


Follow the Leader:

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



Mauricio M. Manriquez & Tommaso Pavone
University of Oslo University of Toronto

Agenda



1. **Problem:** the rule of law (ROL) crisis in the EU

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2. **Puzzle:** Who leads the EU's response?

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5. **Takeaways:** The law is there, but where's the will?

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6. **Next Research: Subnational—ECJ cooperation?**

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- EU is a “community based on the rule of law” (ROL) – ECJ in *Les Verts* (1986)



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 - **On paper:** Art 2 TEU proclaims EU founded on democracy, rule of law & fundamental rights
 - Not just normative aspiration- also practical necessity



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- EU is a “community based on the rule of law” (ROL) – ECJ in *Les Verts* (1986)
 - **On paper:** Art 2 TEU proclaims EU founded on democracy, rule of law & fundamental rights
 - Not just normative aspiration- also practical necessity
 - **In practice:** EU depends on independent national judiciaries for its “infrastructural power”



The Problem



EU Legal Order

1. Government
violates EU law

National Legal Order

The Problem



EU Legal Order

1. Government
violates EU law

triggers lawsuit

2. National Court
solicits ECJ

National Legal Order

The Problem



EU Legal Order

3. ECJ
gov't violates EU law

referral

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National Legal Order

*disapply
nt'l law*

The Problem

- **But:** what happens when nt'l gov'ts autocratize, attack the ROL, & go after the courts?



The Problem

- **But:** what happens when nt'l gov'ts autocratize, attack the ROL, & go after the courts?
 - **After 2010:** HU & PL became the EU's first "competitive authoritarian" regimes

Viktor Orbán's grip on Hungary's courts threatens rule of law, warns judge

Csaba Vasvári's claims of 'overreach' follow freeze on EU funds over concerns about judicial independence



The Collapse of Judicial Independence in Poland: A Cautionary Tale

by John Macy and Allyson K. Duncan

Vol. 104 No. 3 (2020-21) | Judges on the March | [Download PDF Version of Article](#)



The Problem



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referral

National Legal Order

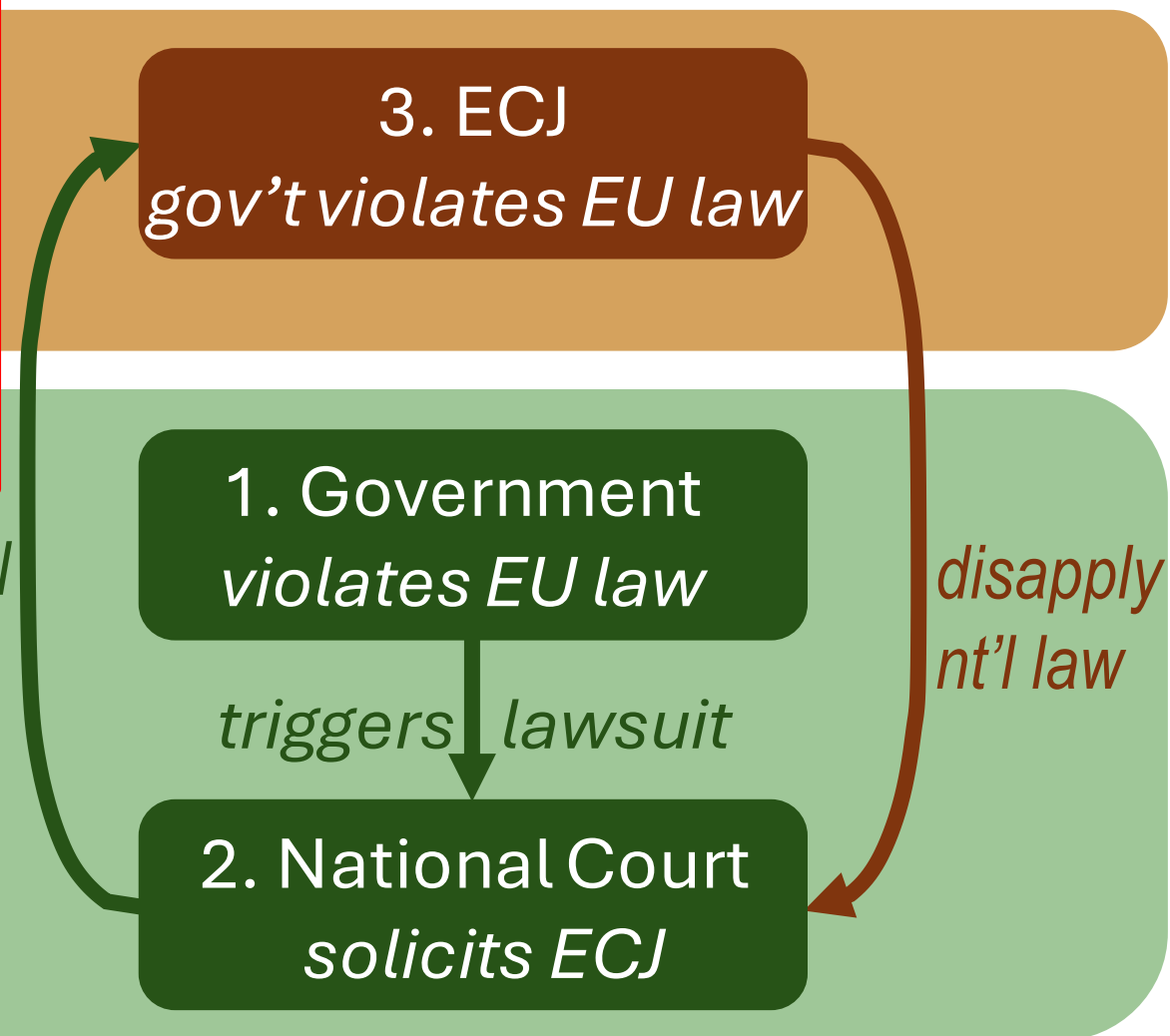
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gov't violates EU law

