

Follow the Leader

The European Commission, the Court of Justice, & the EU's Rule of Law Revolution

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Agenda

Puzzle

Data & Parsing

Research Design

Results

Future Research



TL:DR

1. Puzzle: Who leads the EU's ROL response?



TL:DR

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2. Data & Parsing : New dataset on EU's ROL cases



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3. Research Design: Backtracking agency of ECJ and EC



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4. Results: A proactive Court & a laggard "Guardian"



TL:DR

1. Puzzle: Who leads the EU's ROL response?
2. Data & Parsing : New dataset on EU's ROL cases
3. Research Design: Backtracking agency of ECJ and EC
4. Results: A proactive Court & a laggard "Guardian"
5. Takeaways: The law is there, but where's the will?



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Hypotheses

1. Hypothesis 1: Commission leads the Court Supranationalist theories & Commission's rhetoric



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Fundamental Change Beneath the Surface: The Supranationalisation of Rule of Law Protection in the European Union

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Abstract

Whereas most studies on the European Union's (EU) responses to the rule of law crisis stress the underenforcement of EU law, this article offers a different perspective. Focusing on the long-term dynamics concerning rule of law protection, we detect a gradual trend towards supranationalism. The Rule of Law Conditionality mechanism adopted in 2020 is the first instance of 'effective supranationalism', that is, a rule of law tool that combines supranational decision-making procedures with binding and enforceable consequences. To explain this development in an area that has been marked by considerable resistance to efforts to strengthen supranational oversight, we draw on the agent-centric historical institutionalist approach. Our qualitative study shows that supranationalisation has become possible through two interrelated factors: the joint strategies of community bodies, which have promoted competence transfer to the EU level, and the increasing marginalisation of sovereigntist positions within the Council, given the escalating conflicts with Hungary and Poland.

Keywords: agent-centric historical institutionalism; European Commission; rule of law; supranationalisation

Introduction

The scholarly assessment of the European Union's (EU) approach to tackling the rule of

Hypotheses

1. **Hypothesis 1:** Commission leads the Court
2. **Hypothesis 2:** Court leads the Commission
Politics of supranational forbearance

WHERE HAVE THE GUARDIANS GONE?

Law Enforcement and the Politics of Supranational Forbearance in the European Union

By R. DANIEL KELEMEN^a and TOMMASO PAVONE^{b*}

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ABSTRACT

Why would a supranational law enforcer suddenly refrain from wielding its powers? The authors theorize the supranational politics of forbearance—the deliberate under-enforcement of the law—and explain how they arise from cross-pressures between prosecutorial discretion and intergovernmental policy-making. The article then traces why an exemplary supranational enforcer—the European Commission—became reluctant to launch infringements against European Union member states. While the Commission's policy-making role as engine of integration has been controversial, its prosecutorial role as guardian of the Treaties has been viewed as less contentious. Yet after 2004, infringements launched by the Commission plummeted. The authors demonstrate that the Commission's political leadership grew alarmed that aggressive enforcement was eroding



Hypotheses

1. **Hypothesis 1:** Commission leads the Court
2. **Hypothesis 2:** Court leads the Commission
3. **Hypothesis 3:** Shifting over time

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SYMPOSIUM: EUROPEAN POLITICS
AFTER THE INVASION (PART V)

 OPEN ACCESS

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Turning assertive? EU rule of law enforcement in the aftermath of the war in Ukraine

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^aIPP-CSIC, Universidad Autónoma de Madrid (UAM), Madrid, Spain; ^bIPP-CSIC, Madrid, Spain

