

JUSTICE DELAYED AND JUSTICE DENIED:

Non-Implementation of European Courts Judgments and the Rule of Law

2023 Edition



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Judgments and the Rule of Law

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re:constitution



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Authors: Jakub Jaraczewski (DRI), Nino Tsereteli (DRI), Ioana Iliescu (EIN), Agnès Ciccarone (EIN), George Stafford (EIN) and Yegana Mammadova (EIN).

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The questionnaire on implementation of CJEU judgments was prepared by Laurent Pech, Full Professor of Law, Dean of Law and Head of the Sutherland School of Law, University College Dublin. Democracy Reporting International and European Implementation Network would like to thank Good Lobby Profs for their assistance in preparing the report.

List of experts consulted in preparation of the portion of the report addressing non-implementation of the CJEU judgments

1. **Belgium** – Dr. Mathieu Leloup, Assistant Professor of Constitutional and Administrative law, Tilburg Law School.
2. **Bulgaria** – Dr. Radosveta Vassileva, Visiting Research Fellow, Middlesex University.
3. **Croatia** – Dr. Davor Petrić, Postdoctoral Researcher and Lecturer, University of Zagreb, Department of European Public Law.
4. **Cyprus** – Dr. Stéphanie Laulhé Shaelou, Professor of European Law and Reform, Head of the School of Law and Director of the Jean Monnet Centre of Excellence on the Rule of Law and European Values CRoLEV, UCLan Cyprus.
5. **Czechia** – Dr. Katarína Šipulová, co-director of Judicial Studies Institute, Law Faculty, Masaryk University, Brno.
6. **Finland** – Pekka Pohjankoski, Researcher (European law), Faculty of Law, University of Helsinki.
7. **Germany** – Dr. Aqilah Sandhu, Researcher, University of Augsburg.
8. **Hungary** – Dr. László Detre, Legal Officer, Hungarian Helsinki Committee.
9. **Italy** – Dr. Antonia Baraggia, Associate Professor of Comparative Public Law, Department of Italian and Supranational Public Law, University of Milan & Dr. Jacopo Alberti, Associate Professor of EU law, University of Ferrara.
10. **Lithuania** – Dr. Loreta Šaltinytė, Associate Professor of EU Law, Mykolas Romeris' University.
11. **Luxembourg** – Dr. Catherine Warin, Lawyer, Lecturer, European Institute of Public Administration, re:constitution fellow 2021-2022.
12. **Malta** – Dr. Steffi Vella Laurenti, Assistant Lecturer, Faculty of Laws, University of Malta.
13. **The Netherlands** – Jasper van Berckel Smit, Project Officer, Meijers Committee.
14. **Poland** – Jakub Jaraczewski, Research Coordinator, Democracy Reporting International.
15. **Portugal** – Teresa Violante, Research Fellow and PhD Candidate, Friedrich-Alexander Universität Erlangen-Nürnberg, re:constitution fellow 2022-2023.
16. **Romania** – Dr. Madalina Moraru, European University Institute.
17. **Slovakia** – Viktória Alžbeta Sutórisová, Lawyer, VIA IURIS.
18. **Slovenia** – Dr. Matej Avbelj, Professor of European Law, New University, Ljubljana.
19. **Sweden** – Dr. Andreas Moberg, Associate Professor of International Law, University of Gothenburg.

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Executive Summary

Report Recommendations

1. The European Commission should analyse the level of implementation of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) judgments in European Union (EU) Member States in its annual Rule of Law Report.

The Report should also include specific recommendations for (a) states with particularly concerning records of ECtHR implementation overall; and (b) states with ECtHR and CJEU judgments pending implementation concerning the areas covered by the Report, especially those of independence and impartiality of the judiciary.

2. The European Commission should consistently use other tools available, including infringement procedures and financial pressure, to tackle the failure of certain Member States to fully implement reforms in line with the CJEU and ECtHR judgments.
3. The EU institutions should raise the issue of ECtHR and CJEU judgment non-implementation and the data in this report in discussions with Member State governments and national parliaments.
4. The EU should fund civil society activities designed to enhance ECtHR and CJEU judgment implementation, as well as Council of Europe activities designed to enhance ECtHR judgment implementation.

The attacks on fundamental European values in recent years have continued to raise concern for European stakeholders – governments, the media, and citizens alike. The EU has introduced a series of policy measures designed to halt and reverse this phenomenon, ranging from the new annual rule of law review cycle to targeted measures, such as withholding structural funds from countries with severe infringements of the rule of law.

In 2022, following civil society calls for the EU's rule of law reporting to take into account the non-implementation of judgments from the two key European courts – the ECtHR and the CJEU (hereafter, “the European Courts”) – the EU Commission has included this type of data in its annual Rule of Law Report. This development allowed the EU to identify longer-term problems with the rule of law across all Member States that had previously been overlooked.

The EU Commission's annual rule of law review cycle should continue to take into consideration the non-implementation of judgments of the two key European Courts in order to holistically assess the overall records of compliance with the rule of law in all EU states.

The European Courts do not stop delivering new rulings; in 2022 alone, the ECtHR delivered 1,059 violation judgments. This report reflects the fact that the non-implementation of judgments of the European Courts continues to be a systemic problem. Some 40 per cent of the leading judgments of the ECtHR relating to EU states from the last ten years have not been implemented. Each of these judgments relates to a significant or structural problem in the laws or practices of states, often with direct consequences for many citizens.

Non-implementation of judgments of the ECtHR is a problem across the continent. Bulgaria, Finland, Greece, Hungary, Italy, Malta, Poland, and Portugal all have leading judgments that have been pending implementation for over five years. In Bulgaria, Finland, Hungary, Italy, Poland, Romania, Slovakia, and Spain, over 50 per cent of leading judgments from the last ten years are yet to be implemented. Bulgaria and Romania have each failed to implement over 90 leading judgments.

Hungary has a particularly serious non-implementation problem, with 76 per cent of the leading ECtHR rulings from the last ten years awaiting implementation. Overall, it is notable that the majority of the highest non-implementing countries, namely Bulgaria, Hungary, Italy, Poland and Romania, are also the ones with much broader and systemic rule of law issues, including attacks on the independence of the judiciary and on other oversight institutions.

There are 616 leading ECtHR judgments pending implementation concerning EU states. The European Commission's Rule of Law Report should continue capturing the entirety of these cases and set out recommendations to those Member States with particularly poor levels of implementation.

In the past few years, with the visible decline in the situation regarding the rule of law in several EU Member States, the CJEU has been increasingly focused on rule of law issues, and particularly on measures meant to weaken checks on the government. Hungary, Poland, and Romania have emerged as the countries with the largest number of unimplemented rulings of this kind. A few alarming tendencies have appeared: the refusal to comply with CJEU judgments, coupled with an open contestation of the CJEU's authority; sham compliance, through façade changes that do not significantly change the status quo; partial compliance, through measures that address only fragments of broader systemic problems and do not address underlying issues; and, finally, protracted failure to make institutional arrangements EU law-compliant,

despite general declarations of commitment and recognition of the CJEU's authority. The European Commission's alertness and clarity of assessments can be critical to avoiding illusory compliance or significant delays in the implementation of necessary measures. It is also critical that the Commission does not reach conclusions about the adequacy of reforms prematurely, thereby de-legitimising any further efforts of national actors to address shortcomings emerging in practice.

The European Commission has addressed the non-implementation of the relevant judgments of the CJEU in its rule of law reports, albeit in a somewhat sporadic fashion. A more critical, systematic and holistic assessment of the levels of implementation is warranted, as is flagging significant delays in implementation.

It needs to be kept in mind that, due to the differences in access provisions, the CJEU does not get to rule on as many situations signalling rule of law risks as the ECtHR. The claim is that this is partly because of the Commission's reluctance to resort to the CJEU, and partly because of the formal and informal obstacles national judges face in submitting requests for preliminary rulings.

Introduction

Why is the Implementation of European Court Judgments a Rule of Law Issue?

There are two reasons why the implementation of the judgments of the European Courts is crucial to protecting the rule of law – and why they should be featured in the EU’s rule of law assessments.

First, the judgments often concern issues that are fundamental to safeguarding the rule of law or specific legal guarantees that matter to citizens. In many states, the European Courts have identified serious problems with the executive’s control of the judiciary. There are also a range of judgments concerning the protection of fundamental values that are necessary for maintaining a democratic way of life in a country governed by the rule of law. These cover core issues like the protection of free speech, the right to peaceful protest, and the need for a pluralistic media environment. Judgments concerning these issues need to be implemented if the underlying freedoms are to be protected.

The second reason why implementing European Court judgments is crucial to protecting the rule of law is that the implementation of judgments is intrinsically a rule of law issue. Court rulings are integral to a state that is run by laws rather than by the absolute power of government. Public powers must act within the constraints set out by legislation, in accordance with democracy and fundamental rights. Court judgments are the operative tool by which governmental power is kept in check by the judiciary. If governments are able to exercise power without the limits placed upon them by courts – for instance, by ignoring court judgments – then there is no rule of law.

Comparing the Two Courts		
	Court of Justice of the European Union (EU)	European Court of Human Rights
Is an institution of...	the EU	the Council of Europe
Hears cases concerning...	the interpretation and application of EU law	violations of human rights enshrined in the European Convention of Human Rights
Is composed of...	judges representing all EU Member States	judges representing all Council of Europe members
Cases can be brought to it by...	references from EU Member State courts, by EU institutions, or anyone whose interests have been harmed by the action of EU institutions	Anyone whose human rights have been violated by Council of Europe members
Seat in...	Luxembourg	Strasbourg
Implementation of judgments overseen by...	the European Commission	the Committee of Ministers of the Council of Europe
Possibility of financial sanctions over non-compliance with judgments?	Yes	No

Judgments of the ECtHR

A key safeguard against the re-emergence of authoritarianism in Europe is the European Convention on Human Rights (ECHR, or “the Convention”), as interpreted by the ECtHR, based in Strasbourg. The Convention and the ECtHR were created in the aftermath of World War II, as an early-warning system to prevent the rise of totalitarianism in European states. Systemic non-implementation presents grave challenges to Europe’s core values, particularly when non-implementation maintains legal and practical gaps that prevent a democratic way of life, or when states with poor implementation records start influencing others. Outside the EU, the perils of non-implementation have been made evident by the country with the very worst record of executing the Court’s rulings – Russia.¹ More effective ECtHR implementation would help uphold common European values and safeguard European security, by preventing the rise of authoritarianism.

By assessing whether states are compliant with the Convention, the ECtHR provides an objective analysis of whether developing laws and policies violated fundamental values, and European governments can bring pressure on the offending state to change course. When the ECtHR finds a violation, states are obliged to implement the judgment by changing law and policy, to ensure that similar violations do not happen again. This is reflected in Article 46 of the Convention, setting out the binding force of ECtHR judgments, as well as a procedure to send cases back to the ECtHR if states refuse to implement them – a process that can ultimately lead to states being expelled from the Convention system.

Since its establishment in 1953, the ECtHR’s standing has steadily increased, its rulings have covered more diverse issues, and almost every country in Europe has volunteered to come under its jurisdiction. States joining the EU were obliged to be signatories of the Convention (and subject to rulings of the ECtHR). As a result, the ECtHR became the key guarantor of the continent’s human rights, democracy, and the rule of law. The Convention and Court required signatory states to maintain high standards in the protection of fundamental values. In formerly authoritarian states, governments were obliged to amend laws and practices in order to join the Convention, and to make further amendments when violations were found by the ECtHR. The Convention and the ECtHR, therefore, helped new democracies put down roots, while also protecting and nourishing older democracies. Over the years, the rulings of the Court have led to a huge variety of positive reforms across the continent, such as better protections of freedom of expression, the right to protest, and the right to a fair trial.

¹ Russia has the highest number of unimplemented leading ECtHR judgments out of any state, with 224 leading judgments against Russia that have never been implemented. This includes 90 per cent of the leading judgments against Russia from the last ten years. Information extracted from Hudoc-Exec, 9 February 2023.

Case example: [Protecting freedom of expression for journalists in Romania](#)

Background: Ionel Dălbăan ran a weekly newspaper in the town of Roman. He published an article about a series of frauds allegedly carried out by a senator and the chief executive of a state-owned company. At the time, legislation from the era of Communist former leader Nicolae Ceaușescu continued to restrict free speech, even after Romania had become a democracy. Following a complaint from the chief executive and the senator, Dălbăan was convicted of libel, sentenced to a suspended prison sentence, and ordered to pay damages. Local media described this as an attempt to intimidate the press.

Judgment: The ECtHR found that Dălbăan’s articles had addressed a matter of public interest. His criminal conviction and prison sentence constituted a violation of his right to freedom of expression as a journalist. The Strasbourg Court emphasised the duty of the press to impart information and ideas on all matters of public interest.

Impact: The implementation of this judgment led to reforms protecting freedom of expression in Romania. Prison sentences for insult and defamation were abolished. This was followed by the de-criminalisation of insult and defamation in the Criminal Code.

In recent decades, however, a serious problem has emerged within the ECtHR system – non-implementation of the Court’s judgments. The issues raised by these unimplemented cases are often fundamental, including unlawful restrictions on whistleblowing, freedom of assembly, and freedom of expression. For the judgments to be implemented, governments often need to carry out reforms to law and/or practices that would prevent repetitions of the same violation. In a vast number of cases, reforms are not being carried out. Such political inaction is a threat to European values.

Judgments of the CJEU

The CJEU is the chief judicial body of the EU, judging on cases related to EU law with a broad scope of application and jurisdiction. Established in order to provide the organisation with a justice system that ensures common interpretation and implementation of the EU legal order, the Luxembourg-based court is a critical element of the EU constitutional order and the authoritative source of binding interpretation of the EU treaties and secondary law.

The CJEU considers a wide range of cases. Of particular importance from the perspective of this study are cases emerging from infringement procedures carried out by the European Commission in situations where it suspects that an EU Member State has breached EU law. These cases follow attempts by the Commission at dialogue with the Member State and, where this fails, the Commission may bring the case to CJEU. If the court finds that the Member State

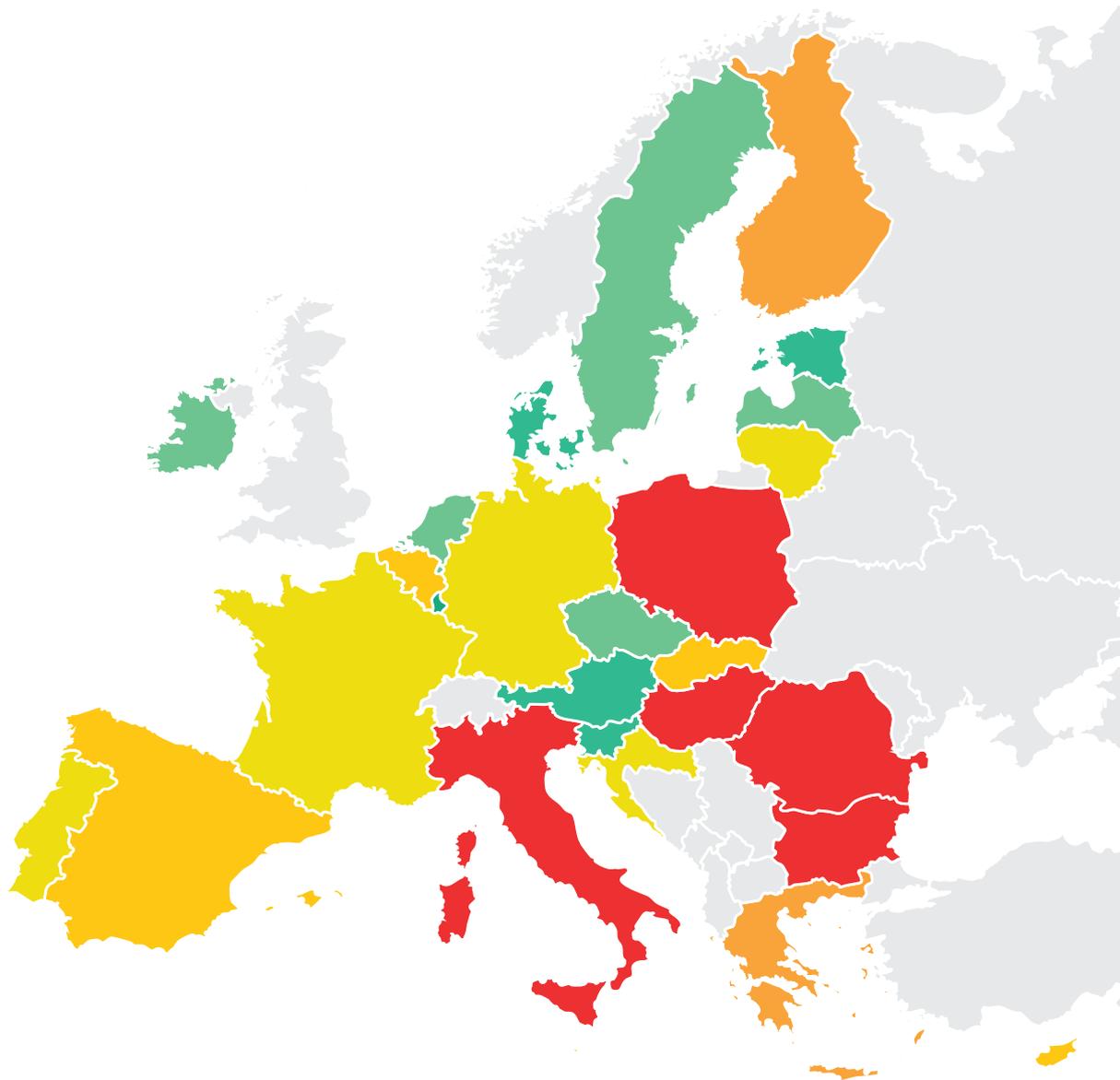
has, indeed, failed to respect the common legal order, it may, on the request of the Commission, issue a financial penalty for non-compliance with the judgments – a critical enforcement element allowing the EU to impart direct financial pressure on the Member State if it fails to observe its obligations under EU law.

The bulk of CJEU rulings are referrals from Member State courts, which may pose legal questions to the CJEU in the event they encounter difficulties in interpreting EU law and its interplay with the domestic legal order. These are, by far, the most frequent type of judgments issued by the Luxembourg court, and they play a vital role in elaborating on the concrete application of EU law in practical cases. While these judgments are only legally binding towards the Member State court that issued them, in practice they have a significant importance in furthering the interpretation of EU law, and Member States are expected to follow them despite not being directly obliged to.

Incidental cases of non-compliance with CJEU judgments have been a long-standing fixture of the EU, with Member States occasionally being unwilling or unable to adequately put the rulings of the court in practice. Since 2020, an increasingly dangerous trend of direct challenges to the authority of the court by Member States has emerged. The finding of the German Federal Constitutional Court that the CJEU acted outside the scope of its competences with regards to a ruling on the European Central Bank's bond-buying scheme has gathered significant attention, and while the German situation was ultimately resolved with no major direct implications, the same cannot be said about the open disregard for the CJEU displayed in the recent years by Hungary, Poland, and Romania. Poland, in particular, has embarked on an alarming streak of anti-CJEU activity, with the government refusing to implement CJEU rulings and interim orders, and the politically compromised Polish Constitutional Tribunal openly challenging the primacy of EU law and respect for the CJEU.

(Non) Implementation of Judgments I: ECtHR

Perfect ●●●●●●●● Very serious problem



Summary

The non-implementation of ECtHR judgments in EU states continues to be highly concerning.

This report uses three key indicators in order to assess the overall state of ECtHR implementation. They are presented in order of their decreasing importance (the most important indicator first, the least important last).

An explanation of each indicator is provided below, along with the data for the EU as a whole. For information related to each EU state, please see the relevant country page. For more information about the methodology used in this report, please see the “Methodology” section, below.

Number of unimplemented leading judgments

 616

The total number of ECtHR judgments concerning EU states that are pending implementation.

“Leading” ECtHR judgments are those that identify a significant or systemic problem in a country, as designated by the Committee of Ministers of the Council of Europe. Each leading judgment that has not been implemented represents a human rights issue that needs to be resolved – usually by changes to laws, policies, and/or practices. For example, a leading judgment finding that a court was not sufficiently independent might reflect an ongoing situation of a lack of judicial independence in a particular country. If that leading judgment is still pending implementation, the problems linked to judicial independence in that country have still not been resolved.

As of 1 January 2023, there were **616 leading ECtHR judgments** waiting to be implemented across the EU. Each of these represents a human rights problem that has not been resolved – and which, therefore, is likely to recur. Examples of leading judgments that are waiting to be implemented can be found on page 21 and following.

The state with the highest number of leading judgments waiting to be implemented is Romania, with 113. The state with the lowest number of leading judgments waiting to be implemented is Luxembourg, with just one leading judgment pending implementation.

Percentage of leading cases from the last ten years awaiting implementation

 40%

The proportion of leading judgments from the last ten years that have not been implemented.

Some states – particularly larger ones – are the subject of a high number of judgments from the ECtHR. Other states are the subject of very few. In order to assess how well states are implementing, it is therefore helpful to look at the proportion of judgments that remain pending and of those that have been implemented. The report assesses the proportion of judgments implemented from the last ten years, because this allows the data from each state to be compared effectively (as some states have been signatories to the ECHR for 60 years, while others have been so for less than 20).

