

# When Courts Clash: Rule of Law, Judicial Independence and EU Enforcement

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## Introduction

When courts clash, the conflict is seldom about doctrine alone. It is about the allocation of public power, the boundaries of constitutional authority and the credibility of a legal order that promises equality before the law. In the European Union, these tensions are amplified by a multilevel system in which national courts and the Court of

Justice share responsibility for giving effect to common values. Over the past decade, disputes over judicial independence, politicised appointments and disciplinary regimes have tested both the resilience of national judiciaries and the Union's capacity to defend the rule of law without overstepping its own design.

This book examines those tests from two angles: the legal tools the EU already has, and the political realities that condition their use. It argues that enforcement is not a single event but a continuum—from early monitoring and targeted litigation to interim relief, sanctions and, where necessary, structural remedies. Rather than treating Article 7 TEU as an outlier, we situate it within a broader toolkit that includes infringement actions for systemic breaches, preliminary references that protect individual rights while shaping institutional incentives, and financial conditionality that aligns compliance with budgetary interests. The central claim is straightforward: law can constrain politics, but only when actors deploy it strategically and in sequence.

To ground this claim, the book combines doctrinal analysis with country case studies. We track how institutional designs—judicial councils, appointment procedures, prosecutorial hierarchies—can be re-engineered to concentrate power, and how domestic and EU actors have responded. The case studies illuminate patterns of legislative capture, the erosion of checks and balances and the emergence of “compliance theatre,” where formal changes mask continuing control. They also highlight instances of resilience: lower courts invoking EU principles, bar associations mobilising expertise, and civil society building evidence that sustains litigation and negotiation alike.

The audience is deliberately mixed: lawyers seeking arguments and authorities; activists and journalists building public accountability; national officials crafting credible reforms; and EU institutions calibrating strategy. To that end, the book does more than map doctrine. It provides enforcement strategies, litigation roadmaps and reform templates—practical tools designed for immediate use. Each roadmap sets out jurisdictional hooks, sequencing options, evidentiary needs and risk management. Each template translates principles into institutional designs that can be adapted to local conditions while meeting EU standards of independence and effectiveness.

The approach taken here is pragmatic and incremental. We do not assume that a single legal instrument—whether Article 7, conditionality or a landmark judgment—can resolve systemic erosion. Durable outcomes arise when multiple levers move in concert: targeted cases that produce interim protection for individuals; financial incentives that reduce the political returns to non-compliance; and transparent metrics that allow monitoring to trigger automatic responses. Throughout, we pay close attention to timing, because in rule-of-law crises delay can be decisive: it changes facts on the ground, entrenches actors and narrows the space for reversal.

Finally, the book is candid about trade-offs. Firm enforcement can strain mutual trust,

yet permissive tolerance corrodes it. Political bargaining can unlock reform, but it can also reward obstruction. The chapters that follow propose ways to navigate these tensions: designing measures that are proportionate yet effective; building coalitions across institutions and Member States; and anchoring reforms in principles that travel well across legal traditions. The goal is neither maximalism nor resignation, but a workable path that restores judicial independence and secures the European promise that law—not power—decides.

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## **CHAPTER ONE: Mapping the EU Rule-of-Law Ecosystem**

The European Union's commitment to the rule of law is not merely a polite aspiration; it is a foundational principle, enshrined in Article 2 of the Treaty on European Union (TEU), alongside values such as democracy, human rights, and equality. This commitment forms the bedrock upon which the entire edifice of European integration is built, ensuring a predictable legal environment for citizens and businesses alike. However, articulating a principle is one thing; consistently upholding it across a diverse and expanding Union of 27 Member States, each with its own legal traditions and political dynamics, is quite another. The EU rule-of-law ecosystem is therefore a complex, multi-layered environment, shaped by a constant interplay of supranational norms, national constitutional identities, and the practical realities of enforcement.