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ECJ
can't respond / act

no referral

1. Government
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2. National Court
cows to gov't

National Legal Order

The Problem

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



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 - **Legal bases:** Ex: Art 2 TEU values enforceable in conjunction w/ Art 19 TEU req of “effective judicial protection” (*Portuguese Judges*, 2018)
 - **Legal principles:** Ex: principle of non-regression in ROL/organization of justice (*Repubblika*, 2021)
 - **Enforcement:** Ex: PL infringed Arts 2+19 TEU & non-regression by disciplining judges (*Commission v. Poland*, 2021)

The Puzzle



- **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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National Legal Order

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The Puzzle



2. Commission

EU Legal Order

ECJ

can't respond / act

Commission alerted

no referral

1. Government attacks the courts

cooptation threats



2. National Court cows to gov't

National Legal Order

The Puzzle



infringement

2. Commission
sues state

EU Legal Order

3. ECJ

ROL-related ruling

*Commission
alerted*

no referral

National Legal Order

1. Government
attacks the courts

cooptation threats

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The Puzzle

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

Ursula von der Leyen vows to use all the EU's 'powers' in legal dispute with Poland

German government declares 'full support' for European Commission to take potential action against Warsaw.

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The Puzzle

- **Hypothesis 1:** Commission leads the Court
 - Supranationalist theories & Commission's rhetoric
- **Hypothesis 2:** Court leads the Commission
 - Politics of supranational forbearance

The curious case of the EU's disappearing infringements

The Commission took a laxer approach to enforcement precisely when it was most needed.

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The Puzzle

- **Hypothesis 1:** Commission leads the Court
 - Supranationalist theories & Commission's rhetoric
- **Hypothesis 2:** Court leads the Commission
 - Politics of supranational forbearance
- **Hypothesis 3:** Change over time
 - From Commission inaction to entrepreneurship

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<https://doi.org/10.1080/01402382.2023.2268492>

 **Routledge**
Taylor & Francis Group

SYMPOSIUM: EUROPEAN POLITICS
AFTER THE INVASION (PART V)