Some **40 per cent** of leading judgments concerning EU states from the last ten years are yet to be implemented. This means that the systemic human rights issues these judgments identify have not yet been resolved; it indicates that national authorities in Europe are not sufficiently active in dealing with a significant proportion of human rights issues identified by the ECtHR.

As of 1 January 2023, the EU state with the largest proportion of leading ECtHR judgments pending from the last ten years was Hungary, at 76 per cent. The state with the lowest proportion was Slovenia, at 13 per cent.

Average time leading decisions have remained unimplemented (and the clock is ticking)

 5 years and 1 month

The average length of time that leading ECtHR judgments concerning EU states have been pending implementation.

The final metric used here is the average time that leading cases have been awaiting implementation. Some cases require extensive reforms that can – and should – take many years

to implement. It should, however, be possible to implement the majority of leading judgments in a relatively short period of time. The longer leading judgments have been pending, the greater the concern that implementation is not being carried out.

The average length of time that leading ECtHR judgments concerning EU states have not been implemented is **five years and one month**.

Countries in the spotlight

This report contains country pages on all 27 EU states. For each country, there is a breakdown of the key statistics, as well as a short commentary on the overall situation and some examples of human rights issues that remain unresolved. There are ECtHR implementation problems in almost every state, and the situation is in need of improvement in the majority of countries.

It is also important to note that there are certain states where the implementation record is of particular concern. There are five states with over 30 leading cases pending, and where the proportion of leading cases pending from the last ten years is above 30 per cent. These states are Bulgaria, Hungary, Italy, Poland, and Romania.

There should be particular concern at the overall state of ECtHR implementation in these countries. Urgent action is needed to promote human rights reforms on a systematic basis.

Methodology

The data for this report is accurate as of 1 January 2023. The number of pending leading judgments in each country has been taken from the [Council of Europe's 2022 Annual Report for the Supervision of Judgments and Decisions of the European Court of Human Rights](#). The other data points have been calculated using data from the Council of Europe's "Hudoc Exec" website.²

When reading the report, it is important to bear in mind the methodology. This is summarised below, with full information set out in the Appendix.

- The data in the report refers to "leading" ECtHR judgments pending implementation, rather than all ECtHR judgments pending implementation. Judgments that identify new structural or systemic issues are classified as "leading" by the Council of Europe. In order to successfully implement a leading case, states must ensure that the underlying problems that caused the ECHR violation have been resolved. The best way to measure whether the ECHR system is leading to substantive changes is by looking at how many leading judgments remain pending implementation.

² For this purpose, data was extracted from the Hudoc-Exec database in March 2023, and adapted to show the situation at the start of January 2023.

- Certain descriptive words are applied in the report according to a classification grid. For each country, the report has a uniform way of describing the number of leading cases pending implementation, the proportion of leading cases pending implementation for the last ten years, and the average length of time that leading cases have been pending implementation.
- The overall assessment of each country’s record is not subject to a uniform formula. The overall categorisation of countries (as “Excellent”, “Good”, etc.) is not carried out according to a rigid formula, as this would have prevented a sufficiently flexible analysis for the different situations in the 27 EU states. Nevertheless, the rating is based on the three constituent objective indicators.
- Cases that are pending implementation may be the subject of ongoing reforms.
- The report does not quantify the severity of violations nor the complexity of the required reforms.

The types of data used in this report were chosen not because they are perfect, but because – to our knowledge – they are the best available. Despite certain limitations, this data provides the best assessment about the overall status of ECtHR implementation in different countries.

Classification Grid							
	Very low	Low	Moderately low	Moderate	Significant	High	Very High
Leading judgments pending implementation	Less than 5	Between 5 and 10	Over 10	Over 20	Over 30	Over 40	Over 50
Percentage of unimplemented leading judgments from the last 10 years	Below 10%	10-15%	15-25%	25-30%	30-45%	45-60%	Over 60%
Average time leading judgments have been pending implementation	Less than 1 year	1-2 years	2-3 years	3-4 years	4-6 years	6-7.5 years	More than 7.5 years

Levels of Implementation across the EU

The colour-coded categories below are used to describe the overall implementation record of each country, ranging from “Excellent” to “Very Serious Problem”. States are listed in alphabetical order within each category. In comparison with the previous year, there are no more countries under the categories “Perfect” and “Significant problem”.

Whilst there are some countries that have achieved improvements in their implementation records in comparison to the previous year, the overall picture is that the data remains largely the same, with the key indicators for the EU as a whole showing slight negative trends.

The categorisation is based on an assessment of the three data sets: the number of leading judgments pending implementation, the proportion of the leading judgments from the past ten years pending implementation, and the average time for which these judgments have been pending implementation. Different weight has been attributed to these categories, however, when determining the overall category that a state falls into.

The difference between categorisations can be quite fine, and different analysts might reasonably come to different conclusions. Nevertheless, we believe that our categorisation system is a simple, accurate, and effective way to understand the overall picture of implementation in each state.

For more information on our assessment methodology, please see the Appendix to this report.

Table 1. Data on the status of (non) implementation of the leading cases before the ECtHR by European countries, as of 1 January 2023³

Country	Category	 Number of Leading Judgments Pending Implementation	 Proportion of Leading Judgments Pending Implementation from the Last Ten Years	 Average Time Leading Cases Have Been Pending Implementation
Luxembourg	Excellent	1 (Very low) ▲	25% (Moderately low) ▲	12 months (Very low) ▲
Austria	Very Good	3 (Very low) ▼	22% (Moderately low) ▼	1 year and 3 months (Low) ▼
Denmark	Very Good	3 (Very low) =	60% (Very high) =	1 year and 6 months (Low) ▲
Estonia	Very Good	3 (Very low) ▲	14% (Low) ▲	11 months (Very low) ▲
Slovenia	Very Good	4 (Very low) =	13% (Low) ▲	1 year and 5 months (Low) ▼
Czechia	Good	4 (Very low) ▲	18% (Moderately low) ▲	4 years and 7 months (Significant) ▼
Latvia	Good	8 (Low) ▲	16% (Moderately low) ▲	1 year and 3 months (Low) ▼
Sweden	Good	2 (Very low) =	17% (Moderately low) ▲	4 years and 1 month (Significant) ▲
Ireland	Good	2 (Very low) =	50% (High) ▲	10 years and 7 months (Very High) ▲
The Netherlands	Good	4 (Very low) ▼	29% (Moderate) ▼	3 years and 7 months (Moderate) ▲
Germany	Moderate	12 (Moderately low) ▼	43% (Significant) ▲	4 years and 2 months (Significant) ▲
Lithuania	Moderate	19 (Moderately low) ▲	31% (Significant) ▲	3 years and 4 months (Moderate) ▼

³ The arrows in the table indicate how the key data points have changed in comparison with the previous year.

Country	Category	 Number of Leading Judgments Pending Implementation	 Proportion of Leading Judgments Pending Implementation from the Last Ten Years	 Average Time Leading Cases Have Been Pending Implementation
Croatia	Moderate	26 (Moderate) ▲	29 % (Moderate) ▲	2 years and 8 months (Moderately low) ▼
France	Moderate	29 (Moderate) ▲	36% (Significant) ▲	2 years and 10 months (Moderately low) ▼
Portugal	Moderate	15 (Moderately low) ▼	39% (Significant) ▼	5 years and 1 month (Significant) ▲
Belgium	Moderately poor	22 (Moderate) ▲	48% (High) ▼	3 years and 5 months (Moderate) ▲
Cyprus	Moderately poor	9 (Low) ▼	59% (High) ▼	3 years and 3Months (Moderate) ▲
Malta	Moderately poor	15 (Moderately low) ▲	45% (High) =	5 years and 4 months (Significant) ▲
Slovakia	Moderately poor	24 (Moderate) ▲	51% (High) ▲	2 years and 11 months (Moderately low) ▲
Spain	Moderately poor	21 (Moderate) ▼	53% (High) ▼	2 years and 9 months (Moderately low) ▼
Finland	Problematic	9 (Low) =	50% (High) ▼	12 years and 11 months (Very high) ▲
Greece	Problematic	27 (Moderate) ▼	34% (Significant) ▼	6 years and 7 months (High) ▲
Poland	Very Serious Problem	46 (High) ▲	56% (High) ▲	5 years and 6 months (Significant) ▼
Bulgaria	Very Serious Problem	93 (Very high) ▲	55% (High) =	6 years and 10 months (High) ▲
Hungary	Very Serious Problem	43 (High) ▼	76% (Very high) ▲	6 years and 8 months (High) ▲
Italy	Very Serious Problem	59 (Very high) ▲	63% (Very high) ▲	6 years and 2 months (High) ▲
Romania	Very Serious Problem	113 (Very high) ▲	60% (Very high) ▲	4 years and 8 months (Significant) ▲

Overview of EU Member States and Their Record of Implementing ECtHR Judgments

Country Analysis:

Austria



Two Examples of ECtHR Judgments Pending Implementation in Austria

1. Administrative courts' refusal to hold oral hearings in social security disputes (*Pagitsch GMBH v. Austria*), pending implementation since 2021.
2. Obligation imposed on a media company to disclose data of authors of comments posted on its internet news portal (*Standard Verlagsgesellschaft MBH v. Austria*), judgment final in March 2022.

Austria's overall record is **very good**. The country has a very low number of pending leading judgments and a moderately low proportion of leading cases that are still pending implementation. The average time that these judgments have been pending is low. Austria's record of ECtHR implementation is excellent.



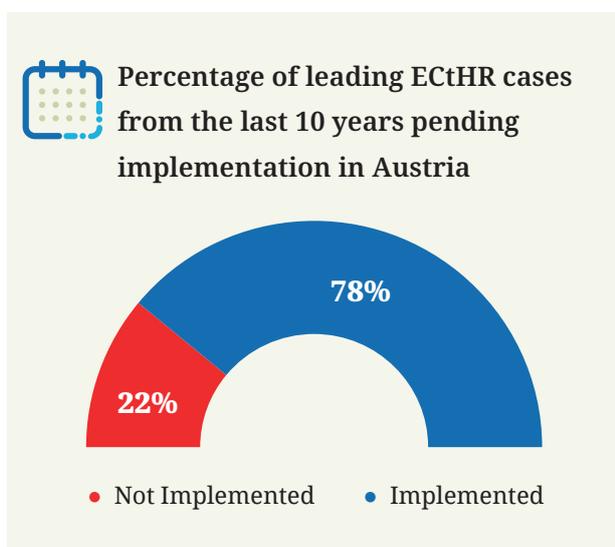
Leading judgments pending implementation

As of 1 January 2023, there were **three leading judgments** pending implementation in Austria. This is an improvement from the previous year, as there were six leading judgments pending at the start of 2022. The Austrian authorities are under obligation to address the implementation of these judgments through general measures. An additional judgment became final in January 2023, concerning access to and the efficient functioning of justice (*Jevtic v. Austria*).

1 year and 3 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was **one year and three months**. This is a significant decrease from the equivalent figure for 1 January 2022; at that time, leading cases had been pending for an average of four years and seven months.⁴ This is a shorter time in comparison with neighbouring EU states Germany and Slovakia.



Austria has a moderately low percentage of leading judgments from the last decade that are pending implementation – **22 per cent**, just below half of the EU average. There was a slight decrease from the figure from the start of 2022, which was 26 per cent. Meanwhile, it should be noted that Austria has implemented five leading ECtHR judgments in the past year.

⁴ The significant changes in the data for “time pending” from 2022 to 2023 result from the closure of two leading cases in March 2022 that had been pending for over 10 years (Stojakovic v. Austria [30003/02] and Mladoshovitz v. Austria [38663/06]).

Country Analysis:

Belgium



Four Examples of ECtHR Judgments Pending Implementation in Belgium

1. **Criminal investigations that last for over a decade** (*Abboud v. Belgium*), pending implementation since 2019.
2. **Failure to properly review claims of unfair elections** (*Mugemangango v. Belgium*), pending implementation since 2020.
3. **Unfounded refusal to deport a murder suspect to face justice under a European arrest warrant** (*Romeo Castaño v. Belgium*), pending implementation since 2019.
4. **Lack of a court review for judges when they are suspended** (*Loquifer v. Belgium*), judgment final in October 2021.

Belgium's overall record of implementing ECtHR judgments is **moderately poor**. This record is determined by a moderate number of pending leading judgments and a high proportion of leading cases from the past ten years that are still pending implementation. Meanwhile, the average length of time for which these judgments have been pending is not excessive.



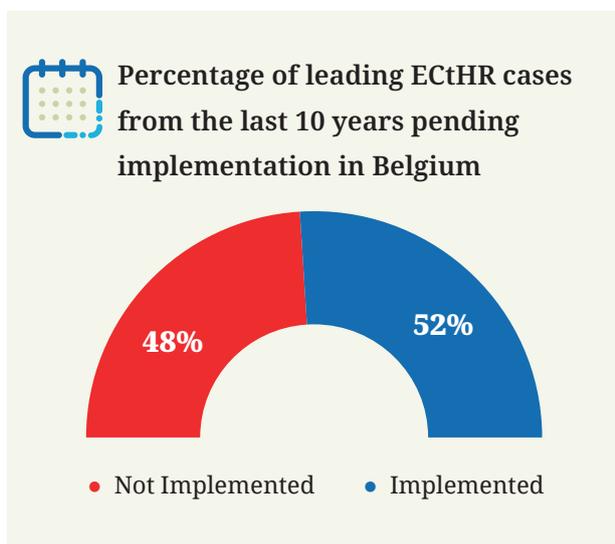
Leading judgments pending implementation

As of January 2023, there were **22 leading judgments** pending implementation in Belgium (an increase of one case from the previous year). This remains a moderate number of pending leading judgments; the figure stands lower than that of neighbouring France, but higher than Germany and the Netherlands. Four of these pending leading judgments are listed in the box above. Inadequate conditions of detention in prison, inadequate care of persons with mental health problems in prison, and the excessive length of criminal proceedings are three of the structural human rights problems Belgium must address by carrying out reforms.

3 years and 5 months

Average time that leading judgments have been pending

On average, leading cases had been pending in Belgium for **three years and five months**, which is a moderate length of time, very similar to the same figure for the neighbouring Netherlands, slightly worse than that for France, and slightly better than that for Germany. The oldest pending leading case is *Bell v. Belgium*, which has been pending implementation since 2009. The case concerns the excessive length of civil proceedings at the first instance level. Eight of the pending leading judgments against Belgium have become final in the past two years, which means they are relatively recent.



Belgium has a high percentage of leading judgments from the last decade that are pending implementation – 48 per cent, which is similar to the figure from the start of 2022 (49 per cent). This is higher than the EU’s 40 per cent average. Furthermore, Belgium has implemented seven ECtHR judgments in the past two years.

Country Analysis:

Bulgaria



Six Examples of ECtHR Judgments Pending Implementation in Bulgaria

1. Huge fines and convictions for journalists as a result of their work (*Bozhkov v. Bulgaria*), pending implementation since 2011.
2. Sanctions against the president of the judges' association in retaliation against her criticism of the Supreme Judicial Council and the executive (*Miroslava Todorova v. Bulgaria*), pending implementation since 2022.
3. Systemic failures to investigate rapes, murders, and other serious crimes (*S.Z. v. Bulgaria, Kolevi v. Bulgaria*), pending implementation since 2009.
4. Deaths of institutionalised children with disabilities resulting from government failures, and lack of effective investigations into their deaths (*Nencheva and others v. Bulgaria*), pending implementation since 2013.
5. Unjustified refusals to register associations that represent a minority (*Umo Ilinden and others v. Bulgaria*), pending implementation since 2006.
6. Excessive use of force by law enforcement agents; ineffective investigations (*Velikova v. Bulgaria*), pending implementation since 2000.

Bulgaria has a **very serious problem** regarding the implementation of ECtHR judgments. Statistics indicate a very high number of leading judgments pending implementation, second in the EU only to Romania. These judgments have been pending implementation for a long time. Finally, Bulgaria is failing to implement a high proportion of the leading judgments handed down by the Strasbourg Court.



Leading judgments pending implementation

On 1 January 2023, Bulgaria had a very high number of unimplemented judgments of the ECtHR – 93. This is a slight increase of one from the previous year (92 leading judgments pending at the start of 2022). These can only be effectively addressed by implementing individual and/or general measures. A list of examples is provided in the box above.

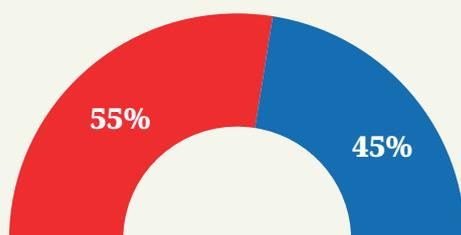
6 years and 10 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was **six years and ten months**, against six years and four months in January 2022. This is significantly longer than the average time in neighbouring Romania, and similar to that in Greece. The oldest leading judgment has been pending implementation for 23 years. That judgment concerns torture, ill-treatment and the excessive use of force by law enforcement agents, which, in a number of cases, resulted in loss of life (*Velikova v Bulgaria*). The implementation of this group of judgments affects a large group of vulnerable people, and the failure to implement them creates the ongoing risk that similar human rights violations will continue to take place.



Percentage of leading ECtHR cases from the last 10 years pending implementation in Bulgaria



● Not Implemented ● Implemented

Bulgaria also has a high percentage of leading judgments from the last decade that are pending implementation – 55 per cent, the same as it was at the start of 2022. This is higher than the EU average of 40 per cent. In the past two years, the Committee of Ministers has ended supervision for 18 leading judgments concerning Bulgaria.

Case example: Reprisals against a judge for criticising the Supreme Judicial Council

Miroslava Todorova was a judge and the president of the Bulgarian Union of Judges (BUJ). In 2009, the BUJ criticised the Bulgarian Supreme Judicial Council (SJC) for the appointment of a new president to the Sofia Court of Appeal who was suspected of corruption; it later criticised the SJC itself for the alleged mismanagement of matters regarding corruption in procedures for the promotion of magistrates, and also denounced several positions taken by the minister of internal affairs to national and international bodies, which affected the public's confidence in the justice system.

Following these events, disciplinary proceedings were brought against Todorova. The SJC ordered her temporary demotion to a lower-instance court, and a reduction in her salary. The ECtHR found that Todorova's freedom of expression had been unlawfully restricted, noting that the proceedings against her had been linked to the public statements of the BUJ, which she was presiding over. The disciplinary measures, which initially even included dismissal, had a chilling effect on both her and other judges, deterring them from expressing critical opinions about the SJC. Furthermore, the sanctions imposed on her were made in the context of a heated public debate between the SJC and the BUJ, and did not pursue an objective prescribed by the convention; they were retaliation for her criticisms of the SJC and the executive, intended to silence and punish her.



“I think that the situation with the implementation of the ECtHR judgments in Bulgaria worsened due to a combination of factors – the political crisis, which we are in for over two years now, with very short periods when we had a functioning parliament, and the lack of political will to implement international human rights standards. The problem is particularly serious with those judgments that touch upon sensitive social and political issues, such as the status of the prosecution, police brutality; the recognition of the Macedonian minority, the right of prisoners to vote, and the housing situation of Roma. The ECtHR judgments from the last year brought a number of additional sensitive issues, such as the lack of a proper legal framework to deal with homophobic hate crimes, arbitrary secret surveillance by the security services, the right to vote of persons under guardianship, the expulsion of entire Roma communities from their only homes, and the need to reform the juvenile justice system. All these issues require prompt legislative measures, and determination to deal with them against serious odds. Bulgaria needs a push from its European partners and from international organisations to prevent its further going downhill towards default.” – Krassimir Kanev, Director of the Bulgarian Helsinki Committee.

Country Analysis:

Croatia



Five Examples of ECtHR Judgments Pending Implementation in Croatia

1. **Journalists forced to pay crippling and unjustified damages after defamation claims** (*Stojanovic v. Croatia*), pending implementation since 2014.
2. **Lack of protection against unlawful state surveillance** (*Dragojevic v. Croatia*), pending implementation since 2015.
3. **Failure to investigate motives of hate crimes against LGBT victims** (*Sabalic v. Croatia*), pending implementation since 2021.

Croatia has a **moderate record** of ECtHR implementation. The country has a moderate number of leading judgments pending implementation, which have been pending for a moderately low length of time. The proportion of leading cases from the past ten years that are still pending implementation is also moderate.



