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INTRODUCTION

Special Issue: Strategic Litigation in EU Law

Introduction to the Special Issue: "Strategic litigation in EU law"

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Strategic litigation is a legal action initiated to achieve broader social, political, or economic ends. It is a form of legal mobilization and a way to exert influence over policies and political processes. It can be used by various actors pursuing different interests and agendas—public or private, progressive or conservative—and often operates alongside other forms of mobilization, such as lobbying or civil society campaigns. For a long time, civil society actors and interest groups in the EU have primarily sought to influence policies through lobbying and activism rather than through litigation. The Court of Justice of the EU (CJEU) has therefore remained off the radar of public-interest litigators in Europe. National courts and the European Court of Human Rights (ECtHR) provided more possibilities for direct actions and third-party interventions. In the past two decades, however, the CJEU adjudicated more regularly on politically salient and socially divisive issues related to the protection of the environment,[1] digital rights or migration.[2] Many of these cases have been initiated by activist lawyers, scholars, and advocacy groups and non-governmental organizations. Pharmaceutical companies, agricultural businesses, and airline industries, among others, have also used European Union (EU) law strategically to advance broader deregulatory agendas.

Against the twofold background of an increasing practice of strategic litigation in EU law and a growing societal and scholarly interest in law as a tool for social, political, and economic transformation, this special issue investigates the systemic features of EU law from the perspective of strategic litigants. The core question that this special issue pursues is: who does strategic litigation in EU law empower?

The special issue is opened by a framing paper where we introduce a methodological approach for studying strategic litigation in EU law. We approach strategic litigation as contextual and normatively open. Contextual, in so far as we see strategic litigation as embedded in specific social, institutional, and economic settings, including broader mobilization campaigns and non-judicial strategies. Normatively open, in so far as we understand strategic litigation as open to the pursuit

[1]Joana Setzer, Harj Narulla, Catherine Higham & Emily Bradeen, *Climate Litigation in Europe,* at 5–6 (Dec. 2022), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/12/Climate-litigation-in-Europe_A-summary-report-for-the-EU-Forum-of-Judges-for-the-Environment.pdf (presenting a Summary Report for the EU Forum of Judges for the Environment).

[2]For an increase of CJEU decisions in the fields of asylum law see, MORITZ BAUMGÄRTEL, DEMANDING RIGHTS. EUROPE'S SUPRANATIONAL COURTS AND THE DILEMMA OF MIGRANT VULNERABILITY 5 (2019).

of a wide range of agendas ranging from normatively desirable—that is to say progressive, public-interest oriented—to normatively undesirable—conservative, private-interest oriented—agendas, and as advanced by powerful and disempowered actors alike. Based on the normatively open and contextual conceptualization of strategic litigation, we set out an analytical framework that captures three different but interlinked dimensions: The variety of actors who litigate strategically in the EU; the structural features of the EU legal order which affect practices of strategic litigation; and the broader systemic effects induced by strategic litigation in the EU's multilevel legal and political system.

Starting from this analytical framework, the contributions collected in this special issue investigate practices of strategic litigation in three areas of EU law which have witnessed an increase of strategic cases brought to the CJEU—human mobility, environment, and digital rights. Mobility includes free movement of persons, EU citizenship rights and EU external migration policy. Environment focuses on policies and laws aimed at mitigating climate change as well as other environmental provisions. Digital rights include data protection and other individual rights in the online sphere. Each of the three fields selected as case studies represents not only a specific legal area, but also a distinct social field with a particular set of actors, strategic choices, practices and—particularly legal—narratives. Focusing on these three fields enables us to draw parallels and identify important distinctions that result in a nuanced and grounded account of the practice of strategic litigation in EU law. To account for the thick context within which strategic litigation takes place, we invited legal practitioners, who are involved in strategic litigation, to contribute with critical reflections on their practice to this special issue. Involving legal practitioners, alongside academics, should thus link theory rooted analysis in the areas of inquiry with grounded reflections on the social practices in the field.

In terms of outline, the special issue adopts the perspective of litigants and is organized based on the three key stages in the life of a strategic litigation: The framing of a case, the litigation phase, and the aftermath of a case.

