasingly came to be considered as a 'Nation'. Significant umbrella organisations like the International Romani Union and the Roma National Congress pushed in this direction.
To be sure, the idea of a forum to represent Roma communities in Europe had been the object of backroom discussions since at least the early nineties. The shift from talk to concrete action only took place, however, when the CoE, and the EU more generally, managed to establish temporary relationships with Roma organisations. A specific policy window within the political opportunity structure enabled the creation of the ERTF. This window was created by two main factors: on the one hand, the CoE's desire to overcome Roma nationalism by creating a more functional body for the expression of concerns at the European level; and, on the other hand, the strong will "to create for the Roma some kind of consultative assembly to represent them on the pan-European level[ii]" on the part of Ms. Tarja Halonen, President of Finland. Furthermore, following the Second World Roma Congress in Lodz (Poland) in 2002, which provided for intense discussions around the idea of a continuous body for EU-level lobbying, wide-scale participation by Roma activists constituted another motivating factor (Nirenberg 2009, p 104-5).

1.2. Law as a constraint: the (re)definition of weak and strong actors

The EWL and the figure of the "Achterberg woman" as controversial category

When interviewed about the progressive emergence of an interest group founded on a collective identity, individual members of the EWL tend 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. All interest groups—transnational groups especially—themselves constitute political arenas in which actors must formally and informally negotiate the political, cultural and social meaning and orientation of their collective action. For this to be possible, a political process of collective identity construction must take place, in which common interests are unified into a singular 'interest group'. In the case of the EWL, however, this process was anything but automatic, and was certainly not aided by the restrictive power of the law.
In 1989, with the *Achterberg* case, the European Court of Justice (ECJ, now CJEU) ruled that Community competences consisted in "[realising] equal treatment between men and women, not in a general fashion, but only as workers"[iii]. In this manner, the Court provided a very restrictive definition of the legitimate frontiers 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 was fundamental: it largely influenced the definition of the prevailing EU gender equality policy, narrowing the group of potential policy recipients to wage-earning women. For this reason, EU gender equality policy at the moment of the creation of the EWL was inherently elitist. It sought to tackle only *some* discrimination to which only *some* women were subjected: i.e. wage-earning female European citizens. The defence and promotion of women's rights at the EU level thus neglected women subjected to multiple discriminations (poor women, migrant women, etc.). This elitist dimension of the gender equality policy mirrors the elitist dimension of the European integration process more generally.

To be sure, this restrictive conception influenced the interest that the EWL would come to represent and defend. The group's initial years of existence were marked by conflict over whether or not to recognise the restrictive conception of gender equality imposed by the EU mandate. One member group, the European Forum of Left Feminists, thrust the issue of representation—of the creation of weak and strong categories of women even *within* the EWL—to the fore during its first General Assembly. The group denounced the fact that, notwithstanding their divergent political and activist backgrounds, the inaugural EWL conference brought together exclusively white, middle-aged, mostly professional women (Hoskyns 1996). A report on this issue shed doubt on the EWL founders and even called into question the group's very existence (European Parliament 1995). It was published with the help of financial support from the European Parliament, and was only adopted by a bare majority during the 1993 EWL General Assembly.

In the end, these inner tensions were only resolved when the perimeter of EU gender equality law and policy was extended. From the mid-1990s on, "the Union was no longer simply about workers, but in fact pertained to general public interests" (Cichowski 2007: 197). This was made possible thanks to gender mainstreaming in particular, which used soft law to push the perimeter of the EU gender equality policy further, and to loosen legal constraints (Jacquot 2010).

The ERTF and the controversy surrounding the Europeanisation of Roma issues

In July 2004 the European Roma and Travellers Forum was registered as an association under French law. 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. Even if, formally, the ERTF is only an association, it plays a privileged and well-recognised role.

Obviously, the ERTF has not been able to include all Roma organisations, and those who do not adhere present a constant challenge to its legitimacy. But, compared to other umbrella organisations, such contestations are not deeply entrenched (Nirenberg 2009). Conflicts have arisen between religious groups (Christians or Muslims) on the one hand, and secular groups, on the other. 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, grew up around the Europeanisation of its activities.

