INTRODUCTION
SPECIAL ISSUE

EU law in the era of digitisation: on strategic litigation causes, actors and processes

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Overview

This Special Issue has been prepared in the framework of **EUFutures**, a research network funded by UACES and the James Madison Charitable Fund, whose main objective is to forge an interdisciplinary network of scholars working on EU law from the perspective of different disciplines, and interested in cross-disciplinary approaches to law and EU integration.[1]

The Special Issue aims to assess the litigation strategies of interest groups in the digital field, at EU level and in the Member States, to analyse why these strategies were chosen, to explain the successes and failures of these interest groups, bottom-up, with a view to assessing the chances of success of future litigation. In doing so we seek to bridge the gap between the literature focusing on the most recent developments of digital law and the literature dealing with strategic litigation. The Special Issue has the overarching aim of demonstrating how integration through law in the EU has shifted decidedly towards a court-centric perspective.

EU integration through EU law: contemporary perspectives

Most scholars agree that law has been instrumental in fostering the EU integration process. The seminal work of Cappelleti, Seccombe and Weiler[2] has developed into a mainstream approach known as "Integration through Law" (ITL), which assumes that EU integration is triggered by law and courts, and more specifically by the European Court of Justice (CJEU). This approach goes as far as saying that the CJEU compensated for the blockades of decision-making in the Council of Ministers at a time when Qualified Majority Voting was not used, i.e. in between the Luxemburg compromise (1966) and the Single European Act (1986). Drawing on this, a large strand of academic literature has developed, showing how the Court, sometimes seen as a political actor[3], exerted judicial activism[4] to influence the development of EU law in many fields.

This is not to say that ITL has become established without being criticized, quite the contrary. Critics even emerged from its de factor Alma Mater, the European University Institute, when a group of legal scholars[5] revisited the ITL doctrine, focusing on its limits and highlighting its normative character. Several developments starting in the 1990s support the claim that law and the CJEU have lost their

[1] https://www.strath.ac.uk/humanities/lawschool/eufutures/
[2] M Cappelletti, M Seccombe and JHH Weiler, *Integration through law: Europe and the American Federal Experience: consumer law, common markets and federalism in Europe and the United States* (New York: Walter de Gruyter & Co, 1986).
[3] K Alter, 'The European Court's Political Power' (1996) 19(3) *West European Politics* 458–87; K Alter, *The European Court's political power, selected essays* (Oxford: Oxford University Press, 2009).
[4] H Rasmussen, 'Between Self restraint and Activism: A Judicial Policy for the European Court' (1988) 13 *European Law Review* 28–38; B De Witte, E Muir and M Dawson, *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar Publishing, 2013).
[5] D Augenstein (ed), *'Integration through law' revisited: the making of the European polity* (Routledge, 2016).

centrality in EU integration: the increasing use of soft law[6], the eventual self-restraint of the CJEU[7], differentiated integration[8] and even disintegration processes[9] such as Brexit and the rise of illiberalism in Poland and Hungary.

However, if ITL has been rightly questioned in the academy, it retains a large number of supporters, from Kelemen[10] arguing that a form of Eurolegalism, replicating the rise of legalism in the United States, has developed in Europe, to Bradford[11] focusing on the so-called "Brussels effect" whereby European Union rules affect the behaviour of many international actors seeking access to the internal market. In this Special Issue, we argue that ITL remains central but needs to be more and more studied through a bottom-up rather than a top-down perspective.

Top-down approaches focusing on the CJEU remain mainstream among lawyers but also in political science. A large number of publications still analyse the autonomy of the CJEU from the Member States in particular[12], its influence through continued activism, and the reasons why the judges would exert activism, be it due to an ideological bias towards integration[13], or over-constitutionalisation[14].