 OPEN ACCESS

 Check for updates

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

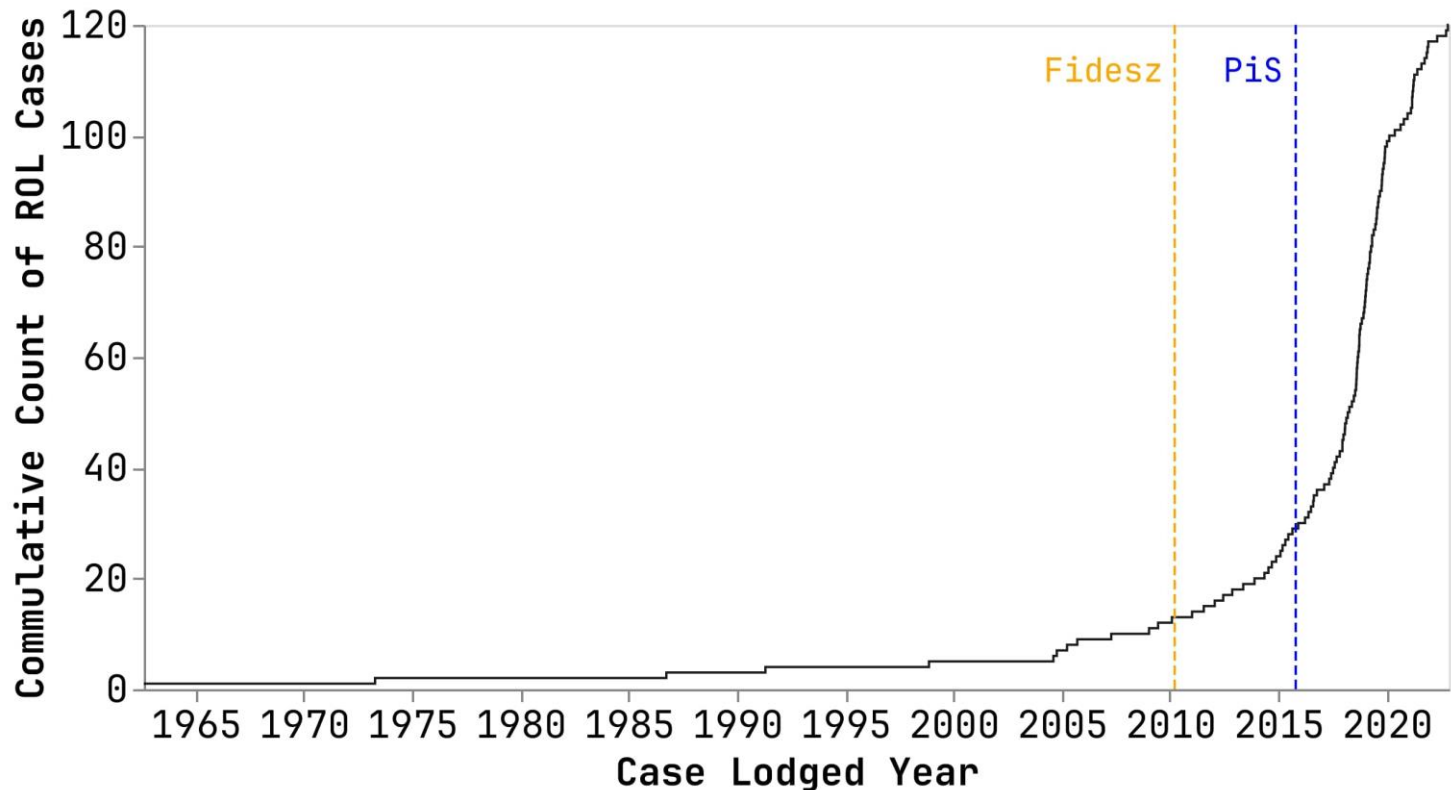
Gisela Hernández^a  and Carlos Closa^b 

Data

- **ECJ-ROL Dataset:** 96 ROL cases, 180 ECJ decisions (2010-pres), & Commission observations in all cases (via FOI requests)

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 - **14 innov. legal bases** (parsing 15,000 citations)
 - **6 innov. legal principles** (parsing 4 authoritative EU law sources)
 - **9 innov. enforcement actions** invoking a new legal basis/principle