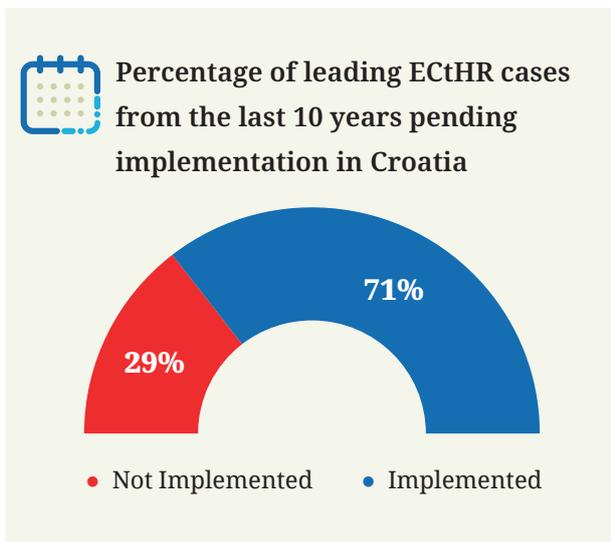
Leading judgments pending implementation

On 1 January 2023, Croatia had **26 leading judgments** of the ECtHR pending. More than half of these have been delivered by the Court in the past two years and, therefore, are quite recent. Several examples of systemic human rights problems in Croatia that have been identified by the ECtHR are listed in the box above. National authorities are under the obligation to address the implementation of these judgments by taking general measures. For example, Croatia must align its case law on defamation with the freedom of expression principles and the criteria laid down in the Court's case law (*Stojanovic v. Croatia*).

2 years and 8 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was **two years and eight months**. This is a significant decrease from the equivalent figure for 1 January 2022; at that time, leading cases had been pending for an average of four years and three months. The significant changes in the data for “time pending” result from the closure of a case concerning the failure to carry out an effective investigation into a racist attack (*Secic v. Croatia* [40116/02]), which had been pending for 15 years, and whose supervision was ended in April 2022. The current figure is a moderately low period of time, longer in comparison with neighbouring Slovenia, but much shorter than that in Hungary.



Croatia has a moderate percentage of leading judgments from the last decade that are still pending implementation – **29 per cent** (higher than the 25 per cent in 2022). The Committee of Ministers has ended the supervision of 26 leading cases in the last two years. The Committee of Ministers agreed that the authorities have taken all necessary measures to implement them. These closures indicate that the Croatian authorities have been active in addressing some implementation issues.

Country Analysis:

Cyprus



Three Examples of ECtHR Judgments Pending Implementation in Cyprus

1. **Unfair procedures for the removal of judges** (*Kamenos v. Cyprus*), pending implementation since 2017.
2. **Unlawful interference with freedom of expression, due to fine for a defamatory article about a public figure** (*Drousiotis v. Cyprus*), judgment final in October 2022.
3. **Poor conditions of detention** (*Danilczuk v. Cyprus*), pending implementation since 2018.

Cyprus has a **moderately poor** ECtHR implementation record. It is the subject of a low number of judgments from the ECtHR. The judgments it does have, however, are not well implemented. This is reflected by the data – there are a low number of leading judgments pending, which have been pending for a moderate length of time. Of the leading cases that have been passed down by the ECtHR, however, a high proportion are still pending implementation.



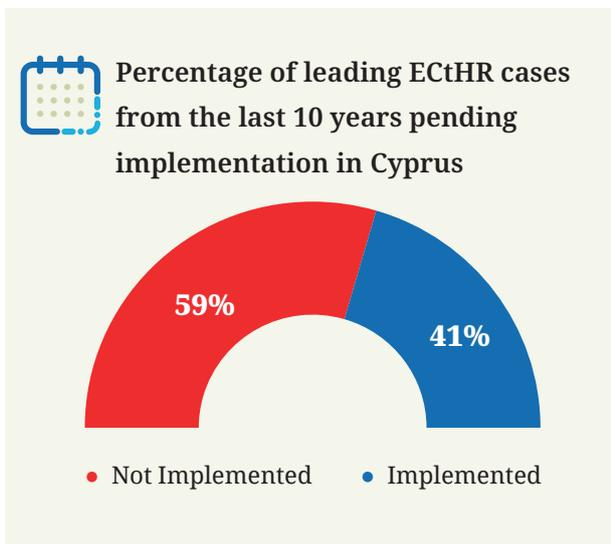
Leading judgments pending implementation

On 1 January 2023, Cyprus had **nine leading ECtHR judgments** pending implementation. This is a decrease of one from the previous year, as there were ten leading judgments pending at the start of 2022. Three examples of systemic human rights problems in Cyprus that have been identified by the ECtHR are listed in the box above. Cypriot authorities are under the obligation to address the implementation of these judgments by taking general measures addressing the conditions of detention in prison, impartiality in proceedings regarding the dismissal of judges, and freedom of expression.

3 years and 3 months

Average time that leading judgments have been pending

On average, leading judgments had been pending implementation in Cyprus for a moderate length of time – **three years and three months** (against two years and seven months in January 2022). This is a lower than the EU average, which stands at five years and one month. The oldest pending leading judgment is *M.A. v. Cyprus*, which has been pending implementation since 2013. The judgment concerns the lack of a remedy with automatic suspensive effect in deportation proceedings, and the absence of speedy review of lawfulness of detention.



Cyprus has a high percentage of leading judgments from the last decade that are pending implementation – 59 per cent, a significant decrease from the figure from the start of 2022, which was 71 per cent. In 2022, it finalised the implementation of three leading cases.

Country Analysis:

Czechia



Two ECtHR Judgments Pending Implementation in Czechia

1. **Discriminatory segregation of Roma children in special schools, based on their ethnicity** (*D.H. and others v. the Czech Republic*), pending implementation since 2007.
2. **Excessive length of detention pending extradition, due to serious delays in asylum proceedings** (*Komissarov v. the Czech Republic*), judgment final in May 2022.

Czechia has a **good** ECtHR implementation record. The country has a very low number of leading judgments pending implementation, and a moderately low proportion of leading cases that are still pending implementation. There is, however, one case that has been pending for a very long time (concerning segregation in schools of children from a Roma background). This makes the average time that leading judgments have been pending significant.



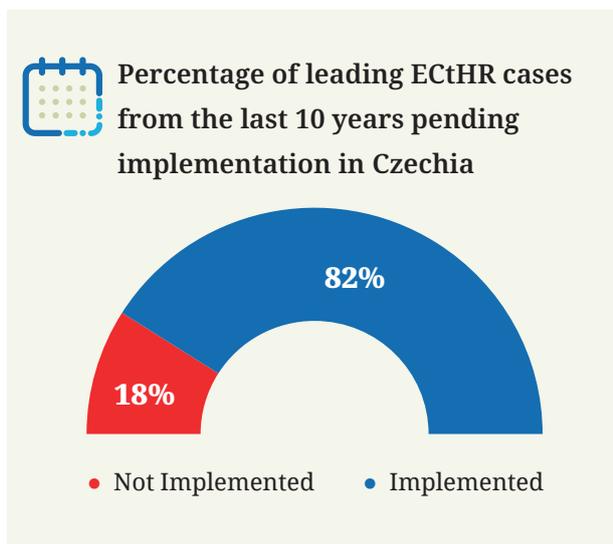
Leading judgments pending implementation

On 1 January 2023, Czechia had **four leading judgments** of the ECtHR pending implementation. This is an increase in comparison with the previous year, when only two judgments were pending implementation. Two of these judgments are listed in the box above. The Czech government has been a good example of leadership and good practice on implementation, having achieved this result through concerted efforts directed towards ECtHR implementation. In the past ten years, the Czech authorities have implemented over 40 leading judgments.

4 years and 7 months

Average time that leading judgments have been pending

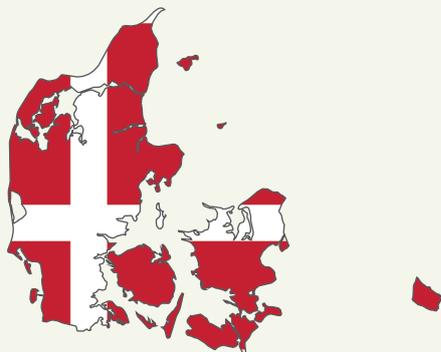
On average, leading judgments had been pending implementation for **four years and seven months**. This timing decreased in comparison with January 2022, when it was seven years and eight months, due to the delivery of two new judgments in 2022. The case concerning discrimination in education against Roma children (*D.H. v Czech Republic*), however, is still pending after 15 years. A range of measures have been taken by the authorities over the years aimed at addressing this case, but they are not yet sufficient. Up to December 2022, the Czech authorities had submitted nine action plans in this case, but they have never requested the case's closure.



Czechia's rate of leading judgments from the past ten years that remained pending was at **18 per cent**, an increase from the figure at the start of 2022, which was five per cent. This is a moderately low rate, and the increase was determined by the delivery of two new ECtHR judgments in 2022, which concern compensation for the expropriation of the property (*Palka and others v. the Czech Republic*) and excessive length of detention pending extradition (*Komissarov v. the Czech Republic*). Czechia has set in place a strong structural solution in addressing overall ECtHR implementation.

Country Analysis:

Denmark



An Example of a Human Rights Problem Left Unresolved in Denmark

Degrading treatment of a psychiatric patient (*Aggerholm v. Denmark*), pending implementation since 2020.

Denmark has **one of the best** implementation records in the EU. The country has a very low number of leading judgments pending implementation. The average time for which these leading judgments have been pending is low. The percentage of leading cases from the last ten years that are still pending implementation is very high, but only because a small number of violation judgments have been delivered against Denmark in the last ten years, and two have been implemented.



Leading judgments pending implementation

On 1 January 2023, Denmark had **three leading judgments** of the ECtHR pending implementation. These are the same judgments as on 1 January 2022, which concern unlawful restraints in psychiatric hospitals (*Aggerholm v. Denmark*), expulsion orders against settled migrants (*Savran v. Denmark*), and unjustified waiting times for family reunification (*M.A. v. Denmark*).

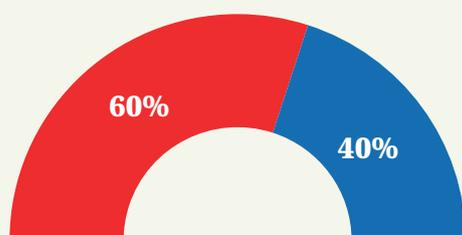
1 year and 6 months

Average time that leading judgments have been pending

In January 2023, the average time that leading judgments had been pending implementation was **one year and six months**, which is an increase compared to the start of 2022, at which time leading judgments had been pending for an average of only six months.



Percentage of leading ECtHR cases from the last 10 years pending implementation in Denmark



● Not Implemented ● Implemented

Denmark has a high percentage of leading judgments from the last decade that are pending implementation – **60 per cent**, which remains stable compared to 2022. However, this is because, since 2012, only five leading judgments have been delivered by the ECtHR against Denmark. Two of these judgments, which concern protection of rights in detention and protection of the private and family life of migrants, have been closed. The other three were made final in 2020 and 2021. They remain pending implementation.

Country Analysis:

Estonia



An Example of a Human Rights Problem Left Unresolved in Estonia

Failure to conduct an effective criminal investigation into sexual abuse allegations (*R.B. v. Estonia*), pending implementation since September 2021.

Estonia has **one of the best** ECtHR implementation records in the EU. It has a very low number of pending leading judgments, a low percentage of pending leading judgments from the last decade, and a very low average pending time.



3

Leading judgments pending implementation

On 1 January 2023, Estonia had **three leading judgments** of the ECtHR pending implementation. While this is a very low number, it is an increase from the previous year; at the start of 2022, there was only one leading judgment pending.

 **11 months**

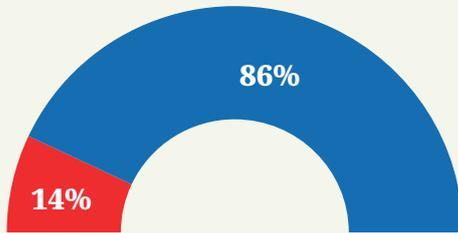
Average time that leading judgments have been pending

As of 1 January 2023, the average time that leading judgments had been pending implementation was very low: **11 months**: this figure was only 3 months in January 2022.

Estonia's rate of leading judgments from the past ten years that remained pending was **14 per cent**, an increase from the figure at the start of 2022, which was five per cent. The increase was caused by the delivery of two new judgments in 2022, concerning the insufficiency of safeguards



Percentage of leading ECtHR cases from the last 10 years pending implementation in Estonia



● Not Implemented ● Implemented

to protect a lawyer's privileged data during seizure (*Sargava v. Estonia*) and pre-trial detainees' visitation rights (*Vool and Toomik v. Estonia*).

Overall, to date, the supervision of 33 leading ECtHR judgments with respect to Estonia has been ended by the Committee of Ministers. Three of these cases were implemented in the past two years.

Country Analysis:

Finland



Four Examples of ECtHR Judgments Pending Implementation in Finland

1. **Fines for journalists writing in the public interest** (*Eerikainen and others v. Finland*), pending implementation since 2009.
2. **Failure to properly regulate police powers of search and seizure** (*Petri Sallinen and others v. Finland*), pending implementation since 2005.
3. **Unfair criminal procedures, due to the non-disclosure of critical information** (*V. v. Finland*), pending implementation since 2007.
4. **Lack of safeguards for involuntary confinement of persons with mental disabilities** (*X. v. Finland*), pending implementation since 2012.

Finland's ECtHR implementation record is quite **problematic**. There have been only a few ECtHR violations found against Finland by the ECtHR, but the majority of these cases are not being implemented by the Finnish authorities. This is reflected in the three key pieces of data. The overall number of leading judgments pending is low, but there is a high proportion of leading cases that are still pending implementation. This also correlates with a very long average length of time that these cases have been pending.



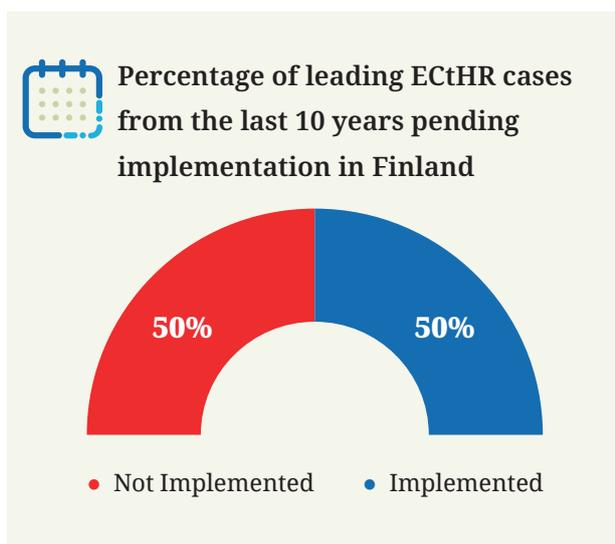
Leading judgments pending implementation

On 1 January 2023, Finland had **nine leading judgments** of the ECtHR pending implementation, the same number as early 2022. No new judgments have been delivered by the Court in recent years. Those that are pending can only be effectively addressed by the Finnish authorities through individual and/or general measures. Four examples of systemic human rights problems in Finland are listed in the box above.

12 years and 11 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was **12 years and 11 months**, which is by far the longest average length of time in any of the 27 states of the EU, as well as in the 46 states of the Council of Europe. This is also an increase from the previous year, as the average time that leading judgments had been pending at the beginning of 2022 was 11 years and 11 months. This excessive length of time is due to the inactivity of the Finnish authorities in promoting ECtHR judgment implementation. Furthermore, six of the leading judgments have been pending implementation for over 13 years. The oldest pending case in Finland is the *Petri Sallinen and others* case, which concerns search and seizure measures that were not in accordance with the law. It has now been pending implementation for 18 years.



Finland has a high percentage of leading judgments from the last decade that are pending implementation – 50 per cent. Only one leading judgment has been implemented in Finland in the past two years (*Kotilainen and others v. Finland*), and no judgments were implemented in 2022.

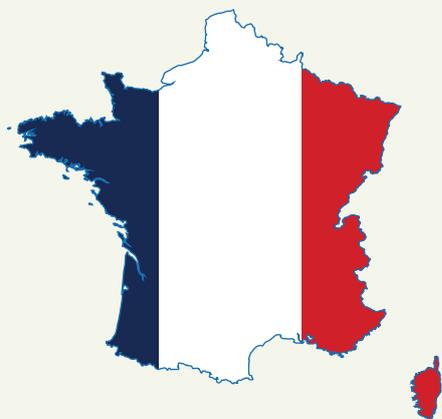
Regarding the authorities' reporting obligations to the Committee of Ministers, in the last two years, the Finnish authorities submitted five action plans related to the *X. v. Finland* case, which concerns unlawful psychiatric confinement, but they have not

been submitting action plans or reports for other pending leading cases. This means that, as of January 2023, Finland was not engaging with the Council of Europe about implementation for most of the leading cases pending.⁵

⁵ Since January 2023, however, the Finnish authorities have reported in four different pending cases.

Country Analysis:

France



Five Examples of ECtHR Judgments Pending Implementation in France

1. **Excessive use of force by police** (*Boukrourou and others v. France*), pending implementation since 2018.
2. **Failure to protect a child from lethal abuse** (*Association Innocence en Danger and Association Enfance et Partage v. France*), pending implementation since 2020.
3. **Unfair criminal convictions for a boycott campaign** (*Baldassi and others v. France*), pending implementation since 2020.
4. **Unfair criminal proceedings** (*M.D. and A.D. v. France, Garcia y Rodriguez v. France*), pending since 2021.
5. **Collection and storage of personal data** (*Dreton v. France*), judgment final in December 2022.

While the figures set out below leave room for progress, France has an overall **moderate** ECtHR implementation record. The overall number of pending leading judgments is moderate, but the proportion of leading cases that are still pending implementation is significant. Meanwhile, the average length of time that the leading cases have been pending implementation is moderately low.



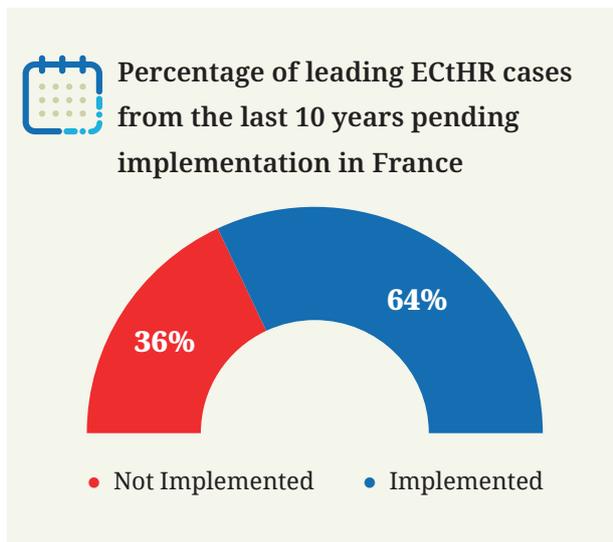
Leading judgments pending implementation

On 1 January 2023, France had **29 leading judgments** of the ECtHR pending implementation. This is an increase in comparison with the previous year, as there were 25 leading judgments pending at the start of 2022. Examples of systemic human rights problems in France are listed in the box above. French authorities must now take specific general measures to address a series of issues, including police brutality, child abuse, and the right to a fair trial.

2 years and 10 months

Average time that leading judgments have been pending

On average, leading cases have been pending in France for **two years and ten months**, which is a moderately low length of time, comparable to the same figure for neighbouring Spain, and shorter than in Germany and Belgium. Thirteen of the pending leading judgments against France became final in the past two years, so they have not been pending for a long time. However, the oldest pending leading group of judgments against France has been pending implementation since 2010. The group of judgments concerns the inaction of the authorities in the execution of judiciary measures of expulsion regarding illegally occupied lands (the *Barret and Sirjean v. France* group of cases).



France's rate of leading judgments from the past 10 years that remained pending is 36 per cent, lower than the EU average, but an increase from the figure from the start of 2022, which was 28 per cent. This figure is better than those for neighbouring Belgium, Germany, Italy, and Spain, which all have a higher percentage of unimplemented judgments. In the past two years, France has finalised the implementation process of 16 leading ECtHR judgments. However, the increase in the number of judgments and in the overall rate of leading cases from the

last ten years is concerning. The country is at risk of its implementation categorisation being downgraded if things continue to move in the same direction.

Country Analysis:

Germany



Three Examples of ECtHR Judgments Pending Implementation in Germany

1. **Lack of procedural safeguards when investigating lawyers' bank accounts** (*Sommer v. Germany*), pending implementation since 2017.
2. **Failure to investigate allegations of police brutality** (*Hentschel and Stark v. Germany*), pending implementation since 2018.
3. **Unjustified and repeated strip searches in prison** (*Roth v. Germany*), pending since 2021.

Germany has a **moderate record** in implementing judgments of the ECtHR. The country has a moderately low number of pending leading judgments, but the average length of time for which these judgments have been pending is significant. Furthermore, a significant proportion of leading cases from the last ten years are still pending implementation.



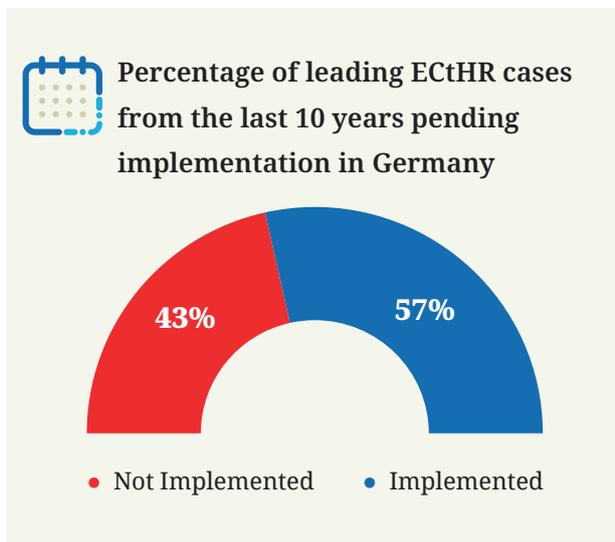
Leading judgments pending implementation

On 1 January 2023, Germany had **12 leading judgments** of the ECtHR pending implementation. This is a slight decrease from the previous year, as there were 13 leading judgments pending at the start of 2022. National authorities are under an obligation to address the implementation of these judgments through general measures. For example, for the implementation of *Roth v. Germany*, the authorities should take measures to put an end to intrusive strip searches in prison and ensure an effective remedy before a national authority to deal with such complaints.