The ERTF's goals are typical of other organisations of its kind. First of all, it aims to establish a "fair and democratic representation" of Roma in Europe. Some Roma organisations, as well as some MEPs[iv] 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 to Europe. This conception has been criticised, however, as a way of absolving "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: 11).

To be sure, the ERTF is a forum for the Europeanisation of the Roma issue, for lobbying within the European policy-making processes and for participating in consultation. At the same time, so as to avoid national-level resistance to a perceived threat of Europeanisation, the Forum has staked a claim as the 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 one side are groups heavily disappointed by national policies, who consequently look to Europe as the only source of fairness and reparation. Some such groups even go so far as to promote European citizenship for Roma, evoking a sort of transnational nomadism embedded in cultural habits and legacy. 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. On the whole, the ERTF is more concerned with this second position: "the ERTF does not depart significantly from previous endeavours by the Roma social movement and it articulates no new radical claims or controversial interests" (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 became pivotal to addressing discrimination against Roma because it made possible an exit from their relatively *marginal* position at the EU level, and enabled coalition-building with other umbrella organisations. At the same time, it pushed ERTF towards a stronger focus on law and implementation.

2. Questioning the role of law as a "weapon of the weak"

Having illustrated how and to what degree law has been instrumental in the creation and shaping of the two interest groups, we now turn to an examination of the functional importance of law within the rights advancement activities of these groups.
Most of the literature on EU interest politics and on the strategies deployed by private actors to shape public policies 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 to influence national policies (i.e., Alter and Vargas 2000; Börzel 2006; Cichowski 2007; Vanhala 2009). This conception suggests 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 with the EU institutions. However, the distribution of tasks is not so clear-cut. Some transnational public interest groups also invest in litigation strategies. When it comes to using law and litigation as part of a lobbying strategy, the attitudes of the two groups differ largely. Whereas the ERTF resorts to extensive judicial activism and strategic litigation, the EWL has all but excluded this type of action from its repertoire. Whereas for the ERTF law is considered and used as a *resource* for collective action, for the EWL law remains a *framework* to be influenced through alternative means of action.
This is all the more interesting given the extent of the legal instruments upon which each group could potentially draw. Anti-discrimination on the grounds of race and ethnic origins is included in the general anti-discriminatory clause of the treaty ever since Amsterdam, which gave rise to two directives on equal treatment from 2000; several articles in the treaties (including a horizontal cross-section clause); and fifteen directives that explicitly address gender equality.
We shall gradually examine the reasons behind this contrasted and counter-intuitive situation, in which the group with a greater number of legal instruments at hand resorts less frequently to judicial strategies (and vice versa). In the framework of the European interest representation system, this inquiry will enable us to better elucidate the classical and paradoxical understandings of law's role either as "weapon of the weak" or as "empowerment of the already powerful" (Börzel 2006).

2.1. A judicial vs. political model of lobbying

Law as a Framework: a paradoxical choice for the EWL?

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, p. 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 (i.e. Dehousse 1998; Hix, 2005).

In 1966, Belgium (along with the Netherlands) did not adopt 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 years of age (Hoskyns 1996). Gabrielle Defrenne's judicial saga had entailed three different trials and three ECJ rulings, following claims put forward by three different Belgian jurisdictions over a period of ten years. The second *Defrenne* ruling established the direct effect of article 119[v] and the third ruling established that equal treatment is a fundamental EU principle[vi]; both provided the legal basis for the development of EU secondary legislation on gender equality during the 1970s and 1980s (Cichowski 2007; Mazey 1995).

Since *Defrenne,* EU case law linked with gender equality has been extensive, both in number and in nature, comprising no less than 201 rulings enacted between May 1971 and May 2011 (CEC 2010; CEC 2011). Rachel Cichowski (2007: 81-94), who has compiled all the ECJ/CJEU preliminary rulings between 1971 and 2003 in the area of social provisions, calculated that over a third (36%) of these rulings involved equality directives and 25% of the total referred to equality provisions in the treaty. Both in absolute and relative terms, case law in the field of gender equality is important and it has significantly contributed to the development, deepening and extension of an EU gender equality policy and to gender equality rights. Accordingly, the historical importance of case law and of activist litigation in the fight against gender-based discrimination at the EU-level has been widely reaffirmed (i.e. Barnard 1999; Cichowski 2001).