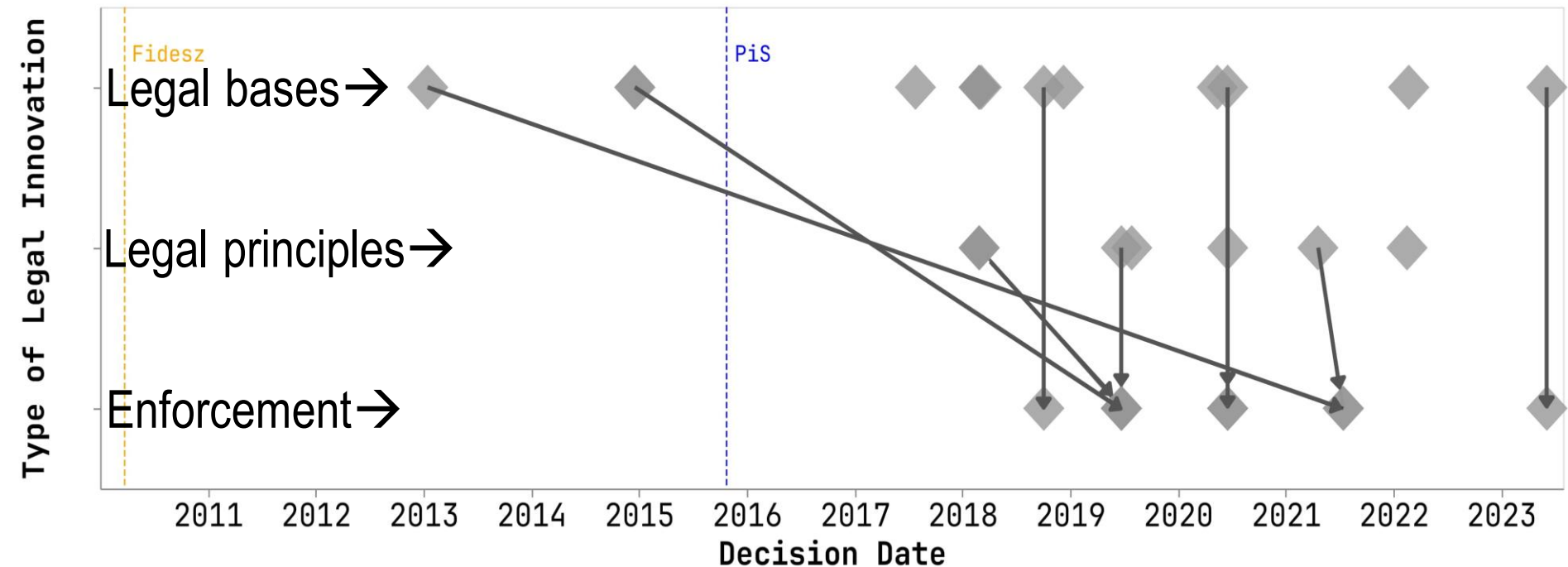
Findings

- **ECJ's teleological approach:** From innovative legal bases to principles to enforcement



Findings

- **ECJ's teleological approach: From innovative legal bases to principles to enforcement**



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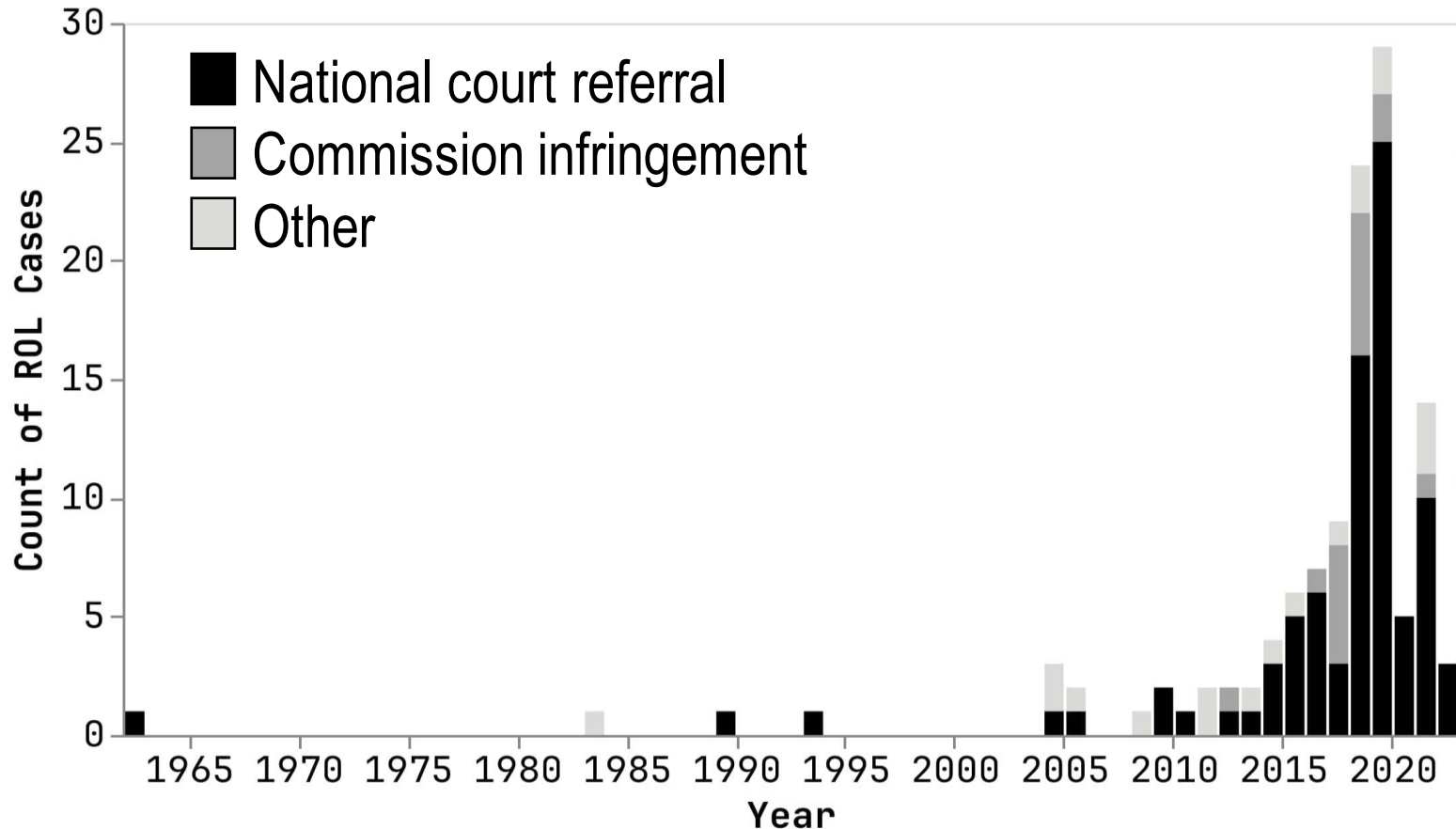