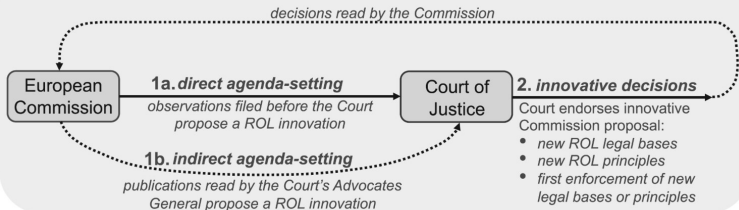
ABSTRACT

When dealing with EU's rule of law (RoL)-related issues, the Commission has often adopted a forbearance approach and the actions taken have crystallised in soft enforcement mechanisms directed at Poland. However, the use of the Conditionality Regulation as an enforcement instrument in 2022 in relation to (lack of) RoL compliance signalled a change into an assertive approach towards Hungary. Why so? This paper argues that exogenous events may change policy priorities and linkage of issues explain this change. Russian aggression against Ukraine prompted a shift in the priorities of member states' governments making them more receptive towards EU Commission enforcement actions. The Hungarian government's friendly attitude towards Russia clashes with the position of most member states and the Commission itself. Orban's partial isolation makes the Commission more willing to exercise RoL enforcement initiatives.

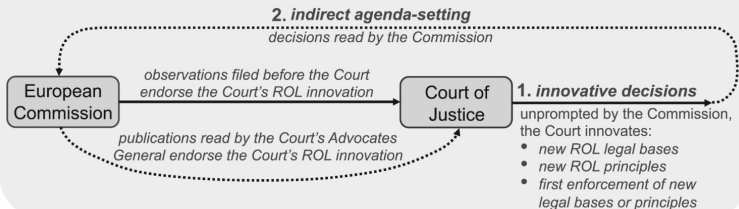


EC and ECJ Relationship Diagram I

Pathway 1: Commission leads the Court



Pathway 2: Court leads the Commission



Research Question

Has the ECJ pioneered this ROL revolution, or have its rulings been prompted by the EU's "Guardian of the Treaties"?



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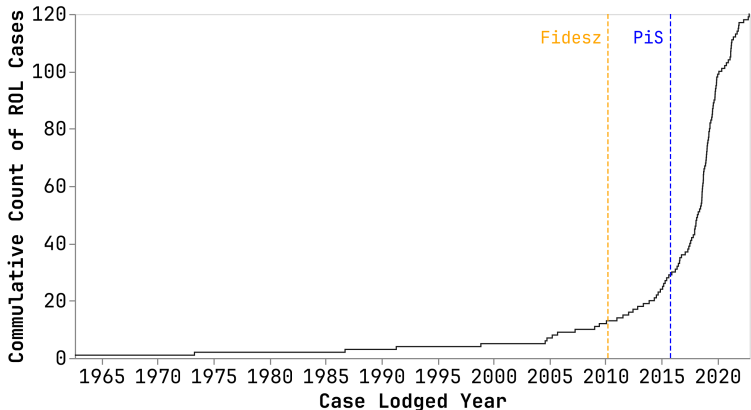
Results

Future Research



The ECJ-ROL Dataset

- Data from 2010 to 2023
- Spanning 96 cases, 180 ECJ decisions and over 15,000 citation points.



Parsing Judgments

JUDGMENT OF THE COURT (Grand Chamber)

27 February 2018 (*)

(Reference for a preliminary ruling — Article 19(1) TEU — Legal remedies — Effective judicial protection — Judicial independence — Charter of Fundamental Rights of the European Union — Article 47 — Reduction of remuneration in the national public administration — Budgetary austerity measures)

In Case C-64/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 7 January 2016, received at the Court on 5 February 2016, in the proceedings

Associação Sindical dos Juizes Portugueses

v

Tribunal de Contas,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz, J.L. da Cruz Vilaça, A. Rosas, E. Levits (Rapporteur) and C.G. Fernlund,



Parsing Judgments

- 32 **Article 19 TEU**, which gives concrete expression to the value of the rule of law stated in **Article 2 TEU**, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 66; judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 90, and of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P, EU:C:2015:284, paragraph 45).
- 33 Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 69, and judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 99).
- 34 The Member States are therefore obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of **Article 4(3) TEU**, to ensure, in their respective territories, the application of and respect for EU law (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 68). In that regard, as provided for by the second subparagraph of **Article 19(1) TEU**, Member States are to provide remedies sufficient to ensure **effective judicial protection** for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 100 and 101 and the case-law cited).
- 35 The principle of the **effective judicial protection** of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 29 to 33).
- 36 The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited).
- 37 It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of **effective judicial protection**.
- 38 In that regard, the Court notes that the factors to be taken into account in assessing whether a body is a 'court or tribunal' include, *inter alia*, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 27 and the case-law cited).