Bottom-up approaches have developed, helping to refine the ITL approach, and opening up new directions for EU law. Assuming that the CJEU is an embedded actor within a complex multilevel system[15], it is important not only to focus on the CJEU and its case-law but also to better understand the actors bringing cases to the Court. The role of the Commission as the guardian of the Treaties has been largely studied, included its eventual self-limitation in bringing infringement cases in the recent period[16]. Similarly, it has been argued that national judges[17] and lawyers[18] have contributed to the empowerment of the CJEU while fulfilling their own objectives through litigation strategies. Some even as a result

[6] B Cappellina, A Ausfelder, A Eick, R Mespoulet, M Hartlapp, S Saurugger and F Terpan, 'Ever more soft law? A dataset to compare binding and non-binding EU law across policy areas and over time (2004–2019)' (2022) 23(4) *European Union Politics* 741-757.
[7] R Dehousse, *The European Court of Justice: the politics of judicial integration* (Basingstoke: Palgrave Macmillan, 1998); O Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint' (2004) 5(3) *German Law Journal* 283-317.
[8] F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a system of differentiated integration: interdependence, politicization and differentiation' (2015) 22(6) *Journal of European Public Policy* 764-82; D Leuffen, B Rittberger and F Schimmelfennig, *Integration and differentiation in the European Union: Theory and policies* (Springer, 2022).
[9] H Vollaard, *European disintegration: A search for explanations* (Springer, 2018).
[10] RD Kelemen, *Eurolegalism: The transformation of law and regulation in the European Union* (Harvard University Press, 2011).
[11] A Bradford, *The Brussels effect: How the European Union rules the world* (Oxford University Press, USA, 2020).
[12] CJ Carrubba, M Gabel and C Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102(4) *American Political Science Review* 435–52; O Larsson and D Naurin, 'Legislative override of Constitutional Courts: the case of the European Union' (2016) 70(2) *International Organization* 377–408
[13] A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge: Cambridge University Press, 2015).
[14] S K Schmidt, *The European Court of Justice and the policy process: The shadow of case law* (Oxford: Oxford University Press, 2018).
[15] S Saurugger and F Terpan, *The Court of Justice of the European Union and the Politics of Law* (Palgrave Macmillan, The European Union Series, 2017).
[16] RD Kelemen and R Pavone, 'Where have the guardians gone? Law enforcement and the politics of supranational forbearance in the European Union' (2023) 75(4) *World Politics* 779-825.
[17] LJ Conant, *Justice contained: Law and politics in the European Union* (Cornell University Press, 2002)
[18] T Pavone, *The ghostwriters: lawyers and the politics behind the judicial construction of Europe* (Cambridge: Cambridge University Press, 2022).

conceptualize the EU as a "law state" – "an unbalanced polity that lacks coercive and administrative capacity and governs primarily through an expansive network of judicial institutions".[19]

Focussing upon interest groups and the methods of EU law

Interest groups, defined as 'organised private actors seeking to influence political decision-making'[20], have also made use of strategic litigation among other instruments of influence such as lobbying or using public opinion[21]. The fact that the CJEU has advanced an extensive interpretation of direct effect has benefited to a large number of interest groups, who were offered new avenues to defend their individual rights, before national courts very often, and sometimes before the European courts. The expansion of the EU competences has also offered new opportunities that interest groups have seized, in areas such as anti-discrimination policies[22] or climate change[23].

The easiest route for strategic litigation by interest groups is at Member States level, through procedures involving national courts, while potentially involving the CJEU if a preliminary reference is made. In addition, interest groups can also have direct access to the CJEU, under restrictive conditions, and bring cases against legal acts of the EU institutions. When it comes to controlling the implementation of EU law by Member States at national level, access to the CJEU is only indirect, and depends on the willingness of the Commission, acting as the guardian of the Treaties, to follow a demand made by an interest group and to bring a case before the CJEU.