4 years and 2 months

Average time that leading judgments have been pending

On average, the time that leading judgments had been pending implementation was **four years and two months**. This is an increase in comparison with 2022, when leading judgments had been pending for an average of three years and two months. This is a significant period of time, higher than that in neighbouring Austria, Belgium, France, and the Netherlands, while lower than the figure for Poland. The oldest pending leading judgment relating to Germany is *Madaus v. Germany*, which concerns the lack of an oral hearing in civil proceedings under the Criminal Rehabilitation Act. The judgment has been pending implementation since September 2016.



Germany has a significant percentage of leading judgments from the last decade that are pending implementation – **43 per cent**, which is slightly higher than the 40 per cent EU average. It is also an increase from the figure from the start of 2022, which was 37 per cent. As of January 2023, the German authorities had complied with their reporting obligations in all of the 12 pending leading cases, by submitting action plans or action reports. This shows that the German authorities are engaging with the implementation process.

Country Analysis:

Greece



Four Examples of ECtHR Judgments Pending Implementation in Greece

1. **Disproportionate convictions and fines for journalism carried out in good faith** (*Katrami v. Greece*; *Vasilakis v. Greece*), pending implementation since 2008.
2. **Police torture and ill-treatment** (*Sidiropoulos and Papakostas v. Greece*), pending implementation since 2004.
3. **Refusal to register non-profit associations for particular minorities** (*Bekir-Ousta and others v. Greece*; *House of Macedonian Civilization and others v. Greece*), pending implementation since 2008 and 2015.
4. **Conditions of detention of asylum seekers and irregular migrants, and lack of an effective remedy to challenge them** (*M.S.S. v. Greece*), pending implementation since 2011.

Greece has a **problematic** ECtHR implementation record. While statistics indicate a moderate number of pending leading judgments, there is a significant percentage of leading cases handed down by the Strasbourg Court that are still pending implementation. Furthermore, these judgments have been pending implementation for a high amount of time.



Leading judgments pending implementation

On 1 January 2023, Greece had 27 **leading judgments** of the ECtHR pending implementation. This is an improvement from the previous year, as there were 34 leading judgments pending at the start of 2022. This moderate number of unimplemented judgments can only be effectively addressed by implementing individual and/or general measures. A few of the issues pending implementation are listed in the box above. For example, measures to address police brutality

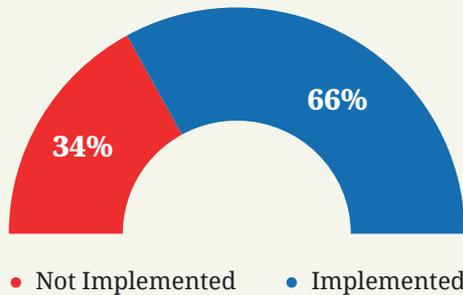
and conduct effective investigations are required for the implementation of the *Sidiripoulos and Papakostas case* (the ECtHR first identified an issue in this area in 2004).

6 years and 7 months

Average time that leading judgments have been pending

On average, the time that leading judgments had been pending implementation was **six years and seven months**, which is also stable compared to 2022 (when the figure was six years and five months). This is similar to neighbouring Bulgaria. The oldest pending leading judgment in Greece is *Satka and others v. Greece*, which has been pending since 2003. That judgment concerns violations of the right to property, due to blocking the use of land by virtue of successive pieces of legislation, without expropriation.

 Percentage of leading ECtHR cases from the last 10 years pending implementation in Greece



Greece's rate of leading judgments from the past ten years that remained pending was **34 per cent**, almost stable compared to early 2022 (when the figure was 35 per cent). This is a significant rate, slightly lower than the 40 per cent EU average. In the past two years, the Committee of Ministers ended the supervision of 26 leading judgments in Greece, considering that all necessary measures had been taken to implement these cases. One of the implemented cases in 2022 was the *Sakir v. Greece* case, which concerned the lack of effective investigation

into an assault on a migrant and the authorities' failure to take into account the possibility of a racist motive. This demonstrates that, although Greece has a problematic overall record, it is engaging with the ECtHR implementation process.

Country Analysis:

Hungary



Five Examples of ECtHR Judgments Pending Implementation in Hungary

1. Systemic threats to judicial independence (*Baka v. Hungary*, pending implementation since 2016 – more information below).
2. Torture and ill-treatment by police officers (*Gubacsi v. Hungary*, pending implementation since 2011).
3. Laws enabling secret surveillance of “virtually anyone” by the state (*Szabo and Vissy v. Hungary*), pending implementation since 2016.
4. Unreasonable limits on journalistic activities (*Mandli and others v. Hungary*), pending implementation since 2020.
5. Discriminatory assignment of Roma children to schools for children with mental disabilities (*Horvath and Kiss v. Hungary*), pending implementation since 2013.

Hungary has **one of the poorest records** in the EU for the implementation of leading judgments of the ECtHR. The statistics below show that there are a high number of leading judgments pending implementation, and that these have been pending for a long period of time. Most strikingly, the data indicates that Hungary is implementing only a tiny proportion of the leading judgments handed down by the Strasbourg Court.



Leading judgments pending implementation

On 1 January 2023, Hungary had **43 leading judgments** of the ECtHR pending implementation. This is a decrease from the previous year, as there were 47 leading judgments pending at the start of 2022. This is still a high figure – the fifth highest of any country in the EU, coming after Bulgaria, Italy, Poland, and Romania. Each of these pending judgments represents a human rights problem. A small number are listed in the box above. They can only be effectively addressed by implementing both individual and general measures.

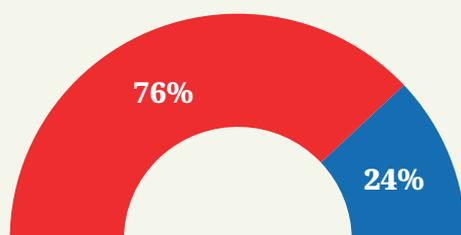
6 years and 8 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was high, standing at **six years and eight months**, slightly longer than the figure in January 2022 (six years and three months). One of the oldest pending leading judgments in Hungary is the *Patyi and others* case, which has been pending implementation since 2009. The case concerns violations of the right to freedom of assembly, due to bans on demonstrations that were either unjustified or devoid of a legal basis. Today, the *Patyi* group has ten repetitive cases. Even though the parliament adopted a new Assembly Law in 2018, Hungary has failed to fully resolve the structural deficiencies that have led to the violations, in order to prevent similar violations from recurring, meaning that leading cases remain pending implementation year after year.



Percentage of leading ECtHR cases from the last 10 years pending implementation in Hungary



● Not Implemented ● Implemented

Most notably, of all EU states, Hungary has implemented the lowest proportion of leading judgments rendered against it from the last ten years; **76 per cent of the leading judgments from the last decade are pending full implementation**. This is an increase from the figure in January 2022, which was at 71 per cent. In the past two years, the authorities have implemented 15 leading judgments concerning subjects ranging from fair trials to freedom of expression.

The data shows that there is **significant room for improving Hungary's ECtHR implementation record**. Systemic problems revealed by the Court are not being resolved.

Case example: Independence of the Judiciary in Hungary – The case of András Baka



In 2009, András Baka was elected as president of the Hungarian Supreme Court for a six-year term. Two years into his mandate, Baka criticised legislative reforms that would fundamentally affect the Hungarian judiciary. These changes went ahead and were recognised by many to have undermined the independence of the justice system. As a result of his public comments, Baka was forced out of office years before the end of his mandate, following a change in the law designed specifically to remove him. The European Court delivered its judgment in 2016. The Court doubted that the legislation that had forced Baka from office had been compatible with the rule of law, noting that his removal by an *ad hominem* legislative measure, which he could not challenge, was prompted by the views and criticisms that he had publicly expressed in his professional capacity, violating not only his right of access to a court and his freedom of expression, but also having a “chilling effect” on other judges. The implementation of this case carries heavy stakes for the rule of law in the country, yet the authorities have failed to carry out steps to implement the judgment. In September 2021, the Committee of Ministers criticised the continuing absence of the necessary safeguards, and “firmly urged” authorities to provide information on their plans to guarantee that judicial mandates will not be terminated in a similar abusive manner.

Furthermore, Amnesty International and the Hungarian Helsinki Committee report that the authorities not only failed to take any measures to implement the judgment, but took further steps that deepened the chilling effect on the freedom of expression of judges, and continued to undermine the independence of the judiciary in general.

The case has been pending implementation since 2016. Structural deficiencies that contribute to a chilling effect on the freedom of expression of judges have not been addressed, and remain in place.



“The fact that the percentage of pending leading European Court of Human Rights judgments from the last 10 years increased since last year is a worrying sign, especially since cases with a strong rule of law connection, such as those affecting judges’ freedom of expression or state surveillance, remain unimplemented. As also raised by the European Commission’s 2022 Rule of Law Report, the ‘ineffective implementation by state organs of judgments of European and national courts is a source of concern’ generally in Hungary. National structures responsible for the implementation of judgments should be reorganised with a view to ensure transparency and inclusivity of various professional groups.” – Statement by the Hungarian Helsinki Committee.

Country Analysis:

Ireland



Two ECtHR Judgments Pending Implementation in Ireland

1. **Historical allegations of sexual abuse of children** (*O’Keeffe v. Ireland*), pending implementation since 2014.
2. **Excessive length of decade-long court proceedings** (*McFarlane v. Ireland*), pending implementation since 2010.

Ireland has a **good** ECtHR implementation record. The Strasbourg Court very rarely finds violations of the ECHR concerning Ireland, and the country has a very low number of leading judgments pending implementation. There are two leading cases pending implementation, however, and these have been pending for a long time. Due to the non-execution of these cases, the average length of time for which leading judgments have been pending is very high.



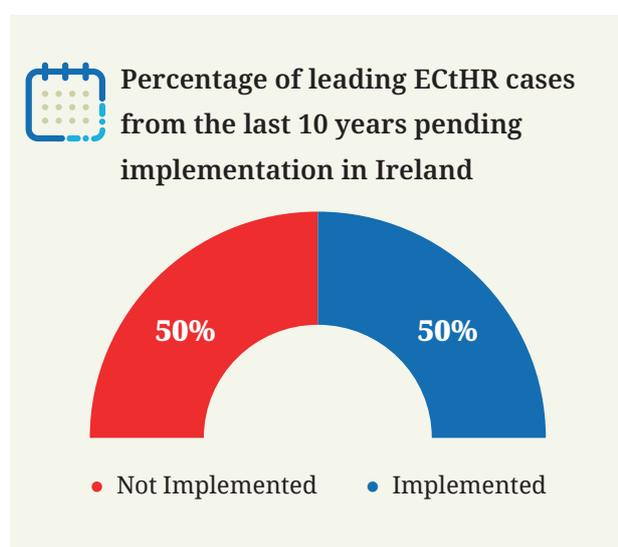
Leading judgments pending implementation

On 1 January 2023, Ireland had **two leading judgments** of the ECtHR pending implementation. These are the same two leading judgments that were pending on 1 January 2022, which are listed in the box above. National authorities are under an obligation to address the implementation of these judgments through general measures. For example, for the implementation of *O’Keeffe v. Ireland*, along with other measures already taken, the authorities must effectively handle compensation claims for historic abuse in schools.

10 years, 7 months

Average time that leading judgments have been pending

On average, leading judgments had been pending implementation for a very long time – **ten years and seven months**, one more year than at the start of 2022. This is the second longest average time for which ECtHR judgments have been pending in an EU state, after Finland. This is the result of two leading judgments that have been pending implementation since 2010 and 2014, respectively. It is not, therefore, indicative of a widespread implementation problem but, certainly, of the existence of a serious issue in these two cases, both of which require a series of complex general measures in order to be implemented.



Ireland's rate of leading judgments from the past ten years that remain pending is higher than the EU average, standing at **50 per cent**, an increase from the figure from January 2022, which was 33 per cent. This rate increase is due to the fact that one (closed) leading judgment that was under ten years old at the start of 2022 was over ten years old at the start of 2023.

The last ECtHR judgment implemented by Irish authorities was in 2019, *Independent Newspapers (Ireland) Weekly v. Ireland*, concerning defamation awards. The Irish

authorities have complied with their reporting obligations for the two pending cases, having submitted over 20 action plans concerning their implementation to the Committee of Ministers. Furthermore, the Irish government has not yet called for case closure in these cases.

Country Analysis:

Italy



Five Examples of ECtHR Judgments Pending Implementation in Italy

1. **Criminal convictions for acts of free speech on matters of public interest** (*Belpietro v. Italy*), pending implementation since 2013.
2. **Failures to enforce court judgments** (*Therapic Center S.r.l. and Others v. Italy*), pending implementation since 2018.
3. **Extremely long court proceedings across the Italian justice system** (*Abenavoli v. Italy*, *Ledonne v. Italy (no.1)*, *Barletta and Farnetano v. Italy*), with the first case dating from 1997.
4. **Failures to address domestic violence** (*Talpis v. Italy*), pending implementation since 2017.
5. **Police brutality not properly criminalised** (*Cestaro v. Italy*), pending implementation since 2015.

Italy has a **particularly poor** record of implementing the Strasbourg Court's judgments. Statistics indicate a very high number of leading judgments pending implementation, as well as a very high percentage of leading cases that are still pending implementation. Furthermore, these judgments have been pending implementation for a long period of time.

 59

Leading judgments pending implementation

On 1 January 2023, Italy had **59 leading judgments** of the ECtHR pending implementation. This is a slight increase from the previous year, as there were 58 leading judgments pending at the start of 2022. Five of these systemic problems are listed in the box above. This is a high number of unimplemented judgments, which can only be effectively addressed by implementing individual and/or general measures. For example, the *Ledonne v. Italy (no.1)* case requires a criminal justice reform aimed at reducing the length of proceedings. While this reform was initiated in 2017, further measures are required to achieve full implementation.

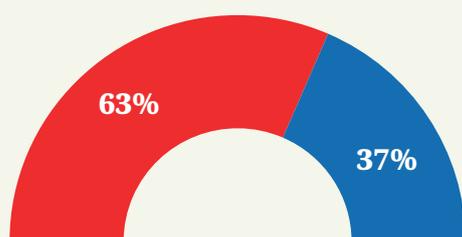
6 years and 2 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was over **six years and two months**, longer than the figure for the beginning of 2022 (five years and ten months). This is significantly longer than the average time in neighbouring states France and Slovenia. The oldest pending leading judgments against Italy are *Ledonne (no .1)* and *Abenavoli*, which have been pending implementation since 1999 and 1997, respectively. They concern the excessive length of criminal and administrative proceedings. The delayed implementation of these judgments creates an ongoing risk that similar violations will continue to occur.



Percentage of leading ECtHR cases from the last 10 years pending implementation in Italy



• Not Implemented • Implemented

Italy also has a very high percentage of leading judgments from the past ten years that remain pending – **63 per cent**, an increase from the figure from January 2022, which was 58 per cent. This is much higher than the EU average of 40.4 per cent. In the past two years, the Committee of Ministers has ended supervision of 11 leading judgments in Italy, considering that all necessary measures had been implemented.

Case example: [Criminal convictions or fines for defamation for newspaper editors](#)

In 2004, Maurizio Belpietro was the director of the “*Il Giornale*” newspaper. He published an article, signed by senator R.I. , entitled “*Mafia, thirteen years of disputes between the prosecution and the carabinieri*”. Claiming that this article had infringed upon their honour, two prosecutors lodged a criminal complaint against Belpietro and R.I. Domestic courts decided that Belpietro had failed in his duties to control the content and presentation of the article. He was ordered to pay a criminal fine of 110,000 EUR and given a suspended prison sentence of four months.

The ECtHR delivered its judgment in 2013. The Court ruled that the imposition of a prison sentence, even if suspended, or a criminal fine, may have had a significant deterrent effect on free discussion of a matter of public interest. This amounted to a disproportionate interference with freedom of expression.

While the judgment has been pending implementation, two more similar cases have been added to this group: *Sallusti v. Italy* and *Magosso and Brindani v. Italy*. These also concern unreasonable criminal convictions of newspaper directors.

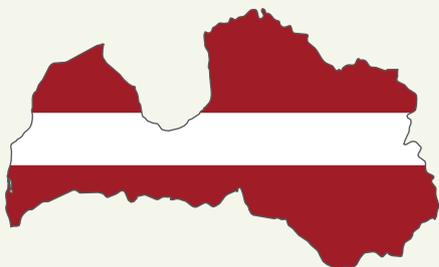
The Italian authorities have provided no evidence to the Council of Europe to demonstrate that this problem has been resolved. The *Belpietro* case has been pending implementation for eight years.



“[...] in Italy the culture of international human rights law is still very weak. There is a general lack of political will in addressing the issues for which Italy has been condemned by the ECtHR. Respect for human rights does not bring consensus in public opinion and often, when it comes to structural problems as in several of the cases that concern us, it needs resources that the government does not want to invest at this time of crisis. For example, Italy has been condemned by the ECtHR regarding life sentences without parole (Marcello Viola v. Italy (no. 2)). However, because of its culture and desire to meet the expectations of voters, the new far-right government reacted by changing the law even more restrictively. In the past, Italy had the first pilot judgment on poor detention conditions and medical care in detention (Torreggiani v. Italy). The Italian government responded with a series of reforms, some of which we still benefit from, and the supervision of the case was closed. However, because of lack of resources and the overuse of detention as a response to social problems, as soon as the tension eased, the previous structural problems in the system have been resurging.” - Susanna Marietti, National Coordinator of [Antigone](#).

Country Analysis:

Latvia



Two Examples of ECtHR Judgments Pending Implementation in Latvia

1. **Unnecessary seizures of legally confidential material** (*Moculskis v. Latvia*), pending implementation since 2020.
2. **Freedom of association: treatment of a trade-union chairperson after she raised concerns about flight safety** (*Straume v. Latvia*), judgment final in September 2022.

Latvia has a **good** ECtHR implementation record. The country has a low number of leading judgments pending implementation, which have been pending for a low amount of time, as well as a moderately low proportion of leading cases that are still pending.



Leading judgments pending implementation

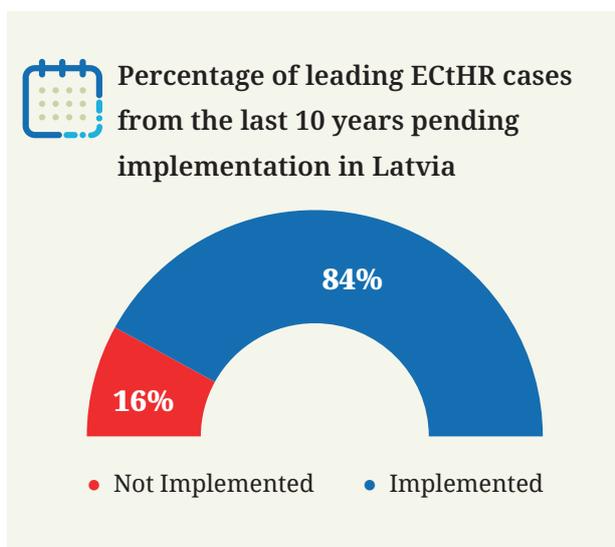
Latvia had **eight leading judgments** of the ECtHR pending implementation. This is an increase from the previous year, as there were seven leading judgments pending at the start of 2022. Two examples of systemic human rights problems in the country are listed in the box above. These judgments should be effectively addressed by the Latvian authorities through individual and/or general measures.

 **1 year and 3 months**

Average time that leading judgments have been pending

On average, the time that leading judgments had been pending implementation was **one year and almost three months**, which is similar to the figure in January 2022 (one year and five

months). The country does not have judgments that have been pending implementation for a long time; the oldest pending leading judgment was delivered in 2020 (*Markus v. Latvia*).



Latvia also has a moderately low percentage of leading judgments from the last decade that are pending implementation – **16 per cent**, an increase from the figure from January 2022, which was 12 per cent, but significantly lower than the EU average. The supervision of five cases was ended in the past two years, as the Committee of Ministers considered that all necessary measures had been taken for their implementation.

Country Analysis:

Lithuania



Three Examples of ECtHR Judgments Pending Implementation in Lithuania

1. **Failure to investigate an alleged murder** (*Tumėnienė v. Lithuania*), pending implementation since 2019.
2. **Failure to investigate extremist online homophobic hate speech** (*Beizaras and Levickas v. Lithuania*), pending implementation since 2020.
3. **Imprisonment in psychiatric hospital without an oral hearing** (*D.R. v. Lithuania*), pending implementation since 2018.