LBC1

LBC2

LP1



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Measuring Legal Innovations

Response: ECJ issues stream of innovative rulings to defend EU legal order.

1. Legal bases: Ex: Art 2 TEU values enforceable in conjunction w/ Art 19 TEU req of “effective judicial protection” (*Portuguese Judges*, 2018)



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1. Legal bases: Ex: Art 2 TEU values enforceable in conjunction w/ Art 19 TEU req of “effective judicial protection” (*Portuguese Judges*, 2018)
2. Legal principles: Ex: principle of non-regression in ROL/organization of justice (*Repubblika*, 2021)



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2. Legal principles: Ex: principle of non-regression in ROL/organization of justice (*Repubblika*, 2021)
3. Enforcement: Ex: PL infringed Arts 2+19 TEU & non-regression by disciplining judges (*Commission v. Poland*, 202



Backtracing Legal Innovations

Mapping legal innovations throughout the ECJ's caselaw.

Date	Agent	Case Number	Decision	Legal Innovation	Type
2013-01-15	ECJ	C-416/10	Judgment	Art 267 TFEU	LBC
2014-12-18	ECJ	Opinion 2/13	Judgment	Art 19 TEU	LBC
2018-02-27	ECJ	C-64/16	Judgment	Art 47 CFR + Art 19 TEU	LBC
2018-02-27	ECJ	C-64/16	Judgment	Arts 2 + 19 TEU	LBC
2019-06-24	ECJ	C-619/18	Judgment	irremovability of judges	LP
2019-06-24	ECJ	C-619/18	Judgment	irremovability of judges	EN
2019-07-19	ECJ	C-556/17	Judgment	finality of judgments	LP
2020-06-18	ECJ	C-78/18	Judgment	democratic pluralism	LP
2020-06-18	ECJ	C-78/18	Judgment	democratic pluralism	EN
2021-04-20	ECJ	C-896/19	Judgment	non-regression	LP
2021-07-15	ECJ	C-791/19	Judgment	Art 267 TFEU	EN
2021-07-15	ECJ	C-791/19	Judgment	Art 267 TFEU	EN
2021-07-15	ECJ	C-791/19	Judgment	non-regression	EN

^a

^aSelected legal innovations for illustrative purposes



Backtracing Legal Innovations

Backtracing legal innovations throughout the ECJ's caselaw. Measuring influence by mapping two pathways of influence EC observations and AG Opinions and the ECJ legal innovations.

Date	Agent	Case Number	Decision	Legal Innovation	Type
2018-08-18	EC	C-78/18	Inf. App	Full Text	-
2019-08-23	EC	C-357/19	Com. Observations	Full Text	-
2019-08-30	EC	C-379/19	Com. Observations	Full Text	-
2019-09-11	EC	C-134/19	Com. Observations	Full Text	-
2019-10-25	EC	C-824/18	Com. Observations	Full Text	-
2019-10-25	EC	C-791/19	Com. Observations	Full Text	-
2019-11-08	EC	C-821/19	Com. Observations	Full Text	-
2019-11-19	EC	C-564/19	Com. Observations	Full Text	-
2019-11-28	EC	C-487/19	Com. Observations	Full Text	-
2019-11-28	EC	C-508/19	Com. Observations	Full Text	-
2020-01-24	EC	C-811/19	Com. Observations	Full Text	-
2020-01-28	EC	C-741/19	Com. Observations	Full Text	-
2020-02-12	EC	C-924/19	Com. Observations	Full Text	-
2020-02-14	EC	C-748/19	Com. Observations	Full Text	-
2020-03-04	EC	C-564/19	Com. Observations	Full Text	-
2020-04-29	EC	C-896/19	Com. Observations	NaN	←
2020-06-18	ECJ	C-78/18	Judgment	Art 63 TFEU + Arts 7, 8, 12 CFR	LBC