Not all interest groups choose to litigate. Jacquot and Vitale[24], for instance, have shown that women lobbies, contrary to Roma lobbies, usually opt against litigation, favouring an insider strategy based on proximity with decision-makers. While an important strand of the literature has sought to explain the successes of interest groups when lobbying the EU institutions[25], fewer studies try to understand why strategic litigation in general and certain litigation strategies in particular are pursued by interest groups, beyond the analysis of individual cases. A large quantitative study[26] as well as some qualitative studies[27],

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[19] D Kelemen et al, Research Seminar, Constructing the European Law State (Institut Barcelona Estudis Internacionals 2024), https://www.ibei.org/en/research-seminar-constructing-the-european-law-state_327510, accessed on 16 December 2024.

[20] J Beyers, R Eising and W Maloney, 'Researching interest group politics in Europe and elsewhere: much we study, little we know?' (2008) 31(6) *West European Politics* 1103–28.

[21] R Cichowski, *The European court and civil society: litigation, mobilization and governance* (Cambridge: Cambridge University Press, 2007); M McCown, 'Interest Groups and the European Court of Justice', in D. Coen and J. Richardson (eds), *Lobbying in the European Union* (Oxford: Oxford University Press, 2009), 89–104.

[22] L Vanhala, *Making rights a reality?: Disability rights activists and legal mobilization* (Cambridge: Cambridge University Press, 2010).

[23] J Setzer, H Narulla, C Higham and E Bradeen, *Climate litigation in Europe - A summary report for the European Union Forum of Judges for the Environment* (The Grantham Research Institute on Climate Change and the Environment, LSE, 2022); E Donger, 'Children and youth in strategic climate litigation: Advancing rights through legal argument and legal mobilization' (2022) 11(2) *Transnational Environmental Law* 263-289.

[24] S Jacquot and T Vitale, 'Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level' (2014) 21(4) *Journal of European Public Policy* 587-604.

[25] A Dür, D De Bièvre, 'The question of interest group influence' (2007) 27(1) *Journal of Public Policy* 1-12; A Dür, 'Interest groups in the European Union: How powerful are they?' in J Beyers, R Eising and WA Maloney (eds), *Interest Group Politics in Europe* (Routledge, 2013), 110-128.

[26] A Hofmann and D Naurin, 'Explaining interest group litigation in Europe: Evidence from the comparative interest group survey' (2021) 34(4) *Governance* 1235-1253.

[27] K Alter and J Vargas, 'Explaining Variation in the Use of European Litigation Strategies' (2000) 33(4) *Comparative Political Studies* 452–82; P Bouwen and M McCown, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' in D Coen, *EU Lobbying: Empirical and Theoretical Studies* (Routledge, 2008), 90-111; L Conant, A Hofmann, D Soennecken and L Vanhala, 'Mobilizing European law' (2017) 25(9) *Journal of European Public Policy* 1376–1389; J Krommendijk and K van der Pas, 'To intervene or not to intervene: intervention before the Court of Justice of the European Union in environmental and migration law (2022) 26(8) *The International Journal of Human Rights* 1394-1417.

have tried to find out the factors determining the choice to litigate. But, once the choice is made to bring a case before a court, what makes this strategic choice successful, or more likely to be successful?

The purpose of this Special Issue is to study the use of strategic litigation by interest groups and uncover the factors determining the successes (and potential successes) of these strategies, in the past and for the future.

In the framework of this Special Issue, and to ensure an element of coherence between the papers, strategic litigation consists of "(the intention of) legal action through a judicial mechanism in order to secure an outcome, either by an affected party or on behalf of an affected party"[28] The objective of these strategies might be to create legal change, political change and/or social change. Strategic litigation is thus understood here as form of legal mobilization to influence policies and political processes used by many actors.[29] The use of this definition does not aim to be definitive, and we recognise that, although widely used, the term strategic litigation has a variety of highly contestable meanings. Despite the proliferation of the term and its salience for EU law, no specific definition of the term can be said to accurately capture the breadth of emerging activity.[30] New definitions and understanding of the term entail a greater need to capture its methodological elements and the means by which it is considered and addressed. We argue, accordingly, that strategic litigation should become an important field of research in different areas of law at national, EU as well as international law, and specifically as a methodology question. It also represents an important intersection in EU law between law and politics worth of further exploration.