At its core, the EU's rule-of-law framework is designed to prevent arbitrary power, ensure legal certainty, and guarantee effective judicial protection. It's a system that relies heavily on mutual trust among Member States, assuming that each national legal system adheres to common standards. This trust is essential for the smooth functioning of cornerstone EU policies, from mutual recognition in criminal matters to the free movement of goods, services, capital, and people. When that trust erodes, cracks begin to appear in the very foundations of the Union. The challenges to the rule of law in recent years have not been isolated incidents; they represent systemic pressures that reveal both the strengths and vulnerabilities of the EU's enforcement mechanisms.

Understanding this ecosystem requires navigating a web of interconnected actors and instruments. On the one hand, we have the EU institutions: the European Commission, as the guardian of the Treaties; the Court of Justice of the European Union (CJEU), as the ultimate interpreter of EU law; the Council, representing the Member States; and the European Parliament, embodying democratic oversight. Each plays a distinct yet often overlapping role in monitoring, assessing, and, when necessary, responding to rule-of-law backsliding. On the other hand, national actors—governments, parliaments,

judiciaries, and civil society—are not merely passive recipients of EU norms; they are active participants, shaping the domestic application and interpretation of those norms.

The sheer diversity of legal systems within the EU further complicates this landscape. While all Member States share a commitment to democratic values, their constitutional traditions, administrative cultures, and judicial structures vary significantly. Some boast long-standing traditions of judicial independence and robust checks and balances, while others have more recently transitioned from authoritarian regimes, with institutions still finding their footing. This heterogeneity means that a "one-size-fits-all" approach to rule-of-law enforcement is often insufficient, requiring tailored strategies that account for specific national contexts while upholding universal principles. It's a delicate balancing act, akin to herding cats, if the cats also have their own complex legal systems.

Consider the concept of "judicial independence," a cornerstone of the rule of law. While universally acknowledged as vital, its practical manifestation can differ. In some Member States, judicial appointments might involve extensive parliamentary scrutiny; in others, they might be predominantly the domain of judicial councils. Disciplinary procedures for judges can range from internal peer review to more formalized administrative processes. The challenge for the EU is not to impose a single, uniform model of judicial organization, but rather to ensure that, regardless of the specific national architecture, the fundamental principles of independence and impartiality are genuinely safeguarded. This often means focusing on the *effects* of national reforms rather than merely their formal design.

The EU's involvement in national rule-of-law matters has evolved considerably. Initially, the focus was largely on economic integration and ensuring the uniform application of EU law through the preliminary reference procedure. However, with successive enlargements and the deepening of integration, the Union increasingly recognized that its fundamental values could not be taken for granted. The past decade has seen a noticeable shift, with the EU proactively developing a more comprehensive toolkit to address systemic threats to the rule of law within Member States. This shift has not been without controversy, sparking debates about subsidiarity, national sovereignty, and the appropriate scope of EU competence. It's a constant negotiation, sometimes quiet, sometimes quite loud.

One of the key lessons learned from recent experiences is that rule-of-law erosion rarely happens overnight. It's often a gradual process, a slow chipping away at institutional safeguards, legislative checks, and judicial autonomy. This incremental nature makes early detection and intervention crucial. Waiting until a system is in full crisis mode makes remediation far more difficult, if not impossible. Therefore, the EU's ecosystem includes various monitoring and reporting mechanisms designed to identify potential risks and emerging trends before they escalate into full-blown crises. These

include annual rule-of-law reports, country-specific recommendations, and ongoing dialogues with national authorities and civil society.

The political dimension of rule-of-law enforcement cannot be overstated. While legal principles provide the framework, the decision to trigger enforcement mechanisms, particularly the more robust ones, is inherently political. It involves weighing diplomatic considerations, strategic alliances, and the potential for unintended consequences. The Council, composed of representatives of the Member States, often finds itself at the epicenter of these political considerations. Reaching consensus among 27 diverse governments on how to address rule-of-law breaches in one of their own can be a formidable challenge, sometimes leading to paralysis or diluted responses. It's a constant reminder that the EU is not just a legal order, but also a political union.