- **Finding 1:** Most of ECJ's ROL cases are referred by national courts, not by the Commission

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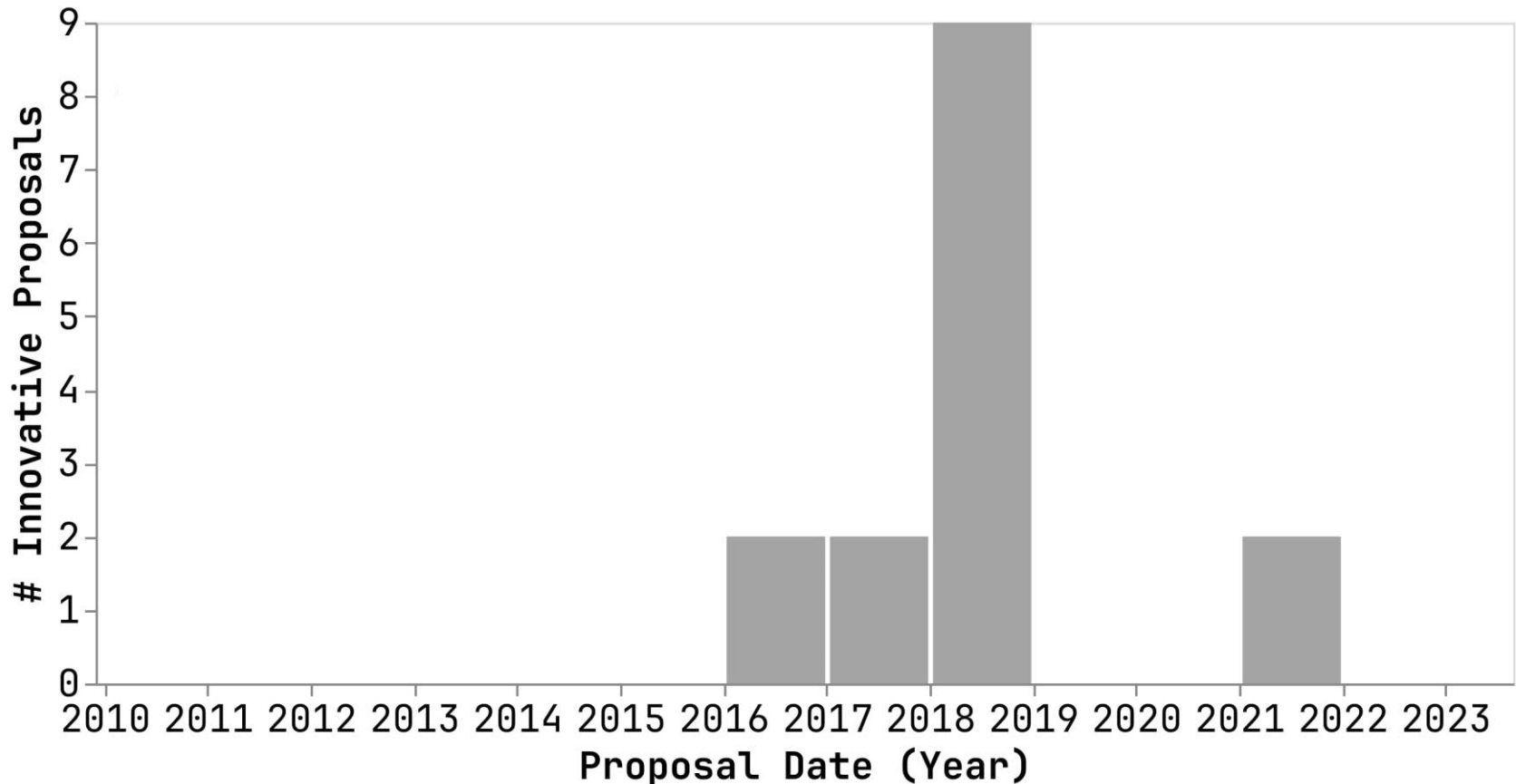