Lithuania has a **moderate** ECtHR implementation record. The country has a moderately low number of leading judgments pending, which have been pending for a moderate length of time, but a significant proportion of leading cases that are still pending implementation.



Leading judgments pending implementation

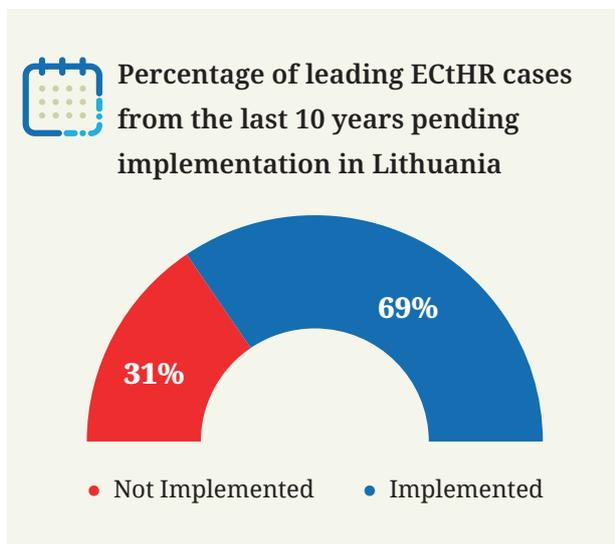
On 1 January 2023, Lithuania had **19 leading judgments** of the ECtHR pending implementation. This is an increase from the previous year, as there were 16 leading judgments pending at the start of 2022. Three examples of systemic human rights problems in the country are listed in the box above.

The most recent ECtHR judgment with respect to Lithuania concerns the refusal to re-issue a passport to a long-term resident who was a former beneficiary of subsidiary protection, without a proper assessment of individual circumstances (*L.B. v. Lithuania*). The Lithuanian government is expected to submit an action plan or an action report to indicate what measures it plans to take to implement this judgment.

3 years and 4 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was almost **three years and four months**, which was a slight decrease compared to January 2022 (when the figure was three years and nine months). This is more than double than that in neighbouring Latvia, for which the figure is one year and two months. Seven pending leading cases in Lithuania have become final in the past two years. The oldest leading judgment, pending implementation for almost 15 years, concerns the lack of legislation governing the conditions and procedures relating to gender reassignment (*L. v Lithuania*).



Lithuania also has a significant percentage of leading judgments from the last decade that are pending implementation – **31 per cent**, an increase from the figure from January 2022, which was 24 per cent. In the past two years, the Lithuanian government has implemented 11 leading judgments, according to the Committee of Ministers. These cases concerned subjects ranging from electoral rights (*Paksas v. Lithuania*) to protection of private life related to non-enforcement of custody decisions (*Rinau v. Lithuania*).

Country Analysis:

Luxembourg



One Example of ECtHR Judgments Pending Implementation in Luxembourg

Unfair proceedings, due to Excessive formalism of the Court of Cassation in civil matters (*Foyer Assurances S.A. v. Luxembourg*), judgment final in January 2021.

Implementation of ECtHR judgments has not been **problematic** for the Luxembourg authorities, as all but one of the judgments pronounced with respect to Luxembourg in the past ten years have already been implemented. Luxembourg has a very low number of pending leading judgments, therefore, and a very low average time for which this judgment has been pending.



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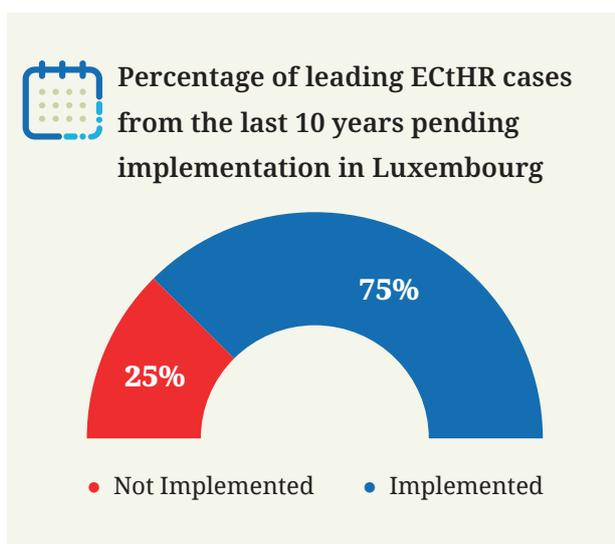
Leading judgment pending implementation

On 1 January 2023, Luxembourg had **one judgment** of the ECtHR pending implementation. This is an increase of one from the previous year, as there were no leading judgments pending at the start of 2022.

 **12 months Average time**

that leading judgments have been pending

The only pending judgment against Luxembourg had been pending for almost **12 months**. The judgment concerns a violation of the right to a fair trial, due to the excessive formalism of the Court of Cassation in civil matters (*Foyer Assurances S.A. v. Luxembourg*).

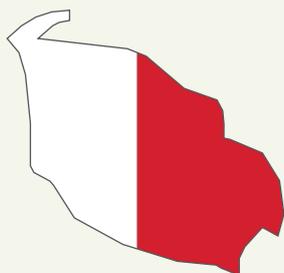


The few judgments pronounced in respect of Luxembourg in the past 10 years had already been implemented and the supervision by the Committee of Ministers ended, except for the case above. As a consequence, as of 1 January 2023, Luxembourg's rate of leading judgments from the past 10 years that remained pending was at 25 per cent (compared to zero per cent at the start of 2022). Since 2011, Luxembourg has implemented 15 leading ECtHR judgments, taking measures to address, for example, the absence of

a judicial review of revocation of releases on parole (*Etute v. Luxembourg*), measures to grant additional rights to suspects in criminal proceedings, in line with four Directives of the EU (*A.T. v. Luxembourg*), and freedom of association and protection of property (*Schneider v. Luxembourg*).

Country Analysis:

Malta



Four Examples of ECtHR Judgments Pending Implementation in Malta

1. **Lack of independence and impartiality in proceedings for unfair dismissal** (*Grace Gatt v. Malta*), pending implementation since 2020.
2. **Excessively long criminal proceedings** (*Galea and Pavia v. Malta*), pending since 2020.
3. **Unlawful ban on a theatre production** (*Unifaun Theatre Productions and other v. Malta*), pending implementation since 2018.
4. **Expropriation without timely and adequate compensation** (*Galea and others v. Malta*), pending implementation since 2018.

Malta has a **moderately poor record** of ECtHR implementation. The country is not the subject of a high number of judgments from the Strasbourg Court, and there are a moderately low number of leading judgments pending implementation. When violations are found by the ECtHR, however, the judgments of the Court are not being implemented consistently. This is demonstrated by the fact that the proportion of leading cases that are still pending implementation is quite high. Furthermore, the average length of time for which these judgments have been pending is significant, indicating that several cases have been pending for a long time.

 15

Leading judgments pending implementation

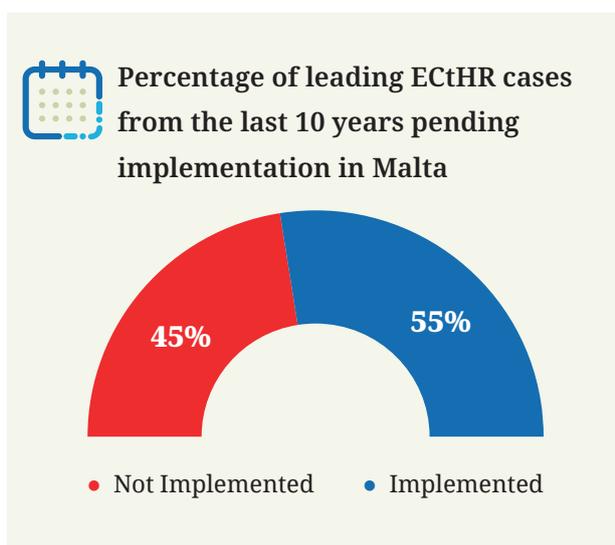
On 1 January 2023, Malta had 15 **leading judgments** of the ECtHR pending implementation. This is an increase from the previous year, as there were 13 leading judgments pending at the start of 2022. This is a moderately low number of pending leading judgments. Four of these judgments are listed in the box above. Four of the pending leading judgments in Malta concern either rent control legislation or disproportionate control of property in the context of the landlord-tenant relationship. These groups of judgments alone comprise over 30 repetitive judgments.

The Maltese authorities have an obligation to take both individual and general measures to implement them.

5 years and 4 months

Average time that leading judgments have been pending

On average, the time that leading judgments had been pending implementation was **five years and four months**, an increase in comparison to the five years and one month at the start of 2022. This is a significant length of time. One of the oldest cases is the *Ghigo* group of judgments, which has been pending implementation since 2006. The group of judgments concerns the disproportionate control of the applicants' property.



Malta's rate of leading judgments from the past ten years that remained pending was **45 per cent**, which is stable compared to 1 January 2022. This is higher than the EU average, however. The Maltese authorities have not implemented any ECtHR judgments in the past two years.

Country Analysis:

The Netherlands



Two Examples of ECtHR Judgments Pending Implementation in the Netherlands

1. Breaches of the right to a fair trial (*Keskin v. the Netherlands*), pending implementation since 2017.
2. Insufficient justifications for pre-trial detention (*Maassen v. the Netherlands*), pending implementation since 2021.

The Netherlands has a **good record** of ECtHR implementation. This record is demonstrated by a very low number of pending leading judgments, together with a moderate proportion of leading cases that are still pending implementation. Furthermore, the average length of time for which these judgments have been pending is moderate.



Leading judgments pending implementation

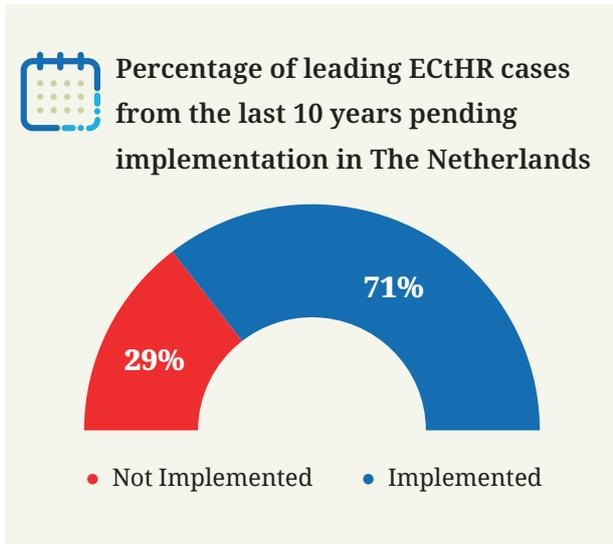
On 1 January 2023, the Netherlands had **four leading judgments** of the ECtHR pending implementation. This is a low number and a significant decrease from the previous year, as there were eight leading judgments pending at the start of 2022. Two of these are listed in the box above.

 **3 years and 7 months**

Average time that leading judgments have been pending

On average, the time that leading judgments had been pending for implementation was **three years and seven months**, which is a moderate length of time. The oldest pending judgment

is *Murray v. the Netherlands*, which has been pending since 2016. The judgment concerns the irreducibility of a life sentence imposed on prisoner suffering from mental illness.



The Netherlands' rate of leading judgments from the past ten years that remained pending was **29 per cent**, an improvement from the last year's figure, which was 40 per cent. This improvement is due to the fact that the authorities implemented five ECtHR judgments in 2022. Some of these judgments concern the right to a fair trial (*X. v. the Netherlands*, *Hokkeling v. the Netherlands*, *Van de Kolk v. the Netherlands*).

Country Analysis:

Poland



Five Examples of ECtHR Judgments Pending Implementation in Poland

1. **Constitutional Court formed unlawfully** (*Xero Flor w Polsce sp. z o.o. v. Poland*), pending implementation since 2021.
2. **Supreme Court formed unlawfully** (*Reczkowicz v. Poland*), pending implementation since 2021
3. **Unjustified criminal convictions of journalists and editors, in violation of their freedom of expression** (*Kurłowicz v. Poland*), pending implementation since 2010.
4. **Excessive length of court proceedings across the Polish justice system** (*Rutkowski v. Poland*, *Beller v. Poland*), with the first case in 2005.
5. **Restrictions on access to legal abortion** (*P. and S., R.R., Tysiac v. Poland*), pending since 2007.

Poland has a **very serious problem** in ECtHR implementation. The statistics presented below show a high number of leading judgments pending implementation that have been pending for a significant period of time. In addition, a high percentage of leading cases are still pending implementation.



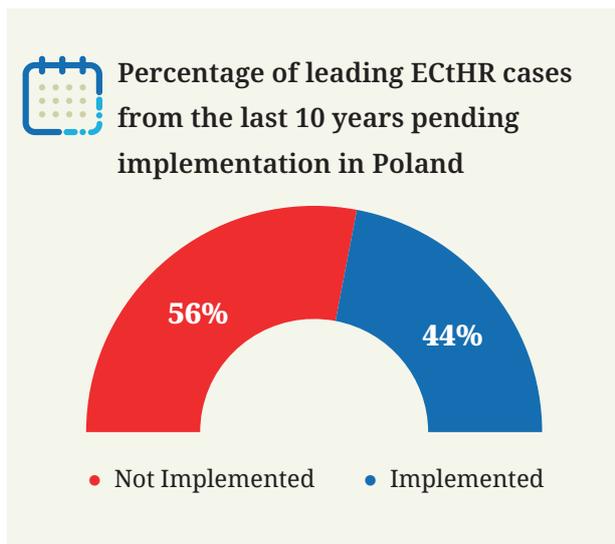
Leading judgments pending implementation

On 1 January 2023, Poland had **46 leading judgments** of the ECtHR pending implementation. This is a significant increase from the previous year, as there were 38 leading judgments pending at the start of 2022. This number, which is higher than the figures for neighbouring EU states Germany, Lithuania and Slovakia, leaves significant room for improvement. Each of these pending judgments represent a human rights problem. Five cases are listed in the box above. These can only be effectively addressed by implementing both individual and general measures.

5 years and 6 months

Average time that leading judgments have been pending

On average, the time that leading judgments had been pending implementation was **five years and six months**, a slight improvement in comparison with the previous year (when it was five years and ten months). One of the oldest leading judgments pending implementation in Poland is the *Beller* case, which concerns the excessive length of proceedings before administrative bodies and courts, and the absence of an effective remedy. The case has been pending implementation since 2005, having accumulated more than 50 repetitive cases. This demonstrates that, when reforms are not carried out to implement ECtHR judgments, there is an ongoing risk that similar human rights violations will occur. Furthermore, Poland has the highest number of pending leading judgments that concern the independence and impartiality of the judiciary.



In comparison with its neighbouring EU states, Poland also has the highest percentage of leading judgments from the last decade that are pending implementation – **56 per cent**, an increase from the previous year’s figure, which was 48 per cent. This is also higher than the EU average rate of ECtHR non-implementation, which stands at 40 per cent.

In the past two years, the Committee of Ministers has ended supervision for seven leading judgments in Poland.

Polish authorities have been active in

their reporting obligations, having submitted, as of January 2023, 65 action reports, 25 action plans and 46 communications in leading cases pending implementation. A number of these documents concern a small number of cases that have been subject to increased international attention, in which the authorities have increased their reporting: *Al-Nashiri v. Poland*, concerning secret detention and “extraordinary rendition” in CIA black sites, and the *R.R., P. and S.* and *Tysiack* cases, which concern safe and legal access to abortion.

Having more than 40 leading judgments pending implementation, out of which five concern serious rule of law issues pertaining to the independence and impartiality of the judiciary, and more than half of judgments from the last ten years pending implementation, Poland’s overall record has worsened, dropping from “significant” to “very serious”.

Case example: Criminal convictions for defamation

Zbigniew Kurłowicz was president of the City Council in Knyszyn. In 2005, in the context of discussions during the City Council sessions regarding the future of a school complex, he criticised the manager of the school complex for mismanagement. The school manager considered the criticism to be defamatory, and lodged criminal proceedings against him. Domestic courts ordered Kurłowicz to pay a fine, to make a statement that the accusations were untrue, and to apologise to the school manager.

The ECtHR delivered its judgment in 2010, finding a violation of freedom of expression. The authorities had failed to strike a fair balance between the protection of the school complex manager's right to defend his reputation and, on the other hand, an elected representative's right to freedom of expression in exercising this freedom where issues of public interest are concerned.

Since the *Kurłowicz* judgment became final, another five judgments have been added to this group that concern similar criminal convictions to fines for defamation. Civil society has pointed out that criminal defamation laws are a significant problem for free speech, public discussion, and democratic life. The Criminal Code still contains the punishment of imprisonment for defamation via the media, and there have been a rising number of criminal defamation cases, as well as a greater use of imprisonment to punish speech. The Helsinki Foundation for Human Rights has called for the decriminalisation of defamation, or at least for the removal from the Criminal Code of prison sentences for defamation. These important cases remain pending implementation.



“Statistics show that the state of execution of ECtHR judgments has deteriorated: The number of unimplemented leading judgments has increased over the last year, from 38 to 46. Still unimplemented are judgments concerning systemic problems with which Poland has been struggling for years – I am thinking in particular of the issue of the lengthiness of proceedings and access to legal abortion. In addition, rulings concerning the rule of law crisis remain unimplemented. What is worse, the current Polish authorities even openly question the legal force of some of these judgments, and clearly demonstrate that the Government do not have the political will to fully implement them. While there have been some changes over the past year, such as the abolition of the infamous Disciplinary Chamber of the Supreme Court, one such reform is not enough to talk about the proper implementation of the ECtHR judgments”. – Dr. Marcin Szwed, Head of Strategic Litigation at the Helsinki Foundation for Human Rights, Poland.

Country Analysis:

Portugal



Three Examples of ECtHR Judgments Pending Implementation in Portugal

1. **Unfair proceedings for the removal of judges** (*Ramos Nunes de Carvahlo E SA v. Portugal*), pending implementation since 2018.
2. **Excessive length of judicial proceedings** (*Vincente Cardoso v. Portugal*), pending implementation since 2013.
3. **Poor conditions of detention in prisons, and lack of an effective remedy in that regard** (*Petrescu v. Portugal*), pending implementation since 2020.

Portugal has an overall **moderate** ECtHR implementation record. While the overall number of pending leading judgments is moderately low, the proportion of leading cases that are still pending implementation is significant. The average length of time that these cases have been pending implementation is also significant.

 15

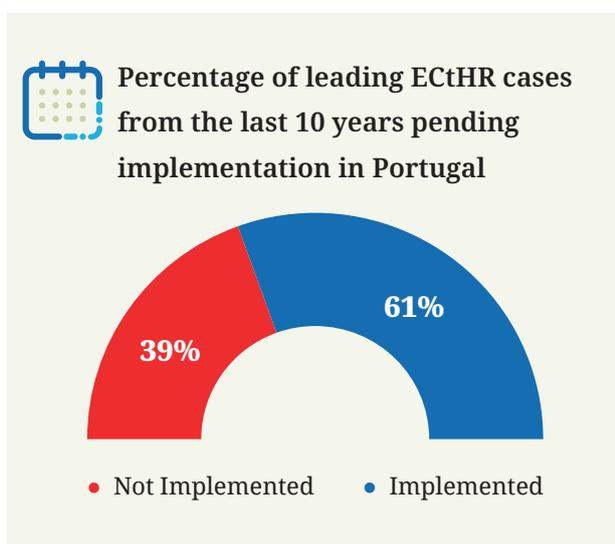
Leading judgments pending implementation

On 1 January 2023, Portugal had **15 leading judgments** of the ECtHR pending implementation. This is a decrease from the previous year, as there were 17 leading judgments pending at the start of 2022. Examples of systemic human rights problems are listed in the box above. This moderately low number of unimplemented judgments can only be effectively addressed by the Portuguese authorities through individual and/or general measures. For example, the implementation of the *Ramos Nunes de Carvahlo E SA v. Portugal* requires measures addressing the fairness of proceedings for the removal of judges from their positions.

5 years and 1 month

Average time that leading judgments have been pending

On average, the time that leading judgments have been pending implementation was **five years and one month**, an increase compared to three years and ten months in 2022. This is quite a significant length of time, significantly worse than the same figure in neighbouring Spain (which stands at two years and nine months). The oldest pending leading judgment against Portugal – since 2011 – is *Moreira Ferreira v. Portugal*. It concerns the failure of the court of appeal to hear the applicant in person, in criminal proceedings brought against her that resulted in her conviction.



Portugal's rate of leading judgments from the past ten years that remain pending is **39 per cent**, which is very similar to the rate in early 2022 (41 per cent). This figure is lower than that for neighbouring Spain (which stands at 53 per cent). In the past two years, Portugal has implemented seven leading ECtHR judgments. These concerned, *inter alia*, the effective functioning of justice (*Paixao Moreira S.A. Fernandes v. Portugal*; *Tato Marinho Dos Santos Costa Alves Dos Santos et Figueiredo v. Portugal*), and the protection of private life (*Carvalho Pinto de Sousa Morais v. Portugal*).