With such a well-known heritage at its back, it appears somewhat paradoxical that the EWL has—since then and unto the present date of publication—never used litigation strategies in order to advance women's rights at the EU level. The EWL almost exclusively constitutes the third branch of the "velvet triangle" (Woodward 2003) of: "femocrats" in the Commission and Parliament; experts in academia and consultancy; and representatives of established women's movements and organisations. Since the 1970s this 'triangle' has composed the gender equality sector, and has been dominant until the mid-2000s (Jacquot 2010). This notion of a "velvet triangle" aims to encompass the more or less loosely institutionalised forms of cooperation in the gender equality field, present at the EU level, which have been able to develop substantive EU gender equality policy through the use of interpersonal relationships and formal and informal contacts. The EWL repertoire mixes corporatist features (participation in consultations; participation as member or observer in expert, administrative or parliamentary groups; management of EU funded projects) with pluralist features (informal contacts; building of coalitions; writing of position papers and argumentative papers; awareness-raising through the press; expertise and counter-expertise) (Balme and Chabanet 2008). It does not, however, include litigation.

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 main point is that ERTF cannot engage directly in strategic litigation with the European Court of Human Rights, but it can and does promote

the latter. The ERTF shows the outcomes of case law, and the benefits of strategic litigation. Together with the CoE, it promotes handbooks and training for attorneys and lawyers on strategic litigation. In this sense, ERTF is a typical pluralist organisation: it combines participation in the auditing of policy-making processes and lobbying, with a more contentious sort of activity based on the promotion of strategic litigation. 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 instrumentalisation 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*[vii] and *DH and others v The Czech Republic,*[viii] 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. It was intended that this strategy include positive measures to combat the social exclusion of Roma, in particular through the improvement of their housing situation. This first experience was very fruitful for the ERTF, which effectively organised 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 organisations 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 engaged with the organisation's main objective (and central internal division). It made it possible for the ERTF to address the discrimination faced by Roma as a group, rather than considering cases only on an individual basis.

2.2. Explaining a contrasted usage of law and of litigation strategies

The EWL as a European women's lobby

Our discussion of the EWL in the previous section of this paper presents an apparent paradox and an analytical puzzle: how can we explain the non-usage of EU law in litigation strategies in light both of the tradition put into place by the *Defrenne* case and of the many EU rules providing the opportunities for such action?

Solving this puzzle requires that we take into account three dimensions: (1) the EWL is a *European-level* interest group and, as such, it is part of the European system of governance—the main traits and the evolution of this system influence the group's modes of action; (2) the EWL is a *women's* lobby, dedicated to the promotion of women's rights, and this specific collective identity has cognitive and normative consequences on the types of actions favoured by the group; (3) the EWL is a *lobby* and its internal characteristics have organisational consequences for the type of actions in which it is able and willing to engage.

The latter set of factors—i.e. the organisational 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 organisational dimension is also the main element emphasised by the actors themselves. In

terms of its membership, the EWL is a large umbrella group, bringing together more than 2500 individual groups, networks and national steering bodies[ix]. However, its General Secretary is small, composed of only nine full-time employees. In line with the classical approach to resource mobilisation (McCarthy and Zald 1997; Kitschelt 1986), 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) of such a strategy is generally considered to be much lower than that required for a litigation strategy. EWL's decision to avoid litigation strategies appears to validate two further hypotheses from the literature on organisational 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: 492). As an interest group, the EWL has chosen, after a highly conflictual episode, to function as a lobby. Rather than working from outside of the system, the promotion of women's rights here entails direct cooperation with EU institutions. In exchange, European institutions grant the EWL broad access to the system (in both formal and informal manners), further decreasing the need for and desirability of litigation. In this context, judicial activism is viewed as a more conflictual mode of lobbying. While undoubtedly sometimes successful, this strategy could also be conceived of as a violation of trust with regard to the other branches of the "velvet triangle", the European Commission in particular.