- **Finding 2:** Commission only proposed 15 of 29 (51.7%) of ECJ innovations (most from '16-18)

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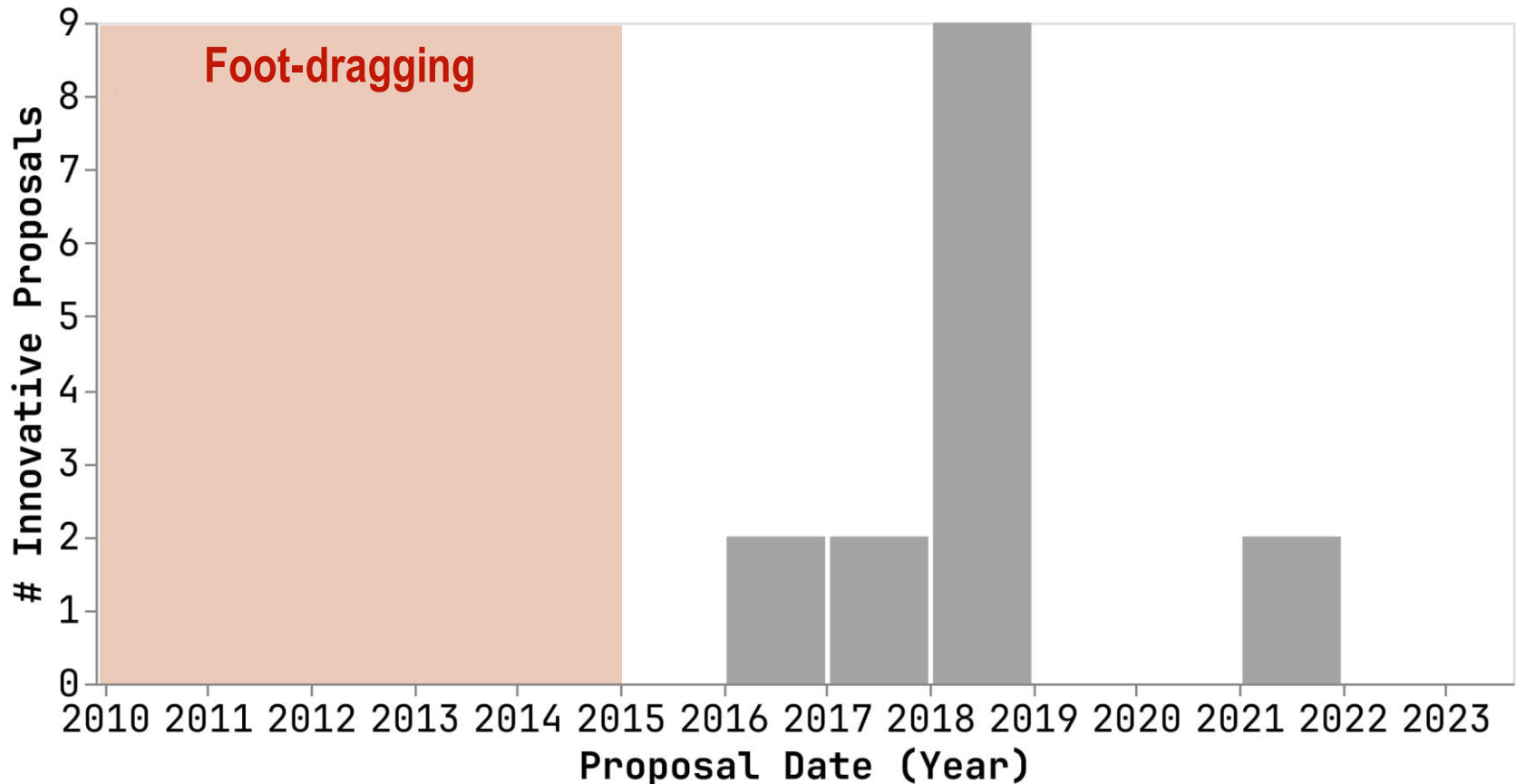
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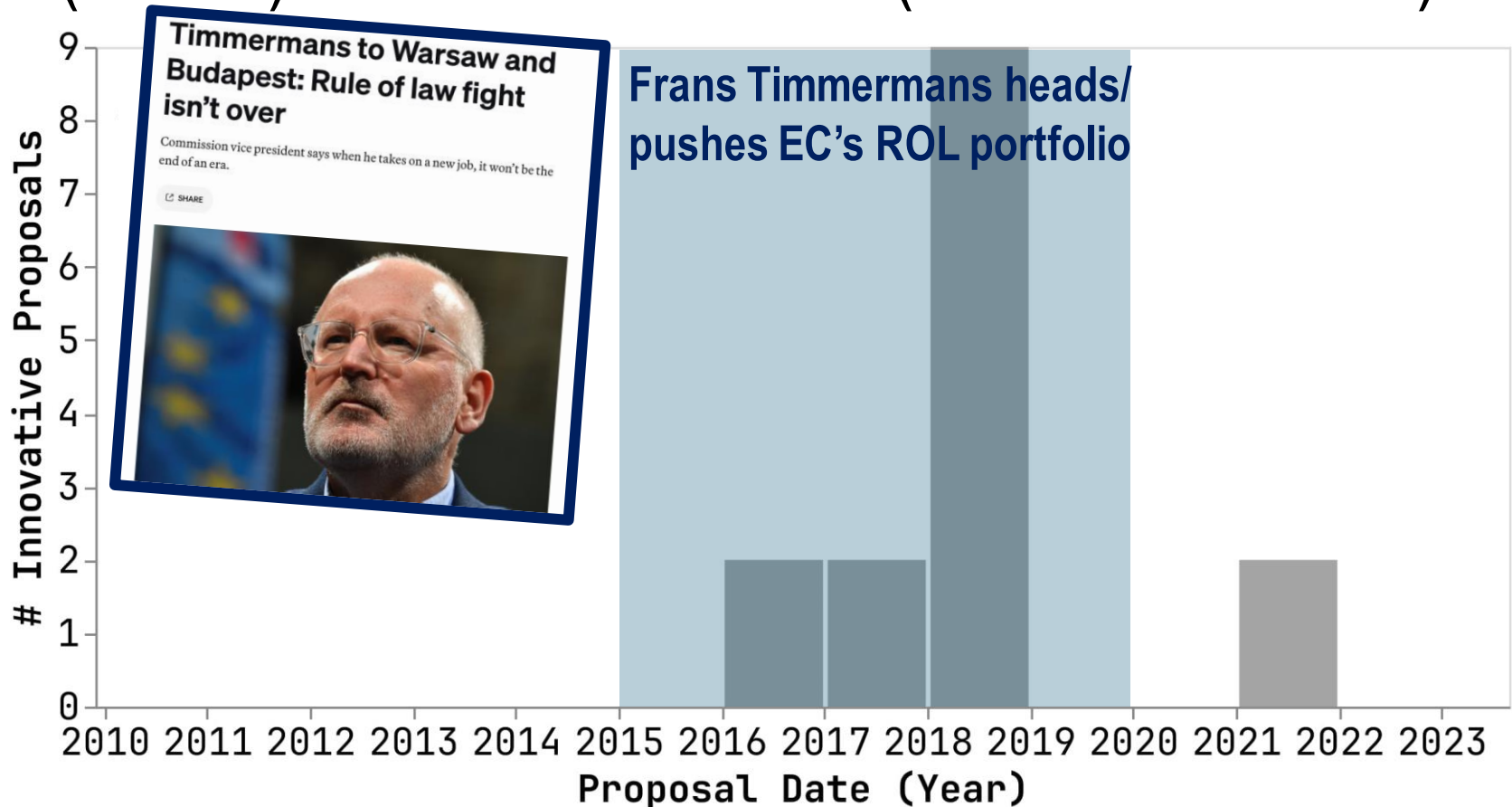
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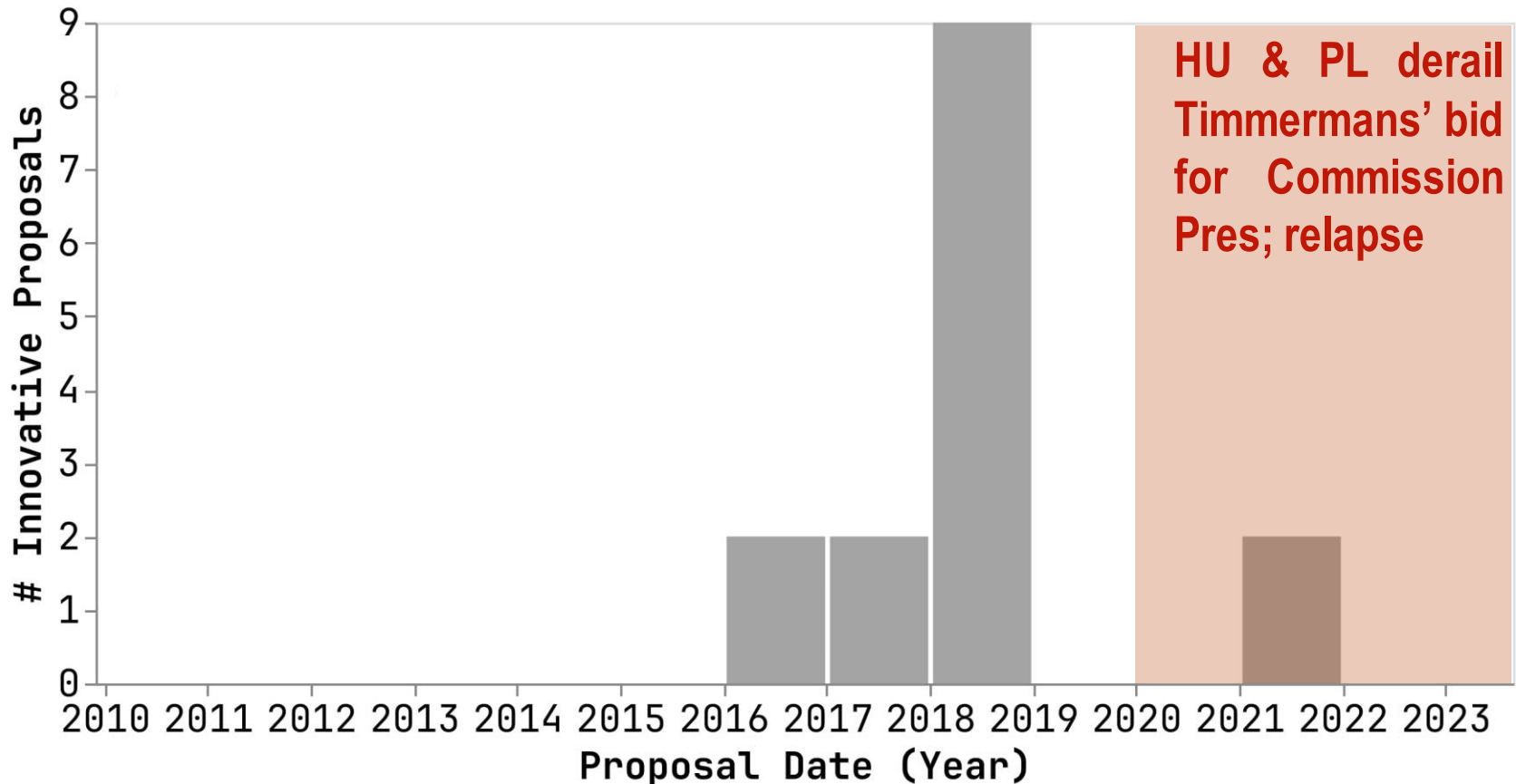
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- **Finding 3:** Even when it proposes innovations, Commission tends to follow in the ECJ's wake
 - **35% of new legal bases** prompted by Commission
 - **50% of new legal principles** prompted by Commission
 - **78% of 1st enforcements** of new LBs/LPs prompted by Commission

Takeaways

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



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- ECJ’s innovative rulings spurred the Commission to act more than the reverse
- EU’s challenge is not that it lacks the legal tools to defend ROL, but that the Commission & member states lack the political will

Next Research

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

EU Legal Order

2. ECJ

Answers nt'l court?

referral

National Legal Order

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solicits ECJ

Thank you!

Questions / Comments?

m.m.manriquez@arena.uio.no