Country Analysis:

Romania



Four Examples of ECtHR Judgments Pending Implementation in Romania

1. **Journalists and a politician given crippling defamation awards when discussing matters of public interest** (*Ghiulfer Predescu v. Romania*), pending implementation since 2017.
2. **Unjustified dismissal of the chief prosecutor for informing the public about anti-corruption activities** (*Brisco v. Romania*), pending implementation since 2019.
3. **Failure to investigate LGBT hate crimes** (*M.C. and A.C. v. Romania*), pending implementation since 2016.
4. **Lack of safeguards regarding secret surveillance and conviction of whistle-blower for disclosing illegal surveillance** (*Bucur and Toma v. Romania*), pending implementation since 2013.

The ECtHR implementation record in Romania is **among the poorest** in the EU, and has continued to worsen. The statistics set out below indicate an extremely high number of leading judgments pending, as well as a very high percentage of leading judgments that are awaiting implementation. Implementation of these has been pending for a significant length of time.

 **113**

Leading judgments pending implementation

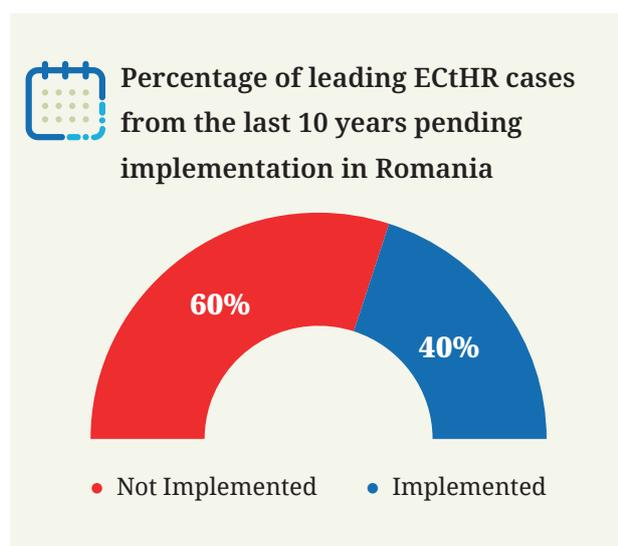
On 1 January 2023, Romania had **113 leading judgments** of the ECtHR pending implementation. This is a significant increase from the previous year, as there were 106 leading judgments pending at the start of 2022. This is also the highest number of pending leading judgments of any country in the EU. Since the beginning of 2020 alone, the ECtHR has delivered 51 violation judgments in respect of Romania. Most-recent judgments concern the failure of authorities to carry out an effective investigation into ill-treatment by a third party (*Toma v. Romania*),

the failure to protect the life of a victim of a subway station accident (*Nedelcu v. Romania*), and unlawful psychiatric confinement as a security measure (*R.D. and I.M.D. v. Romania*). The implementation of these cases needs to be effectively addressed through taking both individual and general measures.

4 years and 8 months

Average time that leading judgments have been pending

On average, the time that leading judgments had been pending implementation was over **four years and eight months**, which was slightly longer than the figure for the previous year (four years and two months). The oldest pending leading case in Romania is *Strain and others*, which has been pending implementation since 2005. The case concerns the ineffectiveness of the mechanisms set up to afford restitution or compensation for properties nationalised during the communist period.



Of the leading judgments handed down by the ECtHR against Romania over the past ten years, **60 per cent** were awaiting full implementation. This is a slight increase from the figure from early 2022, which was 57 per cent.

Since the beginning of 2020, the Romanian authorities have finalised the implementation of eleven leading judgments. While the data shows there is **significant room for improvement**, there are also some **positive examples** of ECtHR judgment implementation, where **reforms**

have been initiated or are underway (see example below). Significant efforts are required, however, to further improve ECtHR compliance and Romania's overall implementation record.

Case example: Journalists and politician given crippling defamation awards when discussing matters of public interest

Ghiulfer Predescu was an investigative journalist working in the city of Constanța. In 2006, a group of armed people were involved in a violent incident in the seaside resort of Mamaia, attacking and damaging a hotel to which the mayor of Constanța, R.M. , was a shareholder. Invited on a television show to speak about the incident, Predescu made several remarks about the division of the city between clans, notably between the supporters of R.M. and his enemies, which led to those armed hostilities. As a result, R.M. instituted civil proceedings against her, claiming that her remarks went beyond what was permitted by the journalists' professional ethics and by the right to freedom of speech. The Constanța County Court allowed the claim, held Predescu liable for paying non-pecuniary damages and costs, ordered her to publish the judgment, at her own expense, in two newspapers, and to present R.M. with written public apologies.

In 2017, the Court delivered its judgment, finding that the sanctions imposed on Predescu were not sufficiently justified, and were not necessary in a democratic society. Predescu's comments were made in the context of a debate of public interest pertaining to the maintenance of public order in Constanța, and the extent to which R.M. was able to comply with his duties as mayor. The allegations had a factual basis, namely, previous published articles and investigation material. The amount of damages she was ordered to pay was extremely high, and had a chilling effect on her freedom of expression. Furthermore, the format of the television show, in which the mayor had participated in both his capacity as a local businessman and an elected public official, had offered the opportunity to exchange and counterbalance views. The Court found that Predescu's freedom of expression had been violated by the appeal court's decision.

Since the judgment was delivered by the Court, in 2017, another seven repetitive judgments have been delivered and added to the group, which indicates a systemic problem. In 2018, the Romanian authorities requested case closure, but civil society argue that legal reform is required to better define the conditions in which restrictions to the freedom of expression are admissible.



“In terms of the general implementation of ECtHR judgments in Romania, we are dealing with the same situation as in the last years – nothing has improved significantly: There is a lack of interest and visibility of this topic on the Romanian public/political agenda, insufficient resources to tackle the complex problem that needs to be solved, as well as a lack of coordinated response to the complex problems they entail. Due to resource constraints, NGO involvement remains marginal.” – Georgiana Gheorghe, Executive Director of the Association for the Defence of Human Rights in Romania – the Helsinki Committee.

Country Analysis:

Slovakia



Four Examples of ECtHR Judgments Pending Implementation in Slovakia

1. **Excessive length of court proceedings** (*Maxian and Maxianova v. Slovakia*; *Javor and Javorova*; *Balogh and others v. Slovakia*), with the first case dating from 2012.
2. **Breach of legal certainty by the prosecutor general and Supreme Court** (*Draft-Ova A.S. v. Slovakia*), pending implementation since 2015.
3. **Allegations of sexual abuse of children not properly investigated** (*M.M.B. v. Slovakia*), pending since 2020.
4. **Failure to properly investigate allegations of police brutality** (*R.R. and R.D. v. Slovakia*), pending implementation since 2020.

Slovakia has a **moderately poor** ECtHR implementation record. The country has a moderate number of leading judgments pending implementation, which have been pending for a moderately low length of time. Meanwhile, there is a high proportion of leading cases that are still pending implementation.



Leading judgments pending implementation

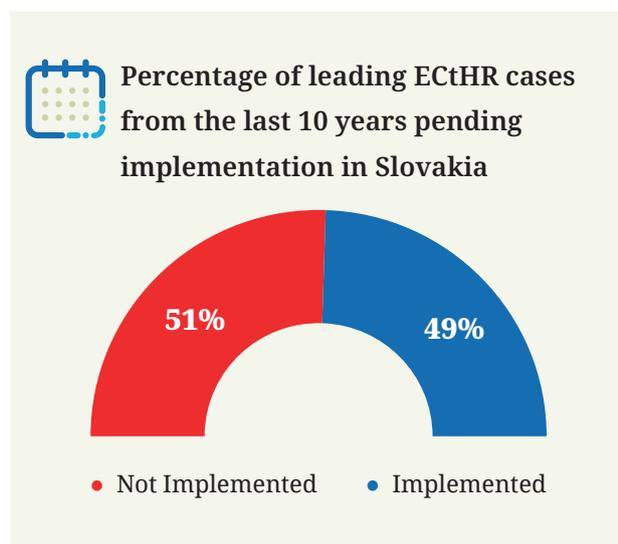
On 1 January 2023, Slovakia had **24 leading judgments** of the ECtHR pending implementation. This was an increase from the previous year, as there were 20 leading judgments pending at the start of 2022. This moderate number of unimplemented judgments should be effectively addressed by the Slovakian authorities through individual and/or general measures. Four examples of systemic human rights problems in Slovakia are listed in the box above. Additional systemic issues concern the lack of impartiality of disciplinary proceedings before the Constitutional Court (*Harabin v. Slovakia*), the excessive length of proceedings concerning

compensation claims related to criminal proceedings (*Javor and Javorova v. Slovakia*), and the excessive length of judicial review of detention (*Besina v. Slovakia*).

2 years and 11 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was **two years and 11 months**, which is almost the same as for the start of 2022. This is significantly shorter than its EU neighbours Czechia, Hungary, and Romania. The oldest pending leading group is *Maxian and Maxianova*, which concerns the excessive length of civil proceedings. It has 28 repetitive judgments, which have been adding to the group since 2016.



Slovakia has a significant percentage of leading judgments from the last decade that are pending implementation – **51 per cent**, an increase from the previous year's figure, which was 41 per cent. In the past two years, the authorities have implemented four judgments, which concern, *inter alia*, the excessive length of civil proceedings and lack of an effective remedy (*Ivan v. Slovakia*), ethnic discrimination and the right to life (*Lakatosova and Lakatos v. Slovakia*), and failure to resolve the issue of the return of children to the country of their habitual residence (*Mansour v. Slovakia*).

Country Analysis:

Slovenia



Two Examples of ECtHR Judgments Pending Implementation in Slovenia

1. **Unjustified failure of a court to examine facts or conduct an oral hearing** (*Produkcija Plus storitveno podjetje d.o.o. v. Slovenia*), pending implementation since 2019.
2. **Excessive length of proceedings concerning foster care permission** (*Q and R v. Slovenia*), judgment final in June 2022.

Slovenia has a **very good** ECtHR implementation record. The country has a very low number of leading judgments pending implementation, which have been pending for a short period of time, as well as a low percentage of leading cases that are still pending implementation.



Leading judgments pending implementation

On 1 January 2023, Slovenia had **four leading judgments** of the ECtHR pending implementation, the same number as at the start of 2022. Two of these cases are listed in the box above.

 **1 year, 5 months**

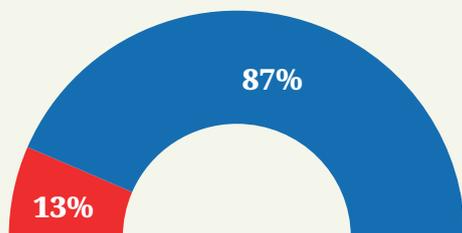
Average time that leading judgments have been pending

On average, these four leading cases had been pending for an average of **one year and five months**, a slight improvement in comparison with the previous year (one year and ten months). This is significantly shorter than in neighbouring Croatia, Hungary, and Italy. One case became final in 2019, one became final in 2021, and two became final in 2022.

Slovenia also has a low percentage of leading judgments from the last decade that are pending implementation – **13 per cent** (similar to the figure at the start of 2022, which was 12 per cent).



Percentage of leading ECtHR cases from the last 10 years pending implementation in Slovenia



● Not Implemented ● Implemented

In just the past two years, the supervision of eight leading ECtHR judgments was ended by the Committee of Ministers. Most of these cases did not require general measures, as the violations stemmed from isolated occurrences.

Country Analysis:

Spain



Five Examples of ECtHR Judgments Pending Implementation in Spain

1. Criminal convictions for criticising the monarchy (*Stern Taulats and Roura Capellera v. Spain*), pending implementation since 2018.
2. Protection of private life of judges supporting Catalan people’s “right to decide”, (*M.D. and others v. Spain*), judgment final in September 2022.
3. Failure to ensure the impartiality of judges in a criminal trial (*Otegi Mondragon and others v. Spain*), pending implementation since 2019.
4. Ineffective investigations into allegations of police ill-treatment (*Ataun Rojo v. Spain*), pending implementation since 2015.
5. Disproportionate use of force, and failure to investigate police ill-treatment against peaceful assemblies (*Laguna Guzman v. Spain, Lopez Martinez v. Spain*), pending implementation since 2021.

Spain has a **moderately poor record** of ECtHR implementation. The country has a moderate number of leading ECtHR judgments pending implementation, and the average length of time for which these judgments have been pending is moderately low. However, a high proportion of the ECtHR judgments concerning Spain are still pending implementation. This indicates that there are improvements to be made in the efficiency with which Spain implements judgments of the ECtHR.



Leading judgments pending implementation

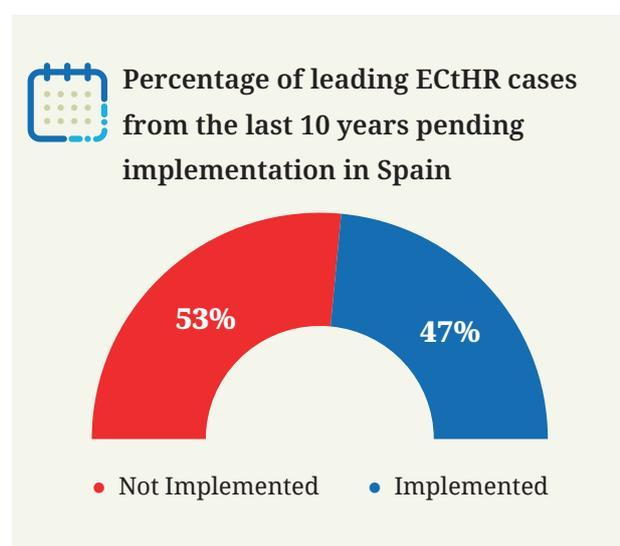
On 1 January 2023, Spain had **21 leading judgments** from the ECtHR’s pending implementation. This was a decrease from the previous year, as there were 23 leading judgments pending at the start of 2022. This is a moderate number, as the figure is comparable to those of France and Portugal. Five of these are listed in the box above. Ineffective investigations into allegations of

ill-treatment in police custody and disproportionate criminal convictions for defamation are two of the main structural problems that Spanish authorities must address through reforms.

2 years and 9 months

Average time that leading judgments have been pending

The average time that leading judgments had been pending implementation was **two years and nine months**, (a small improvement, compared to three years and one month in 2022). Although this represents a notable delay, it is moderately low in the context of the EU as a whole, similar to the same figure for neighbouring France.



Spain had a high percentage of leading judgments from the last decade that were pending implementation – 53 per cent, a decrease from the figure from early 2022, which was 61 per cent. **This is much higher than the EU average.** In the past two years, the Committee of Ministers ended supervision for ten Spanish ECtHR judgments, out of which four were isolated cases that did not require general measures.

Country Analysis:

Sweden



Two ECtHR Judgments pending implementation in Sweden

1. **Failure of courts to investigate invasion of privacy by non-Swedish broadcasts** (*Arlewin v. Sweden*), pending implementation for 2016.
2. **Insufficient safeguards in bulk signals-intelligence gathering** (*Centrum for Rattvisa v. Sweden*), pending implementation since 2021.

Sweden has a **good record** of ECtHR implementation. The country has a very low number of pending leading judgments, but they have been pending for a significant length of time. It also has a moderately low proportion of leading cases that are still pending implementation.



Leading judgments pending implementation

On 1 January 2023, Sweden had **two leading judgments** of the ECtHR pending implementation. These are the same judgments that were pending on 1 January 2022, and are listed in the box above. The authorities have already been taking both individual and general measures to implement the *Arlewin* case, which has been pending for six years.

4 years and 1 month

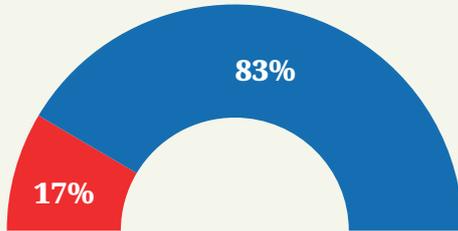
Average time that leading judgments have been pending

On average, these two leading cases had been pending for **four years and one month**. This is a much lower figure than that for neighbouring Finland, but higher than that for Denmark.

Furthermore, Sweden has a moderately low percentage of leading judgments from the last decade that are still pending implementation – **17 per cent** (similar to the figure in January



Percentage of leading ECtHR cases from the last 10 years pending implementation in Sweden



● Not Implemented ● Implemented

2022, which was 13 per cent). In total, Sweden has implemented 40 ECtHR judgments to date, out of which four were implemented in 2021.

(Non) Implementation of Judgments II: CJEU

Methodology

This study of state performance aims at discerning whether EU Member States have made adjustments in laws and practices in line with the CJEU judgments. It focuses on a portion of the CJEU rulings that are related to the rule of law, particularly those falling under the four areas covered by the European Commission's Rule of Law Reports. Rule of law Reports have mentioned the CJEU rulings, but in a sporadic fashion, thus failing to reflect on the overall level of implementation.

To ascertain the extent to which EU Member States have implemented necessary changes, we have consulted national experts. Experts from 19 EU Member States filled in a questionnaire.⁶ They highlighted those CJEU rulings that have not yet been fully complied with,⁷ critically assessing, where relevant, the changes in law and practice meant to bring the national legal systems in compliance with CJEU rulings, and highlighting any shortcomings of reforms or any risks in the implementation. The analysis covered the implementation of the CJEU judgments emerging out of the Commission's referral of cases to the CJEU and requests for CJEU preliminary rulings by national courts. The experts reflected on the reactions of the European Commission to non-compliance. They also highlighted problematic national laws and practices that have not been subject to the CJEU rulings and have not been tackled sufficiently by the Commission.

⁶ The questionnaire has been filled in by experts from Belgium, Bulgaria, Cyprus, Croatia, Czechia, Finland, Germany, Hungary, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Sweden.

⁷ One limitation of this research is that it does not take already implemented rulings into account and, hence, does not provide an idea of the overall performance. Instead, it focuses mainly on unimplemented rulings at this time.

This report breaks down state responses to CJEU rulings into two groups – political and judicial. It discerns four problematic patterns of non-compliance in the responses of political actors, including sham reforms that are meant to disguise non-compliance and partial reforms that are insufficient, especially where the flaws in laws and practices are systemic. As regards judicial responses, one alarming trend is that of resistance to European Courts by constitutional courts, independently or as orchestrated by governments. The study also reveals positive practices, with the national courts serving as guardians of the rule of law and seeking to apply EU law and CJEU prescriptions, even at the risk of disciplinary sanctions.

Findings

Political responses to CJEU rulings: four types of non-compliance

Four types of political responses to the CJEU rulings emerge from this study of state performance:

- (a) **outright refusal** to comply and complete inaction;
- (b) **sham or façade reforms** that do not change the status quo substantially (essentially **disguised non-compliance**).⁸ This may take the form of dismantling one body, only to establish a similar one with the same problematic features, or of canceling a criticised rule, only to reintroduce it in a slightly different form.
- (c) **partial or incomplete implementation** – reform that is necessary, but insufficient, especially in view of the systemic nature of the shortcomings.
- (d) **protracted reform processes**, with Member States generally expressing commitment to reform, bringing forward various legislative proposals, but not showing any tangible progress.

Outright refusal to implement is relatively rare, even though politicians may seek to use constitutional courts to defend controversial laws. It might be hard to distinguish between (b) and (c), as governmental intentions are hard to decipher with absolute certainty (is it a strategy to simulate compliance and/or disguise non-compliance, or did the government genuinely try, and failed?). However, a close look at legislative and other changes typically allows for a conclusion on whether it is a sham or a credible, but only partial reform.

⁸ For more on the term, see: Ula Aleksandra Kos, “Controlling the Narrative: Hungary’s Post-2010 Strategies for Non-compliance before the European Court of Human Rights”, *European Constitutional Law Review*, 21 February 2023.

Sham compliance

An expert on Hungary provided some examples of sham compliance or (poorly) disguised non-compliance. While the provision of the Act on Asylum that was subject to a CJEU judgment (C-564/18) is no longer in force (since 1 January 2023), there is still a constitutional provision with essentially the same content (allowing for the refusal of asylum if the applicant arrived in Hungary through any country where they were not persecuted or threatened with persecution).⁹

Another example of sham compliance comes from Poland. The replacement of the Disciplinary Chamber of the Supreme Court with the Professional Liability Chamber, in line with the CJEU ruling C-791/19, amounted to a merely cosmetic change, because the Professional Liability Chamber has retained many of the problematic features of the Disciplinary Chamber, mainly the presence of “new” judges appointed with the participation of the non-independent National Council of Judiciary. To alleviate the Commission’s concerns and secure the payout of recovery funds the Commission had withheld over the rule of law concerns, including as regards the disciplinary system, Poland introduced a new draft law in December 2022. The draft law envisioned moving the disciplinary proceedings regarding judges out of the Supreme Court altogether, but this attempt stalled when President Andrzej Duda refused to sign the law into force and, instead, sent it for review by the Polish Constitutional Tribunal, where a case was still pending at the time of elaborating the questionnaire.

Partial compliance

The Hungarian questionnaire also gave an example of partial compliance, particularly with regard to CJEU judgment C-564/19, in the sense that the proposed reforms, if adopted, would be insufficient. According to the CJEU judgment in that case, a national supreme court cannot declare a request for a preliminary ruling submitted by a lower court unlawful on the grounds that it is irrelevant to the dispute at hand. In the case in question, disciplinary proceedings were initiated against a judge for turning to the CJEU (but were subsequently dropped). In the view of the CJEU, the mere prospect of being subject to such proceedings can undermine the mechanism of preliminary references and judicial independence.