Civil society organizations, legal professionals, academics, and journalists play an increasingly vital role in this ecosystem. They act as independent watchdogs, monitoring legislative changes, documenting abuses, and providing critical information to both national and EU institutions. Their work often forms the evidentiary basis for formal enforcement actions and helps to raise public awareness and mobilize domestic opposition to rule-of-law backsliding. In many cases, these non-state actors are the first line of defense, providing early warnings and sustained pressure where official channels might be slow or hesitant to act. They are the unsung heroes, often working tirelessly behind the scenes.

The concept of "mutual trust," while foundational, has been severely tested. When one Member State systematically undermines its judiciary, it can have ripple effects across the entire Union. A judicial decision from a court in a Member State facing rule-of-law concerns might be viewed with suspicion by courts in other Member States, potentially hindering cooperation on issues ranging from extradition to the recognition of judgments. This fragmentation of trust can undermine the very essence of the single market and the area of freedom, security, and justice. Rebuilding this trust, once eroded, is a monumental task that requires consistent and credible enforcement. It's like trying to put Humpty Dumpty back together again, but with legal principles.

The EU's financial instruments also form a growing part of this ecosystem. The principle of budgetary conditionality, which links access to EU funds to respect for the rule of law, represents a significant development. The idea is simple: if a Member State benefits from the financial solidarity of the Union, it must also uphold the Union's core values. This mechanism offers a powerful incentive for compliance, particularly for countries that are net recipients of EU funding. However, its implementation has also raised complex legal and political questions, including concerns about proportionality, legal certainty, and the potential impact on final beneficiaries of EU funds. It's a powerful lever, but one that needs to be wielded with precision and care.

Furthermore, the relationship between EU law and national constitutional law is a perpetual dialogue, sometimes harmonious, sometimes fraught with tension. National constitutional courts play a crucial role in interpreting and applying both national and EU law, sometimes leading to "authority conflicts" where national constitutional identity clashes with the supremacy of EU law. These clashes highlight the complex, evolving nature of multi-level governance and the ongoing negotiation of competence between the Union and its Member States. Understanding these dynamics is essential for any effective strategy to defend the rule of law, as national courts are often both the subject of EU scrutiny and a potential avenue for reform.

The European Public Prosecutor's Office (EPPO) is another relatively new, yet significant, addition to the rule-of-law ecosystem. Tasked with investigating and prosecuting crimes affecting the financial interests of the Union, the EPPO represents a direct EU capacity to enforce the law in areas previously reserved for national authorities. Its establishment underscores the growing recognition that systemic corruption and fraud can directly undermine the rule of law and the effective functioning of EU policies. While its mandate is specific, its very existence strengthens the EU's ability to act where national enforcement mechanisms might be compromised. It adds another arrow to the quiver, albeit one with a very specific target.

Finally, the concept of "effective judicial protection" under Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union serves as a guiding principle throughout the ecosystem. This principle mandates that Member States must provide effective remedies for individuals to challenge breaches of EU law, and that their national courts must be capable of fulfilling their role as "decentralized EU courts." This means ensuring that national judges are independent, impartial, and have the necessary resources and procedural safeguards to apply EU law correctly. It effectively places an obligation on Member States to maintain robust judicial systems that can give full effect to the entire body of EU law.

In essence, the EU rule-of-law ecosystem is a dynamic, multifaceted arena where legal principles, political realities, and diverse actors constantly interact. It is a system under strain, but also one that is demonstrating an increasing capacity for adaptation and resilience. The following chapters will delve into each of these components in more detail, exploring the specific legal tools, political dynamics, and enforcement mechanisms that are deployed in the ongoing effort to defend the European promise that law, not power, ultimately decides.

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