Existing studies have focused on different areas such as international criminal justice[31], climate change[32], human rights[33], and social law[34]. This Special Issue focuses on 'digital law', broadly framed so as to include digital aspects of other policy fields. 'Digital law', as a relatively recent field of EU law, can be seen as a legal (battle)field where interest groups not only lobby EU institutions but also implement litigation strategies. European Union digital law has developed as an emerging field with many recent specific laws such as, for instance, the GDPR, the Digital Markets Act, the Digital Services Act, the AI Act, Data Governance Act and the NIS directives. Digital activities also have the potential to impact other EU policies from competition law to internal market law and consumer protection. Digital activities, governance and law-making also increasingly permeates EU external relations law. The extraordinary span of law-making unsurprisingly has many consequences. The increasing body of legislation relating to the digital domain is likely to generate many cases and rulings. Indeed, the case-law of the CJEU on digital issues is expanding. Many disputes brought before the courts have opposed two categories of litigants: economic interest groups, including the Big Tech, defending their material interests, and interest groups acting in the name of citizens[35]. An examination of the use of strategic litigation in this field is thus a timely endeavour.

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[28] K van der Pas, ‚Conceptualising strategic litigation' (2021) 11(6(S)) *Oñati Socio-Legal Series* S116-S145.
[29] P Cebulak, 'Mapping the potentials and pitfalls of using European law for strategic litigation against illiberal reforms' (2024) 20 *International Journal of Law in Context* 379–400.
[30] See further P Cebulak, M Morvillo and S Salomon, *Strategic litigation in EU law: Who does it empower?* (2024) (pp. 1-35). (Jean Monnet Working Papers). Jean Monnet Center, NYU School of Law available at https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02_Pola-Cebulak-Marta-Morvillo-Stefan-Salomon.pdf
[31] F Jeßberger and L Steinl, 'Strategic litigation in international criminal justice: Facilitating a View from Within' (2022) 20(2) *Journal of International Criminal Justice* 379-401.
[32] J Peel and HM Osofsky, 'Climate change litigation' (2020) 16(1) *Annual Review of Law and Social Science* 21-38.
[33] H Duffy, *Strategic human rights litigation: understanding and maximising impact* (Bloomsbury Publishing, 2018); A Novak, *Transnational Human Rights Litigation* (Springer International Publishing, 2020).
[34] R Dukes and E Kirk, 'Legal Change and Legal Mobilisation: What Does Strategic Litigation Mean for Workers and Trade Unions?' (2024) 33(4) *Social & Legal Studies* 479-500.
[35] V Golunova and M Eliantonio, 'Civil Society Actors as Enforcers of the GDPR: What Role for the CJEU?' (2024) 15 *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 180.

To answer our research question, we look at both actors and structures. Focusing on actors will help us to provide a comprehensive understanding of the litigation process, from the choice to litigate, to the outcome of the strategy (success or failure before courts). Focusing on structures will allow us to assess changes in substantive and institutional/procedural law in order to assess whether these changes may or may not increase the chances of success of strategic litigation.

Key elements of Special Issue

The different contributions to this Special Issue study several sub-fields of EU law in different but complementary ways. They identify key cases and issues, the main interest groups involved, their litigation strategies (and how these fit into an overall strategy), and the legal instruments and legal procedures of use in a strategic litigation context. Against this background, the contributions look to both legal and political explanations in order to test two main assumptions.

First, reasons for litigation successes and failures are of a purely legal nature. For example, the main decisions of the CJEU in favour of privacy can be explained by the fact that privacy and data protection have acquired a constitutional status with the EU Charter of Fundamental Rights becoming legally binding. Many NGOs choose to litigate in the digital sector because they know that they are likely to win the case. The success or failure depends on the type of litigation strategy that has been chosen by the interest groups (e.g. litigation at domestic level vs litigation at EU level, when possible).