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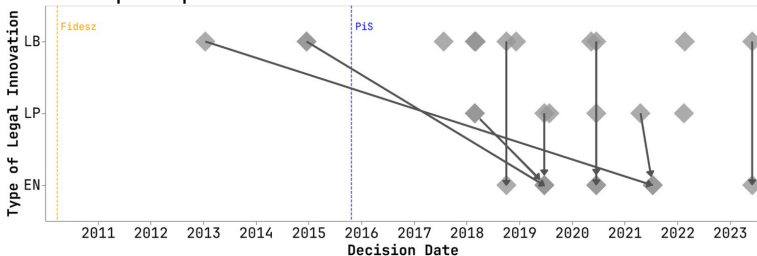
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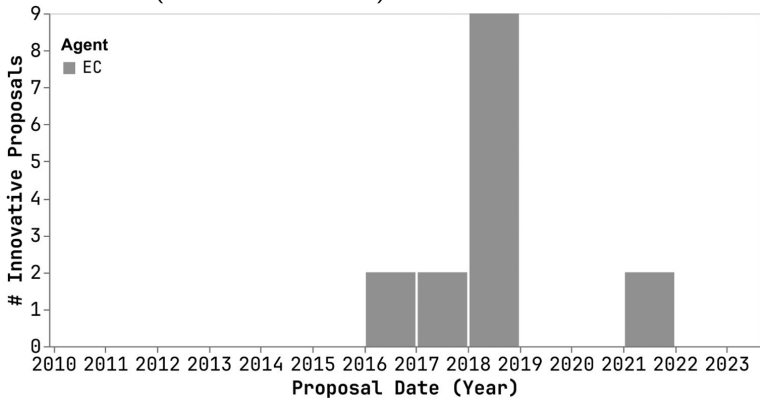
Results I

Finding 1: ECJ's teleological approach: From innovative legal bases to principles to enforcement



Results II

Finding 2: Commission only proposed 15 of 29 (51.7%) of ECJ innovations (most from '16-18)



Results III

1. With the exception of 2016-18, EU's “Guardian of the Treaties” has been missing in action



Results III

1. With the exception of 2016-18, EU's "Guardian of the Treaties" has been missing in action
2. ECJ's innovative rulings spurred the Commission to act more than the reverse



Results III

1. With the exception of 2016-18, EU's "Guardian of the Treaties" has been missing in action
2. ECJ's innovative rulings spurred the Commission to act more than the reverse
3. EU's challenge is not that it lacks the legal tools to defend ROL, but that the Commission & member states lack the political will



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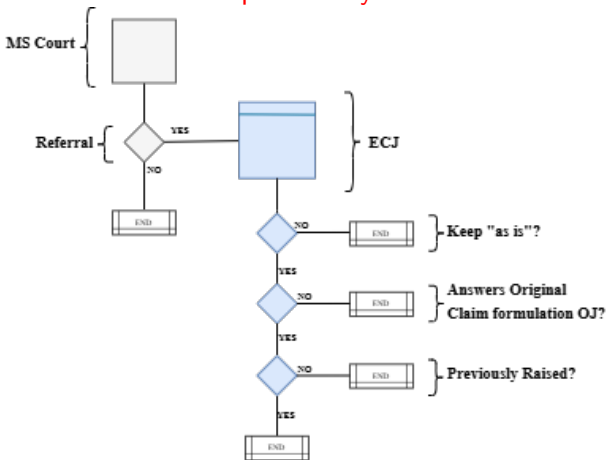
Results

Future Research



Future Research

What explains national courts success in the development of EU Caselaw via preliminary references?



Feedback Questions

Thank you for your time!!!

Please feel free to ask any questions and comments.

Contact

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