Secondly, the case of the EWL lends support to the organisational 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: 493). As indicated by the large range of its activities—from a campaign 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 lead it to develop a professional approach to lobbying, one based on "transnational interest formation" (Helfferich and Kolb 2001: 149). This in turn decreases the need for and desirability of litigation.

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. Similarly to EU gender equality policy in general, 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' (Jacquot 2010). The rationale underlying this idea is that the difference between the sexes is universal; it concerns all human societies. This difference primes over other differences (social, ethnic, etc.). In short, "women are not a category": they are half of humanity (Bereni and Lépinard 2004). This "exception frame" 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 would have mandated the EU to fight discrimination based on sex alongside discrimination based on race or ethnic origins, religion, disability, age or sexual orientation. Seen in this manner, it would appear that the use of law as a "weapon of the weak", and of litigation as a strategy for groups who are marginalised in the European system of interest representation, is not a mode of action that the EWL would naturally choose to employ. As underlined by Lisa Vanhala, "framing processes will permeate all aspects of [an] organisation: 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 organisation may dictate courses of action or tactics that are considered more

'appropriate' than others" (Vanhala 2009, p. 743). The logic is to use different modes of action, and for the EWL, litigation strategies are not part of this logic. The group's identity 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 strategic litigation would be the symbolic equivalent of giving up on this "exception frame", to recognise (before not only other public interest groups but also its constituency) that the EWL no longer enjoys privileged access and treatment, that it has been weakened or marginalised within the policy process.

Finally, the EWL is a lobby operating within the European system of interest representation, and this is of course not without its consequences. There is 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 characterised by the development of soft, non-binding instruments and new modes of governance (essentially gender mainstreaming and open methods of coordination), while uses of hard law have progressively diminished (Beveridge 2012; Jacquot 2010). The weakened legal dimension of the EU gender equality policy implies a reduction in opportunities for 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 to actors who wish to develop EU regulation and provide the attendant protection it affords 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 (i.e. the integration of the gender dimension across all sectors of EU policies and actions) tend to push interest groups towards lobbying rather than judicial activism.

The ERTF as a pluralist lobby.
In comparison with the EWL, the ERTF makes use of a more plural repertoire of action. As mentioned above, the CoE created the ERTF in order to provide a representative body capable of lobbying. But the ERTF has gone further, adopting a more contentious form of action that views strategic litigation as a means to challenge national policies. It publicises case law and strategic litigation, promotes the training of lawyers, engages directly in complaints relating to the rESC. How can we explain this divergence from the EWL's strategy? The ERTF too is an umbrella organisation, involved in diplomatic actions, acting in a cooperative manner through conferences, papers, proposals, and informal meetings. The ERTF too boasts a large membership of national and transnational organisations, and scarce resources. If the literature suggests that transnational groups concentrate on political lobbying, that only domestic groups would work with litigation, and that litigation is synonymous with the "empowerment of the already powerful" (Börzel 2006), why then would a transnational umbrella organisation promote strategic litigation? Three main variables help to explain this puzzle: (1) group resources and a professional approach to lobbying; (2) group identity; and (3) the evolution of EU governance and modes of public policies in the anti-discrimination field.

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. 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 has 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 Center (ERRC) and the European Roma Information Office (ERIO) in Brussels[x]. All these TANs are strongly engaged in promoting strategic litigation for Roma rights (Goldston 2010).

Secondly, strategic litigation 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, for example, strategic litigation served to articulate the national government's clear responsibility with regard to European regulation. In a certain sense, this is a perfect case 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. Due to this disconnection from the national level such members are not always very representative of 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 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 to 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, so to speak, in order to build common ground between Roma in 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 is important in this case, as in the case of the EWL, are the strategic choices that comprise the identity-building processes 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 organisations seeking to federate and coordinate 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 organisations play the role of transnational representation, competing with one another, and often involving the same NGOs. Because these organisations always emphasise participation, they increase activists' opportunities for engagement.