Second, the reasons for litigation successes and failures are mainly of a political nature. They reflect the respective weight of actors and the interplay of influences within the European Union, where legislative processes have possibly been dominated by elites, Big Tech and watered down through strategic lobbying. This is not to say that the courts necessarily rule in favour of Big Tech. NGOs can compensate for their lack of resources by joining forces, coordinating and adjusting their strategies to maximise their chances of success.

Overview of articles

Drawing on different fields, including law, political science and public administration, the articles focus upon the theory and practice of our research question.

Van der Pas shows how, in the field of data protection, several civil society actors engage with the EU remedies system in order to attain their goals. This proliferation of strategies within the EU system raises the question: who are these actors and why do they (not) choose an EU (extra-)legal avenue? This paper explores the use of the EU remedies system by civil society actors in the field of data protection. It shows how procedural law throughout the EU, but also within the EU system, could be more harmonized and procedural hurdles lowered, in order to provide for effective means of enforcement.

Terpan and Saurugger seek to explain the success of the litigation strategies pursued by public interest groups in transatlantic data transfers and argue litigation has taken an important place in the strategies developed by these actors, as evidenced mainly by the number of public interest groups involved (at least indirectly) in litigation and the legal expertise they mobilise. In terms of instruments, they conclude from a legal analysis that NGOs developed strong legal arguments based on hard law, to which the Commission has mainly countered with political commitments, at best soft law, on the part of the American authorities. The search for legitimacy in the public can be seen as an additional reason why the Court favoured a pro-privacy jurisprudence.

Golunova and Tas assess approaches to strategic litigation against tech companies in the areas of data protection and online content regulation by mapping out strategic litigation lawsuits concerning two crucial practices affecting the enjoyment of fundamental rights in the digital domain – personal data processing and content moderation. The paper reflects upon ways to close the gap between the existing strategic litigation efforts of civil society actors in response to different challenges to digital rights.

Fasel focuses on the strategic litigation by social media companies against the Austrian Communication Platforms Act, a member state law adopted during the transition period from the E-Commerce Directive to the DSA. The paper's case study shows how companies successfully used EU internal market principles to challenge the Austrian law, paradoxically aligning their interests with the European Commission's goal of preventing legal fragmentation within the EU. It argues that it is important to consider the role of the DSA in the context of the EU's ambitions for industrial strategic autonomy and digital sovereignty.

Tzanou and Vogiatzoglou show how mobilization is an emerging field yet one demonstrating many shortcomings from a socio-legal studies perspective. They show how first, a lack of collective action reveals a gap in the recognition of collective data protection harms. Second, a lack of actors and problems from this area of mobilisation, reveal the problems of data protection mobilisation before the CJEU and the changes this has effectuated. Third, a prevailing legal problem has been the protection of the data protection rights of the majority, thus placing its experiences at the top of the hierarchy of EU data protection problems compared to those of minoritized data subjects.

Fahey examines the place of EU law in the actions of Max Schrems and his 'linked' NGO, None of your Business ('noyb'), in the context of its predominantly transatlantic nature. Existing literature pays insufficient attention to the narrow focus by Schrems on EU-US data transfers and the ways in which his use of EU law is mostly outside of EU court rooms and also outside of EU lobbying channels. The paper thus explores the place of EU law in the work of Schrems - often taking place outside of Court rooms and official lobbying channels when challenging EU data transfers . Fahey draws attention to the links between lobbying and litigation as to EU data transfers and beyond mirrored in the work of noyb - where little caselaw exists per se - and where broader aims and means are at stake necessitating a broader reach. The focus upon the '*locus*' adds to research highlighting the procedural limitations of the EU law system. It supports a broader framing of strategic litigation in understanding data transfers and the broader 'Brussels effects' of the work of Schrems.

Overall, the Special Issue seeks to add value to understanding emerging questions of EU law. We also draw attention to future directions of methodologies of EU law and the directions of the EU's digital transformation, and demonstrate the many factors influencing the evolution of EU law.