The contributions addressing the framing of a case investigate several points of interest: The factors that affect actors' choice to litigate in EU—and member states'—courts as compared to other means to advance a political agenda, for example lobbying; the peculiarities of coalition-building, in particular in a supranational setting; and the conditions or the lack thereof for broader legal mobilization in the EU. The section opens with Alberto Alemanno discussing the structural obstacles that have so far hindered legal mobilization in the EU, arguing that these have prevented it from unleashing its democratic potential. Justin Borg- Barthet and Francesca Farringdon engage with the external boundaries of the concept of strategic litigation and differentiate it from strategic lawsuits against public participation (SLAPP), highlighting the potential and limits of the recently approved anti-SLAPP Directive. Approaching the actors engaged in strategic litigation in the EU, Andreas Hofmann asks to what extent strategic litigation is a weapon of the weak or rather a tool in the hands of already powerful actors and discusses the features of the interest groups pursuing strategic litigation based on European and international law. Sofie Fleerackers dissects corporate strategic litigation around the Emission Trading System in the EU. Adam Ploszka addresses the relation between strategic litigants and judicial institutions, starting from the case of Poland, where a weakened judiciary has resulted in a popularization of strategic litigation before the CJEU and in a broadening of the actors engaged in the practice. Finally, Dion Kramer explores, from a participatory perspective of an engaged legal scholar, the case of homeless EU citizens in the Netherlands and the considerations behind the choice between litigation and advocacy as legal mobilization strategies.

The second part of the special issue covers the litigation phase. It examines the specific features of the EU legal order when it comes to litigating strategic cases. The contributions in this part investigate the procedural rules that play a role in opening or closing possibilities of strategic litigation, and how they affect different types of actors operating on different levels of the EU multi-level legal order. The section opens with a focus on the pre-litigation phase in

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environmental and digital rights litigation. Mario Pagano inquires into the impact of the 2021 Aarhus Regulation Reform on the possibilities for environmental actors to mobilize through the internal review procedure and its potential repercussions on access to court. Francesca Palmiotto and Derya Ozkul focus on strategic litigation at the intersection of digital technology and migration and reveal the hurdles faced by public-interest litigants in the pre-litigation phase. The digital rights focus is further developed by Swee Leng Harris, whose contribution addresses the role of civil society in the enforcement of human rights in relation to tech giants through strategic litigation. Virginia Passalacqua discusses the interplay of institutional and legal factors, on the one hand, and social factors, on the other, in shaping legal mobilization for migrants' rights, starting from the case of Greece—until recently a surprising zero-reference case when it comes to EU migration law. The Greek case is also the focus of Elli Kriona's contribution as a practitioner involved in strategic litigation for migrants' rights. Kriona explores the legal and administrative challenges encountered by Civil Society organizations seeking to advance migrants' rights through strategic litigation, and discusses the interplay with advocacy activities at the international and EU level.

Finally, the third part focuses on the aftermath of strategic cases. Given the broader goals pursued by strategic litigants, it is essential to consider their effects beyond the courtroom. Thus, contributions in this part focus on the "afterlife" of strategic litigation—its implementation, political impact and impact on the public discourse at national and EU level—and consider further avenues for strategic litigation in EU law. In her contribution, Reilly Willis questions the ability of the EU legal system to represent environmental concerns and the groups most affected by climate change, whose voice she finds to be ultimately curtailed in the context of strategic litigation in front of the CJEU. Connecting the national and the EU level, Christina Eckes puts forward a doctrinal argument to open up a so far foreclosed avenue for strategic climate litigation in the EU, namely challenges to the adequacy of national climate mitigation measures adopted in compliance with EU law. The multilevel dimension of the EU legal order and its implications for strategic litigation is further addressed by Stefan Salomon's contribution. Here, Salomon discusses the legal and political aftermath of a strategic case on border controls within the Schengen area (joined cases C-368/20 and C-369/20), where he himself acted as applicant, with a focus on member states' non-compliance. To conclude, Catherine Forget, one of the lawyers involved in the Passenger Name Record (PNR) case (Case C-817/19) discusses the various stages of the case—from referral to implementation—and its judicial and legislative follow-up in Belgium.

Like all academic work, this special issue is the result of a collective endeavor and went through different phases. We initiated a first workshop on "Strategic litigation in EU law" in Amsterdam in January 2023 and a second follow-up event in March 2024. We wish to thank all the participants in both workshops for lively discussions, the in-depth engagement with our work and ideas, and creating the stimulating and encouraging atmosphere that is essential for any academic work. We hope that the contributions collected in this special issue will contribute to moving forward academic discourses and practices of strategic litigation in the idiosyncratic EU legal order.

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