The final variable affecting the ERTF's repertoire of action is the evolution of EU governance. The key trends already having been discussed above in this paper, we simply add here that 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)[xi], or the recent European Platform for Roma Inclusion[xii]. These platforms bring together the representatives of the EU Member States, Members of the European Parliament, various organisations 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 unique and 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 contentious side of its action (i.e. the promotion of strategic litigation) has become a resource for consolidating the membership of the Roma NGOs, and for burnishing its external image. Once again, we observe here strategies of adaptation to the institutional environment.

Conclusion

In this paper, we have compared two weak interest groups engaged in European participatory policy-making. We have illustrated the extent to which the EU has been able to select and co-opt "good" civil society groups in order to legitimate its fields of intervention. The European Commission has engineered and maintained these bodies, in some sense depolitising part of their potential for contention. The dynamic of forum-making that we described in relation to the EWL and to the ERTF has produced tensions between weak and strong members, and it has developed new sets of resources and constraints for Roma and women's rights groups. Nevertheless, the links and co-optations fostered by the Commission are not simply forms of manipulation: this opportunistic stance affects both legitimation processes and symbolic production. The commission recognises the voice of (some of) the advocacy groups and holds out up its dialogue with minorities and weak groups as an exemplary milestone.

The comparative approach we have adopted here makes it possible to develop some tentative conclusion on the points stated in the introduction. 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 have 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 to put institutional and political discrimination into light. At the same time, this paper has shown that recourse to litigation is never an automatic or obvious choice for weak advocacy groups. 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 (non-)recourse to litigation, and hence the position of these actors within the broader EU system of interest representation: (1) organisational variables; (2) the group's identity, 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 EU system of interest representation. On the whole, these three main variables make possible the analysis of civil society agency as constrained—though not determined—by the institutional configuration of law and the configuration of the Commission policy communities. 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. 2004); and that the same is true for the diffusion of social movements' repertoires of action (Della Porta and Caini 2011). But when we consider such movements in the context of highly structured institutional environments, the convergence that they exemplify in 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 regards to the selection of instruments and their implementation—would appear highly related to the normative context in which this interaction is situated, tested and evaluated. Also, whereas the frame of antidiscrimination is common to both of our cases, as is

the institutional context of the EC, we have observed different kinds of strategies. Our interpretation is that the manner in which leeway is carved out for minority groups, and the strategies they undertake in their relation to the Commission's participatory devices, both go beyond explanations based on path dependency or sectorial logic. The three main sets of variables we highlight here suggest a neo-institutional interpretation of the groups' agency: they opt for strategic *adaptation*, over mimicry or emulation.

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Notes

[i] Major strategic differences between the European Commission and the Council of Europe will be developed starting from 2008.
[ii] CoE, Committee of Ministers, GT-ROMS(2003)4, 4 March 2003, <https://wcd.coe.int/ViewDoc.jsp?id=18659&Site=COE>, accessed on January 31st 2013.
[iii] Ruling by the Court (second chamber) from 27 June 1989. *J.E.G. Achterberg-te Riele et al. vs Sociale Verzekeringsbank*. Aff. 48/88, 106/88 and 107/88 (cons. 12).
[iv] Daniel Cohn-Bendit defended this position vigorously in 2008.
[v] *G. Defrenne/Sabena*, C-43/75, 8th April 1976.
[vi] *G. Defrenne/Sabena*, C-149/77, 15th June 1978.
[vii] App. No. 32881/04, judgment date 28 April 2009
[viii] App. No. 57325/00, judgment date 13 November 2007
[ix] See <http://www.womenlobby.org/>, accessed on March 3rd, 2012.
[x] He also served as a board member of the Contact Point for Sinti and Roma Issues of the Organisation for Security and Cooperation in Europe (OSCE).
[xi] The Decade is an arena of coordination that brings together Central and Eastern European governments, intergovernmental and nongovernmental organisations, as well as Roma NGOs.
[xii] The European Platform for Roma Inclusion brings together national governments, the EU, Human Rights organisations and Roma NGOs.

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