To receive funds from the EU Recovery and Resilience Facility, Hungary was to remove obstacles to the use of its preliminary reference procedure in line with the CJEU judgment C-564/19. An [analysis](#) by the Hungarian Helsinki Committee (HHC), Amnesty International Hungary, and the Eötvös Károly Institute, from May 2023, suggests that the proposed change to the Code of Criminal Procedure, precluding the prosecutor from challenging judicial requests for preliminary rulings from the CJEU, while necessary, is not sufficient to execute the CJEU

⁹ The Hungarian expert also highlighted that the procedural rules on filing a request for asylum are in violation of EU law, and are subject to an infringement procedure (INFR(2020) 2310).

judgment. The proposed amendments are of a strictly procedural nature, and are limited to criminal procedures. They would close the procedural path by which the prosecutor general can challenge lower courts' requests for preliminary rulings. This formal modification would not, however, affect the legal force of the decision of the Kuria (Hungary's supreme court) subject to the CJEU judgment C-564/19, as the Kuria's decision covers all types of proceedings – not just criminal, but also civil and administrative – and creates a material obstacle for judges seeking preliminary rulings from the CJEU. Proper execution of the CJEU ruling requires the negation of the binding legal effect of the mentioned decision. This, according to Hungarian civil society, could be achieved by the modification of all procedural codes (not just the criminal procedural code) to prohibit litigants from challenging requests for preliminary rulings on the basis of a Kuria decision or any other basis, and expressly declaring that a request for a preliminary ruling submitted by a lower court cannot be deemed unlawful under any circumstances. If this does not happen, their report warns, the Kuria's decision will continue to have a binding effect on the jurisprudence, irrespective of the fact that the prosecutor general may not in the future bring similar appeals before the Kuria.

While Hungary adopted new legislation in connection with CJEU judgment C-821/19 (concerning the criminalisation of assistance to asylum seekers), the response was not entirely adequate in this case either, and the Commission does not consider the judgment to have been implemented.

Romania has recently implemented reforms in line with CJEU prescriptions, for example, as regards the reform of bodies investigating alleged corruption by judges and prosecutors. A closer look at these reforms led actors at the national and regional levels to the conclusion that these efforts did not amount to full compliance.

In October 2018, Romania established a special section within the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors (the Special Section for the Investigation of Offences in the Judiciary, or SIIJ). This newly created entity was entrusted with the task of investigating corruption by judges and prosecutors, taking this role over from the National Anticorruption Directorate (DNA). This was contrary to the recommendations in an [opinion](#) from the Venice Commission.

The Commission's October 2018 opinion warned that the establishment of the SIIJ would undermine the independence of judges and prosecutors and public confidence in the criminal justice system. The Commission saw the possible re-routing of high-profile cases of corruption pending before the DNA as a major risk, and suggested that such a move would undermine the DNA's anti-corruption work and the DNA as an institution. While acknowledging that "the choice of means for fighting against offences belongs to the national legislator", the Commission expressed fear that the new structure would serve as an instrument to intimidate and put pressure on judges.

On [18 May 2021](#), at the request of a Romanian court under the preliminary reference procedure, the CJEU issued a ruling on the compatibility with EU law of the legislation establishing the

SIIJ. The CJEU laid down a number of criteria for assessing the compatibility of such legislation. It noted that, in order to be compatible with EU law, such legislation must be justified by objective and verifiable requirements relating to the sound administration of justice, must provide guarantees ensuring that those criminal proceedings cannot be used as a system of political control over the activity of those judges and prosecutors, and must fully safeguard the rights enshrined in Articles 47 (the right to an effective remedy and a fair trial) and 48 (the presumption of innocence and right to defense) of the EU Charter of Fundamental Rights. After identifying a number of possible concerns with regard to the fulfilment of these criteria in the present case, the CJEU left the ultimate assessment to the referring courts. Soon after, on 7 June 2021, the Pitești Court of Appeal declared that the SIIJ's existence was not justified by objective and verifiable requirements related to the sound administration of justice, and that it was not competent to investigate a case brought before it.¹⁰

Romanian authorities moved forward with the dissolution of the SIIJ. In view of the claims regarding underperformance of this body and reports about pressure on judges and prosecutors, the dismantling of the SIIJ may have been viewed as adequate follow up to the CJEU ruling. There are question marks, however, as to whether the structure that replaced the SIIJ fulfils the requirements of EU law any better.

The respective law ¹¹ ([Law No. 49/2022](#)) was adopted in February 2022, signed by the president of Romania on 11 March 2022, and entered into force a few days thereafter. Under this new law, the SIIJ's competences were taken over by non-specialized prosecutors from prosecutor's offices attached to the High Court of Cassation and the Courts of Appeals. The Romanian legislature adopted this law without waiting for the opinion of the Venice Commission. A major issue for the Venice Commission was that the new law did not re-establish the competences of National Anti-Corruption Directorate (DNA) as regards corruption offences committed by judges and prosecutors. The [opinion of the Commission](#) from March 21 suggests that non-specialized prosecutors replacing the SIIJ would not be better placed to investigate allegations of corruption by judges and prosecutors than the existing specialised prosecution service, the DNA. The Commission saw the DNA as superior to this new structure in terms of functional independence, specialization, experience, and technical means at its disposal. It recommended restoring the competences of the specialized prosecution service to also investigate and prosecute offences committed by judges and prosecutors within its remit.

The Romanian authorities not only failed to wait for the Venice Commission's recommendations, and replaced SIIJ with a new mechanism that arguably lacks autonomy and the capacity to adequately investigate and prosecute corruption, but also [proceeded to appoint](#) several prosecutors in line with Law No. 49/2022 to conduct investigations, including into

¹⁰ Disciplinary proceedings were initiated against this judge for disapplying the legislation establishing the SIIJ in light of the CJEU judgment of 18 May 2021. The Romanian judicial council ultimately rejected the disciplinary action by decision of 14 April 2022.

¹¹ Law no 49 of 11 March 2022 on the abolition of the Section for the Investigation of the Crimes in the Judiciary, as well as for the amendment of law no. 135/2010, regarding the Criminal Procedure Code.

corruption by judges and prosecutors. These prosecutors have to deal with corruption in the judiciary in addition to their other, ordinary tasks.

In a law that entered into force in December 2022, Law No. 303/2022 , “Regarding the Status of Judges and Prosecutors”, the Romanian legislature abolished the disciplinary offense for judges of non-compliance with the Constitutional Court rulings. As explained in greater detail below, judges faced the choice between respecting the decisions of the Romanian Constitutional Court or the CJEU’s decisions. This choice emerged out of contradictions between the decisions of these two courts. Judges that failed to comply with the Court decisions could face disciplinary proceedings.

[The Association for the Defense of Human Rights in Romania \(APADOR-H\)](#) has been skeptical about the total elimination of non-compliance with Constitutional Court rulings as a disciplinary offence, as this would endanger respect for Constitutional Court decisions. They leaned towards the mid-way solution of keeping the offense and re-defining it in cases of conflict between constitutional court and CJEU decisions, allowing the courts to give priority to the latter.

The Romanian Constitutional Court, in its [judgment no. 520](#) of 9 November 2022 , ruled on the constitutionality of the new legislation, including the elimination of the disciplinary offense of failure to comply with Constitutional Court decisions. In essence, the Constitutional Court ruled that the elimination of this offence is constitutional, because the failure to comply with its decisions may subject the judge or prosecutor to disciplinary liability, to the extent that it would be demonstrated that they had exercised their office in bad faith or with gross negligence. In other words, with the implementation of Law 303/2022, it is no longer possible to argue that every failure to comply with Constitutional Court judgments will be sanctioned as a disciplinary offence, but only if the failure to comply was done in bad faith or with gross negligence. According to this interpretation, the change does not lead to the complete cancellation of disciplinary sanctions, and the implications for judges might vary, depending on the decision-makers’ assessment of the judges’ convictions .

Protracted reform processes

An example of governmental failure to adjust laws to guarantee prosecutorial independence in light of CJEU jurisprudence comes from Germany.¹² This is essentially an example of a rhetorical

12 One more feature of the German legal system recently became the subject of a CJEU ruling. In its decision on a request for a preliminary ruling from the Austrian court, the CJEU clarified that a European Investigation Order (EIO, according to Directive 2014/41/EU) issued by a German Tax Office for Criminal Tax Matters and Tax Investigation (Finanzamt) was invalid because the Tax Office could not be considered an issuing authority in the sense of the Directive. The CJEU ruled that, as an administrative entity, the Tax Office was integrated into the hierarchical structure of the German Ministry of Finance, without any autonomy or independence. The Public Prosecutor’s Office, in contrast, acts as a guarantor of legality and serves the general interest to ensure observance of the law. As a non-judicial authority, the Tax Office could not issue an EIO. It could not, for the purpose of the Directive, be equated to the public

commitment to comply, coupled with a protracted reform processes that led to no tangible results.

In 2019, following two preliminary ruling requests by the Irish High Court and the Supreme Court of Ireland, the CJEU found that, as the German prosecution services are subjected to external orders of the ministries of justice, they could not be considered independent “issuing judicial authorities” within the meaning of the Framework Decision 2002/584 on the European Arrest Warrant. The “external” power to issue instructions enables ministers of justice “to have a direct influence on a decision of a public prosecutor’s office to issue or, in some cases, not to issue a European Arrest Warrant.” (CJEU, judgment of 27 May 2019, C-508/18 (OG) and C-82/19 PPU (PI), para. 77). In the same connection, concern was voiced by the UN Human Rights Committee, which pointed out that the independence of the prosecution services from the executive was not ensured, and urged Germany to consider a legal reform.¹³

Under the previous government, in January 2021, the Federal Ministry of Justice and Consumer Protection published a first draft bill.¹⁴ However, this bill was not introduced in parliament during that legislative period and was not taken up by the new government. The current government coalition has, until now, merely promised to amend the law in accordance with the requirements of the CJEU decision, and to adjust the ministerial powers of instruction. (Coalition Agreement, “Mehr Fortschritt wagen”, 2021-2025, p. 84). Yet, to date, no concrete draft bill has been proposed. The expert reporting on Germany highlighted, however, that as long as the law is not amended, it is interpreted in light of EU law. This means that the criminal justice system has adapted its practice to it by subjecting every European Arrest Warrant to a judge’s decision. The competence to issue European Arrest Warrants lies with the magistrate court (Haftrichter) in the case of criminal prosecution, and with the criminal courts of first instance in case of the execution of a sentence. However, the public prosecutors’ offices are still tasked with the preparation and execution of European Arrest Warrants. The procedure has, thus, become more complex, and ties up considerably more resources in the criminal justice system.

Lack of political will to implement reforms

One such example comes from Bulgaria, another country facing major issues with prosecutorial independence. The expert in Bulgaria highlighted the CJEU judgment in case C 648/20 PPU, of 10 March 2021. In that judgment, the CJEU declared that European Arrest Warrants issued by the Prosecutor’s Office of Bulgaria and European Arrest Warrants based on national arrest warrants issued by the Prosecutor’s Office that have not been subjected to judicial oversight

prosecutor, as the German government had assumed. The CJEU insisted on the clear distinction between judicial and administrative authorities, clarifying that the latter could not assume judicial powers, as this would jeopardise legal certainty and the principle of separation of powers underlying the EIO Directive (CJEU, 2 March 2023, C-16/22).

¹³ CCPR/C/DEU/CO/7, 30 November 2021, paras. 40-41

¹⁴ See the [draft of the former government ministry](#) (in German).

violate Article 47 of the EU Charter (Right to an effective remedy and to a fair trial). This case touched upon a serious rule of law issue – that of excessive powers of the Prosecutor’s Office exercised without proper judicial and other checks, which, according to national experts, should be addressed through a major reform of Bulgarian criminal law. Most importantly, since communist times, the Prosecutor’s Office has been issuing decrees for the 72-hour detention of persons in custody that are not subjected to judicial oversight at any point (before, during, or after detention). Despite the ECtHR’s findings of violations on this matter,¹⁵ Bulgaria never modified its Code of Criminal Procedure, and the Prosecutor’s Office continues issuing such decrees. The problem is now even more serious, as the Prosecutor’s Office uses the same decrees to issue European Arrest Warrants.

In Slovakia, the provisions regarding the criminal liability of Slovak judges for abuse of law raised concerns from the perspective of the CJEU case law.¹⁶ In 2020, the Slovak Parliament amended the constitutional provision on the immunity of judges (Constitutional Act. No. 422/2020 Coll). It also introduced the new criminal offense of the “abuse of law”, under which judges may be prosecuted for any arbitrary decision either causing damage to or bestowing favor on another person. (Act No. 312/2020 Coll). Concerns about the misuse of this provision were raised repeatedly. In many respects, this offence resembles that of an abuse of power by a public figure, yet the abuse of law is penalised less severely. This also emerged from the criminal proceedings in the corruption cases of several Slovak judges who, once convicted, received more lenient sentences than those for other public officials (e.g., prosecutors).¹⁷ The European Commission found the legislation controversial and recommended, in its 2022 Rule of Law Report, that Slovakia “ensure that sufficient safeguards are in place and duly observed when subjecting judges to criminal liability for the crime of ‘abuse of law’ as regards their judicial decisions”. In February 2023, the Judicial Council of Slovakia approved a resolution demanding the offence be removed from the Criminal Code,¹⁸ yet the Judicial Council does not have the power of legislative initiative and, therefore, the motion was sent to the minister of justice. It emerges from a [Via Iuris report](#) that the Ministry of Justice ultimately proposed an amendment, but it has yet to be approved.

In its 2022 Report on Slovakia, the European Commission also made a reference to CJEU case law (the *Repubblika* case) in connection with the regime for the dismissal of members of the Judicial Council of the Slovak Republic (also introduced by the 2020 constitutional reform). Under this regime, Council members may be dismissed at any point by the appointing authority (three members are appointed by the government, three by the Judicial Council, and three

¹⁵ *Zvezdev v Bulgaria*, Application no 47719/07), 7 January 2010. *Zvezdev* should be read in conjunction with *Kolevi*, which concerns the vertical, communist style hierarchy of the Prosecutor’s Office, and the fact that a sitting general prosecutor may initiate and sustain bogus criminal proceedings against a person.

¹⁶ The *Commission v Poland* case, the *LM* case and the *Joined Romanian Cases* were mentioned in the Commission’s Rule of Law Report in regards of the introduction of criminal liability for the Slovak judge.

¹⁷ Adam Valček, “[A Paradox from the ‘Storm’ Case. A Clerk May Receive a Higher Sentence than a Malicious Judge](#)” (in Slovak), *Trend*, 27 February 2022.

¹⁸ [Resolution of the Judicial Council of the Slovak Republic of 14 February 2023](#).

by the president, with the remaining nine members elected by judges). There are no legally prescribed conditions for such dismissals, and no initiative has yet been introduced in this regard. To date, no members have been dismissed under the new legislation.

Poland has failed to observe the CJEU interim order in case C-204/21, concerning the Disciplinary Chamber and the so-called “muzzle law” (a set of provisions concerning disciplinary liability of judges, and obliging them to disclose membership in organisations and associations). This failure led the European Commission to request CJEU approval of a financial penalty over non-compliance with the Court. The CJEU subsequently instituted a daily fine of EUR 1 million (which Poland refused to pay), which was reduced to 500,000 EUR. The interim order no longer applies, since the CJEU issued a ruling on the matter on 5 June 2023, finding the remaining Polish legislation aimed at stifling judges and preventing them from examining the status and independence of their peers to be in breach of EU law. At the time of writing, it was too early to assess Poland’s compliance with the now final ruling of CJEU in case C-204/21, although the initial reactions from Polish governmental officials indicated an unwillingness to respect the verdict.

Judicial responses (constitutional and ordinary courts)

The analysis of state practice shows that courts may undermine the rule of law or act as its guardians, even at the risk of being subject to disciplinary sanctions. This section highlights some of the troubling trends, as well as positive developments, in this respect.

Contestation of CJEU rulings by constitutional courts of EU Member States

In the past few years, constitutional courts of Member States have directly challenged the primacy of EU law and the authority of the CJEU, often giving their governments justification for refusing to comply with the CJEU rulings. Top national courts disagreeing with CJEU interpretations is not entirely new or uncommon. Cases such as the German Federal Constitutional Court’s Solange I and II judgments became the cornerstones in the development of the relationship between national law and EU law. In recent years, however, a new type of pushback has emerged, one that cannot be described as an attempt to foster a dialogue based on good faith.

In its judgment of 5 May 2020, the German Constitutional Court declared a judgment of the CJEU concerning the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) to be “simply not comprehensible and arbitrary from an objective perspective so that, to this extent, the judgment was rendered *ultra vires*”.¹⁹ In June 2021, the Commission initiated

¹⁹ BVerfG, Judgment of 5 May 2020, 2 BvR 859/15, para. 116. According to the expert, the official translation sounds more dramatic than actually intended, as the CJEU’s decision (Judgment of 11 December 2018, Case 493/17 – Weiss and Others), which was declared inapplicable by the BVerfG, was very well studied by the judges and indeed “comprehensible”. However, the legal reasoning of the CJEU was considered

infringement proceedings against Germany in connection with this judgment, particularly for undermining the “primacy, effectiveness and uniform application of Union law”.²⁰ The German government reacted in August 2021 with an official statement, which led to the closure of an infringement case. In this statement, the government formally reaffirmed the principles of autonomy, primacy, and effectiveness of EU law. It expressly recognised the authority of the CJEU in the EU, and declared its intention to use all means at its disposal to actively avoid a repetition of an *ultra vires* finding in the future.²¹ Experts have suggested that this statement by the German government is, in a sense, an empty promise. The government cannot coerce the Federal Constitutional Court to reverse its decisions or abandon its *ultra vires* and identity control. The Federal Constitutional Court monitored proper execution of the decision in question by the government bodies. In a subsequent complaint, an applicant claimed that the Bundestag (the German parliament) and the Federal Government did not take enough measures to make sure that the requirements set forth in the PSPP judgment were met. The Federal Constitutional Court declared this application inadmissible, finding that “the Federal Government and the Bundestag, in cooperation with the ECB, have taken measures to implement the judgment” (Federal Constitutional Court, Order of 29 April 2021, 2 BvR 1651/15, 2 BvR 2006/15).

It is unlikely that the Federal Constitutional Court will abandon its *ultra vires* and identity review, in light of the government’s promise towards the Commission. However, it has not activated these competences since. It has always declared that it exercises these reviews with restraint, in light of European integration, and in a cooperative manner (see the Judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21 against the Act Ratifying the EU Own Resources Decision [EU Recovery Package]).

Although the German Constitutional Court acted independently of the government, some other constitutional courts have been instrumentalised by governments to challenge the CJEU’s authority. While the PSPP judgment was an isolated case, a few constitutional courts have engaged in more systemic contestation.

In Poland, which has seen various attempts by the government to weaken checks and balances and remove judicial oversight over its actions, the government has employed a politically captured Constitutional Tribunal²² as a means of resisting the CJEU. Following a series of CJEU judgments, the Polish Tribunal issued a string of rulings that clearly attempted to counter

unacceptable and non-transparent, especially from a methodological perspective (in the German original: “*schlechterdings nicht mehr nachvollziehbar*”).

²⁰ European Commission, letter of formal notice (9 June 2021), accessible under <https://ruleoflaw.pl/wp-content/uploads/2022/02/doc-1-LFN-to-DE-EN.pdf>

²¹ European Commission, [Press Release](#); for a summary of the proceedings, see: Deutscher Bundestag, “Aktueller Begriff Europa”, Nr. 09/21 (23 December 2021); the full German statement is available online under <https://ruleoflaw.pl/wp-content/uploads/2022/02/doc-2-DE-reply-to-LFN-de.pdf>.

²² In its 2021 Xero Flor ruling, the ECtHR concluded that irregularities in appointments to the constitutional court undermined the legitimacy of the process. The ruling PiS party captured the constitutional tribunal by denying judges appointed by the outgoing parliament their seats and appointing loyal judges instead, as well as by placing one of those judges as its president.

emerging jurisprudence of the CJEU on the rule of law. The issue at hand was raised both in infringement actions by the Commission and from referrals from other Polish courts, which found elements of changes to the Polish judiciary brought about since 2015 to be contrary to EU law. In July 2021, the Polish Tribunal ruling in a case brought by the Supreme Court of Poland, itself increasingly compromised, found that interim measures issued by the CJEU in cases concerning the judiciary are incompatible with the Polish Constitution. A far more alarming move by the Polish government and the Constitutional Tribunal came in October that year, with the Tribunal handing down its judgment (K 3/21, of 7 October 2021) in a case brought forward by Poland's prosecutor general, who happened at the same time to be the minister of justice. In that judgment, the Polish Tribunal stated that the primacy of the EU law does not apply in Poland with regard to laws on the organisation and functioning of the Polish judiciary. This and earlier judgments were not, in fact, judicial reviews of the compliance of EU treaties with the Polish Constitution, as presented by the applicant and the Tribunal but, instead, an attempt to undermine the judgments of the CJEU on the Polish judiciary and provide the government with a legal excuse to ignore these decisions of the EU court.

While presented ostensibly as a clash between EU law and Poland's Constitution, this case was widely seen as a sort of "counter" to earlier CJEU judgments, formulated as a review of EU treaties, solely due to the fact that the Polish Tribunal doesn't have the competence to review the judgments of other courts.

In Hungary, the Constitutional Court got involved in connection with the CJEU's C-808/18 judgment (*Commission v Hungary*), a case concerning policies regarding border checks, asylum and immigration, in which the CJEU found Hungary failed to fulfil its obligations under EU law. The government initiated an abstract interpretation procedure at the Constitutional Court, asking whether implementing the CJEU's judgment would violate Hungary's sovereignty, its constitutional identity based on the historical constitution, and its inalienable right to dispose of its population. In [its decision](#), the Constitutional Court of Hungary did not examine the CJEU's judgment directly, and did not question the supremacy of the EU law but, essentially, allowed non-compliance under circumstances that the government can determine.

The Romanian Constitutional Court upheld controversial measures affecting the justice system and, by doing so, clashed with the CJEU. In response to the 18 May 2021 judgment of the CJEU, on 8 June 2021, the Romanian Constitutional Court issued its decision no. 390.²³ Despite the CJEU's suggestion to the contrary, the Constitutional Court [insisted](#) that the section within the Prosecutor's Office investigating judges was in conformity with the constitution, dismissing the concern that the section could be perceived as an instrument for the pressuring and intimidation of judges. With this decision, the Constitutional Court precluded national judges from applying the CJEU prescriptions if they conflicted with its rulings. It insisted that the EU law had no primacy over the Constitution, and that national courts did not have the power to examine the conformity of a provision of national law found to be constitutional with the

²³ [A Tale of Primacy Part. II – Verfassungsblog](#)

provisions of EU law. This meant, according to the Constitutional Court's logic, that, since the Constitution is above EU law, any law that is declared constitutional by the Constitutional Court acquires constitutional value. In the same ruling, the Constitutional Court accepted that Romania cannot adopt a piece of legislation contrary to its obligations as a Member State of the EU, but suggested that this prohibition would have "a constitutional limit based on the concept of national constitutional identity". The Court has not defined this concept of constitutional identity, however.

In a press release of 23 December 2021, the Romanian Constitutional Court refused to accept the judgment of the CJEU, delivered on 21 of December 2021, in the joined cases C-357/19, Euro Box Promotion and Others, C-379/19, *DNA – Serviciul Teritorial Oradea*, C-547/19, *Asociația Forumul Judecătorilor din România*, C-811/19, *FQ and Others*, and C-840/19, *NC*. It argued that the conclusions of the CJEU ruling – that the effects of the principle of the primacy of EU law apply to all organs of a Member State, without national provisions, including those of a constitutional nature, being able to hinder this, and according to which national courts are obliged to disapply, of their own motion, any national legislation or practice contrary to a provision of EU law – could have effect only after a revision of the Constitution .

The Romanian Constitutional Court reaffirmed the supremacy of the Constitution over EU law, based on the constitutional identity – a term the Court has not clearly defined, a point that has been criticised – and found the CJEU to have acted *ultra vires* when assessing the independence of national judicial bodies within the framework of the preliminary reference procedure. The Constitutional Court implicitly prohibited national courts from applying EU law once it had qualified it as lacking a basis in the Romanian Constitution, an extreme stance given that non-compliance with constitutional case law was, until recently, expressly qualified as a disciplinary offence.²⁴

The Constitutional Court had not, as of April 2023, revised its decision, which is still binding for all Romanian courts. While disciplinary sanctions have been canceled, the Constitutional Court's interpretation of those changes still leaves room for the imposition of such measures on judges. In its decision no. 520/2022, the Constitutional Court ruled that the failure to comply with its decisions could still count as a disciplinary offence and lead to disciplinary liability for the judge, if it was demonstrated that they had exercised their office in bad faith or with gross negligence. This interpretation was linked to Article 147 of the Constitution, which establishes the binding character of Constitutional Court rulings. Based on this interpretation of the Law no. 303/2022, not every failure to comply with Constitutional Court rulings would be sanctioned, but some could be.

The above trends indicate a worrying uptick in resistance against the EU's top court. In

²⁴ For an extensive analysis of the Romanian rule of law context and its impact on the referrals, and the disciplinary offence, see: Raluca Bercea and Sorina Doroga, "The Romanian Report" in Madalina Moraru, Mohor Fajdiga & Federica Casarosa (eds.) *Triial National Reports*, EUI RSC, 2022/52, Centre for Judicial Cooperation.

some cases, such as the German example, these can be seen as isolated incidents of a highly unfortunate route taken by a Member State's top court. In other instances, however, such as with Poland and Romania, these developments point to a far more dangerous trend of disregarding decisions of CJEU. The Polish case, where the government has practically weaponised the country's constitutional court against EU institutions, is particularly egregious, and holds a particular danger for the EU legal order in the event of pick-up by other EU Member States.

National judges and the preliminary reference procedure

In their questionnaires, experts from several EU Member States reported no formal or informal barriers to the submission of requests for preliminary rulings by judges under Article 267 of the Treaty on European Union (TEU), and even pointed to the rising number of such requests in the past few years. These include Belgium,²⁵ Italy,²⁶ Slovenia, and Spain.²⁷ In some countries (for example, Malta), while no particular formal or informal barriers are discernible, according to one expert, only a handful of requests for preliminary rulings have been made – five in the case of Malta (with one still pending). Preliminary references are also rarely submitted from courts in Luxembourg.

Experts from a few states (Hungary, Poland, and Romania) have highlighted formal barriers to the submission of such requests by judges. They have also reported informal barriers (such as threats and the targeting of judges through media campaigns) that may be applied, even after formal barriers are removed.

As explained above, until recently, in the context of clashes between the Romanian Constitutional Court and CJEU decisions, Romanian judges faced a choice: either follow the Constitutional Court decisions or the CJEU prescriptions. If they implemented the CJEU prescriptions, they could be subject to disciplinary proceedings for disregarding the Constitutional Court's rulings. In fact, disciplinary proceedings were opened with respect

²⁵ The expert on Belgium highlighted that the Belgian Constitutional Court often makes such requests and subsequently follows the CJEU interpretation, respecting the CJEU authority.

²⁶ The report on Italy indicated the issue of *Giudici di Pace* (temporary magistrates in charge of very small claims), claiming that their salary condition, being different to those of the permanent magistrates, constitutes a breach of their independence and of the Framework Agreement annexed to Directive 1999/70. The CJEU, through a preliminary ruling, has *de facto* supported their claim (see, *inter alia*, C-658/18); the European Commission has opened infringement proceedings in this regard. Some others *Giudici di Pace* have contested, through preliminary requests, the compatibility between the principle of judicial independence enshrined in EU Law and the COVID decrees adopted by the Italian Republic, contesting, in particular, the shift towards online and telematic procedures imposed to cope with the pandemic (see case C-220/20).

²⁷ The expert reported a rise in the number of requests for preliminary rulings since 2010, and noted that the Supreme Court is the court that submits most requests for preliminary rulings. The areas in which more preliminary rulings were requested in 2022 were harmonisation of legislation, social policy and fundamental rights.

to several judges on this account – for enforcing the CJEU judgment of 18 May 2021.²⁸ This was bound to have a chilling effect on judges and hinder the application of EU law and CJEU decisions. While disciplinary sanctions for disregarding Constitutional Court rulings have been canceled, the Constitutional Court’s interpretation of this amendment still raises questions.

Polish judges have also faced formal barriers. Up to July 2022, the provisions of the “muzzle law” provided for disciplinary liability for judges applying EU law or referring to CJEU. Despite this, Polish judges continued submitting requests for preliminary rulings to the CJEU. The 2022 reform of the law on the Supreme Court and ordinary courts removed these grounds for disciplinary liability, effectively removing the obstacle. Nevertheless, judges continue to face harassment through informal channels, such as through calls by the captured National Council of Judiciary for action to be taken against “activist” justices.

In responding to the questionnaire, the Hungarian expert also referred to formal barriers, particularly the possibility a request for a preliminary ruling would be declared unlawful, on the grounds that it is irrelevant to the dispute, and the possibility that judges could be subject to disciplinary proceedings for seeking such rulings. The CJEU judgment C-564/19 declaring this practice contrary to EU law remains to be implemented, as explained above.

Formal obstacles were also named by the expert on Sweden, suggesting that the requirement of leave to appeal, in combination with a strong culture of hierarchy between the levels of courts, might explain the low number of cases referred to the CJEU.

For Slovakia, the expert there reported an internal debate about the appropriateness of initiating disciplinary proceedings against a judge who submitted a case to the CJEU, based on the culpable delays in proceedings (with the question having no connection to the case pending).²⁹

Experts from other countries brought up a range of other barriers, such as judges’ fear that their careers would end or that they would be subject to harassment (Bulgaria), the complexity of the procedure and its being time-consuming (Czechia), the national legal culture³⁰ (Portugal), and courts being under-resourced (Finland). The expert on Lithuania highlighted that the Supreme and Supreme Administrative Courts have made roughly two-thirds of references for

28 To date, there are already disciplinary proceedings opened by the Judicial Inspectorate against the judge from the Pitești Court of Appeal for directly applying the EU law and the ECJ judgment. Disciplinary proceedings have also been brought against a judge from Oradea, who sent the C-291/19 application for preliminary ruling (one of the applications that led to the judgment of 18 May), and who was convicted to a disciplinary penalty of 25 percent reduction of her salary for a three-month period, which was confirmed by the HCCJ.

29 The expert noted a preliminary question posed on this in April 2023 – C-232/23 – Štíkel. The activity of the judge in question is problematic, e.g., she refused to adhere to anti-pandemic measures, was publicly questioning the authority of other courts, etc. See: <https://hnonline.sk/slovensko/96053562-antiruskarska-sudkyna-sa-postavila-pred-sud-po-boku-s-harabinom-jej-mama-bojovala-proti-jeho-praktikam>

30 The expert noted that while the situation has been changing slowly, Portuguese judges do not use EU law much.

preliminary rulings, and that they employ consultants specialised in EU law. A likely reason for the reluctance of lower courts to refer, according to the expert, is their excessive workload, combined with underfunding and lack of access to specialised consultants that are adequately trained in EU law issues. Judges reportedly say their caseloads would not be reduced if they decided to make a reference, even though it is a complicated procedure. In other words, a judge's decision to make a reference for a preliminary ruling is not recognised as sufficiently significant so that their other workload would be at least temporarily reduced. The judge is thus expected to find extra time in order to make a reference for a preliminary ruling.

In addition, the Supreme and Supreme Administrative Courts seem to take their duty to refer particularly seriously after the *Baltic Master Ltd.* [case](#), in which the ECtHR found Lithuania in breach of Article 6 of the ECHR, where the Supreme Administrative Court had failed to present adequate arguments for its refusal to make a reference for a preliminary ruling.

After this decision, the Court reopened the proceedings and agreed to make a reference for a preliminary ruling. Despite an interpretation that was favourable to the complainant, however, it decided that there were no legal grounds to change the result of the case, and substantiated its decision on an alternative legal provision that was not a subject of a reference for a preliminary ruling.

The expert on Croatia highlighted that the Croatian legislation previously allowed for appeals to stay proceedings and submit a preliminary reference to the CJEU. The Supreme Court could annul such submissions, holding that the answers to the questions of interpretation of EU law were not relevant for the case pending before the referring court. The CJEU found that such rulings of the Supreme Court were not in line with the case law on the discretion of referring courts under Article 267 (2) of the TEU. Following this episode, the legislature amended the criminal and civil procedural codes. As they stand now, they do not allow for appeals against the decisions of national courts to stay proceedings and submit preliminary references. As highlighted by the expert, however, the law on administrative disputes still allows for appeals. This means that, in the context of the administrative disputes, appellate courts could still erroneously interfere with the discretion of lower courts under Article 267(2) of the TEU, which may, in turn, influence the decision of some of these courts on whether to refer the matter to the CJEU.

The European Commission and implementation of CJEU rulings

The European Commission refers to the CJEU rulings in its rule of law reports, highlighting the failures to implement specific CJEU prescriptions or giving general guidance on reforms in light of the CJEU judgments. However, this coverage still remains sporadic. The Commission does not analyse state performance systematically as regards the overall level of (non-) compliance. It makes sense to highlight the general record in terms of the level of implementation of CJEU

rulings in areas covered by the reports. This would give a more holistic representation of the level of implementation. At this point, such an approach is warranted towards a handful of states (at a minimum, Hungary, Poland, and Romania) with several rulings pending implementation.

The European Commission has also started using other tools more proactively to fulfil its role as a guardian of the treaties. It has reacted to some of the alarming developments, for example, by launching infringement procedures against both Germany and Poland over their challenges against the CJEU. In the German case, the infringement procedure has since been closed, with the Commission finding that the ultimate outcome of the situation following the PSPP judgment led to no lasting damage to the EU's legal order, and that the issue was resolved. On 22 December 2021, the Commission launched an infringement procedure in connection with the decisions of the Polish Constitutional Tribunal from 14 July 2021 and 7 October 2021. According to the Commission, the Tribunal breached the general principles of autonomy, primacy, effectiveness, uniform application of EU law, and the binding effect of rulings of the CJEU. In view of irregularities in the appointment procedures of three judges and in the selection of its president, the Commission concluded that the Constitutional Tribunal no longer met the requirements of an independent and impartial tribunal.³¹ On 15 July 2022, the Commission decided to send a reasoned opinion to Poland, to which Poland replied on 14 September 2022, rejecting the reasoning of the Commission. The Polish reply did not address the Commission's concerns. In February 2023, the Commission decided to take Poland to the CJEU for violations of EU law by the Tribunal.

Previously, the Commission initiated infringement procedures against Poland and referred cases to the CJEU in connection with the flaws of the disciplinary regime and other issues related to the justice system.

The Commission continues to maintain the Article 7 of the TEU procedure against Poland, under which it considers a wide scope of Polish rule of law to be in crisis, including the status of judges and the disciplinary liability system. This procedure is, however, effectively stalled, as no advance has been made on possible recommendations within the scope of Article 7(1) of the TEU, and any possible vote on an Art 7(2) of the TEU sanction is politically improbable, given that the unanimity requirement means Hungary and Poland can cover for each other in a hypothetical Council vote.

Aside from the above, the Commission has so far withheld the payout from the Recovery and Resilience Facility to Poland over the rule of law concerns, including the disciplinary system for judges. Poland attempted to alleviate these concerns and achieve a payout from the recovery fund with a new December 2022 law that envisioned moving the disciplinary proceedings regarding judges out of the Supreme Court altogether, but this attempt has

³¹ This is also in line with the Committee of Ministers calls to the Polish authorities, in the context of the [Xero Flor](#) case, to take rapid remedial action to ensure the Constitutional Court is composed of lawfully elected judges.

stalled after President Duda refused to sign the law into force, and instead sent it for review by the Constitutional Tribunal, where a case was still pending at the time of answering the questionnaire.

The European Commission has recently been praised for showing assertiveness, for example, in addressing the rule of law issues through pushing for legislative reforms that are in line with CJEU prescriptions. Alongside other instruments, it has used the [conditionality](#) regulation, a tool meant to protect the financial interests of the EU, to address systemic corruption in Hungary. The EU has also included a set of benchmarks, including a few on the judiciary, in the Recovery and Resilience Facility plan, and made payments under the Facility conditional on meeting these milestones. One of the milestones is [related](#) to the restoration of the right of Hungarian judges to make preliminary references to the CJEU.

Some countries experiencing rule of law declines have received much greater attention than others. While Poland and Hungary have received some attention, at least with regard to threats to judicial independence and corruption, rule of law issues in other countries, such as, for example, Bulgaria and Greece, have remained mostly under the radar. Also, it seems the Commission has paid a great deal of attention to certain issues, and far less to others. [Informal capture of media](#) is often claimed to be in this latter category, as regards Poland and Hungary, for example.³²

Demanding legislative reforms can be central to reversing the rule of law decline, especially in countries where the ruling elites have instrumentalised laws to capture institutions. Hungary is a good example of this. In other countries, where the ruling parties do not have as much control over legislative processes, informal methods of capturing independent institutions might be more prevalent. It might be critical, therefore, to make a distinction as to where the problems lie, and to make recommendations accordingly.

Some expert contributions to the study called for the exercise of caution by the Commission in its assessment of states' attempts at reforms, so as to identify cases of disguised non-compliance – where reforms do not substantially change the status quo, and where controversial institutional arrangements are replaced by new ones that are not all that different.³³ The Commission should approach the governments' use of comparative arguments to justify reforms carefully if they appear to be misleading or false. It is becoming common for governments to point fingers at other countries, typically well-developed democracies, to argue that the arrangements they have introduced are similar and, hence, defensible. Since such comparative arguments are often manipulative, selective and contextually misleading, they need to be unpacked and debunked.

32 The infringement action was initiated against Hungary with regard to Klubradio, years after the radio station got in trouble.

33 The case of the Polish Professional Liability Chamber of the Supreme Court, which replaced the Disciplinary Chamber, is one such example, highlighted by the Polish expert. There are a few more examples from Hungary.

The Commission should also be wary of partial compliance,³⁴ where the problems are systemic, but the solutions proposed only address some aspects of broader problems in an isolated manner. This means that any legislative initiative should be examined critically and followed up to check on the implementation before making any definite assessment. Otherwise, there is a risk of the approval of inadequate reforms, thereby hindering any further efforts to improve the system and disempowering actors that seek such change at the national level.

A few experts warned against approval by the Commission of institutional arrangements based on formal consistency with “standards”, without looking beyond the formal façade and assessing the functioning of those arrangements in practice.³⁵ It may very well be that, while looking good on paper, the arrangements reinforce existing informal power structures, to the detriment of the rule of law. By marking such formal compliance as progress, the Commission risks legitimising malfunctioning institutional arrangements and hindering any further change.³⁶

While legislative changes are often necessary, however, they are hardly sufficient. Greater attention needs to be paid to *de facto* implementation of those changes, including any informal practices. A portion of the rule of law problems are due to the informal power of ruling elites and the informal practices they engage in (Bulgaria and Slovenia,³⁷ for example). Informal power can be acquired through media capture or through installing a loyal cadre in the key positions in the judiciary. As a result, political dependencies can emerge, even if formal guarantees are in place to safeguard media freedom or judicial independence.

34 The experts identified the Commission’s lack of explicit action on partial compliance or inadequate compliance with the rulings (e.g., Poland, and C-791/19) as a problem.

35 As an example, the expert from Bulgaria argued that the Commission supported controversial reforms increasing the procedural powers of the Prosecutor’s Office, thereby worsening an already existing problem. The same expert expressed concern about the political subordination of the judicial council and the failure of the Commission to adequately highlight political dependencies in its reports or otherwise, marking the judicial council reform as progress instead. A related concern raised was that the Commission did not sufficiently highlight judges’ complaints about harassment – through bogus disciplinary and criminal proceedings, media campaigns, threats of physical violence, etc.

36 Experts have criticised the Commission’s overly positive reports on Bulgaria and Romania, and the closure of CVM with regard to Romania.

37 The expert on Slovenia wrote: “Most of the cases of tampering with institutions and sectors of Slovenian democracy, which raise serious doubts about the compliance with the rule of law, however, do not take place formally, rather by informal, sociological practices, which are naturally hardly identifiable by the European commission. This also explains the scarcity of cases brought against Slovenia.”

Systemic rule of law issues in EU Member States pending action by the European Commission

The experts' questionnaires highlighted a range of significant and/or systemic issues that, according to experts, have not received sufficient attention from the Commission so far.

COUNTRY	ISSUE
Poland 	<ul style="list-style-type: none">- Politicisation of the Prosecutor's Office and the concentration of power and competences in the prosecutor general (who is, at the same time, the minister of justice), resulting in the repression of prosecutors critical of the government and failure to investigate cases problematic for the ruling camp.- The situation of state-owned public media: turning public media into the vehicles of pro-governmental propaganda, with no political balance and criticism of the government; expansion of state-owned media through aggressive buyouts of private outlets and using these outlets to advance partisan goals.
Hungary 	<ul style="list-style-type: none">- Threats to the independence of the ordinary judiciary .- Capturing the Constitutional Court, by changing the rules on the nomination of its members.- Failure to handle corruption threatening the EU's financial interests (even if this has been partly addressed under the Conditionality Regulation).- The severe distortion of media pluralism.- Changing the electoral system to favour the ruling parties.
Croatia 	<ul style="list-style-type: none">- Internal individual judicial independence ³⁸ (a preliminary reference asking whether certain provisions of national law are consistent with

38 One of the provisions subject to criticism is Article 40 (2) of the Law on Courts, which provides that “legal positions” adopted at plenary meetings of all judges or sections of Croatian high courts bind individual chambers and judges of those courts or sections. The second provision is Article 177(3) of the Rules of Procedure of the Courts, which provides that the decision of a court of second instance is not finalised, i.e., published and delivered to the parties, until a judge appointed by the president of that court – the so-called ‘registrations judge’ – confirms it. The registrations judge examines the legal merits of every

COUNTRY	ISSUE
	<p>the EU law requirements and CJEU case law is currently pending).³⁹</p> <ul style="list-style-type: none"> - A checks and balances issue, which concerns the relationship between the executive branch and the judiciary.⁴⁰ - The executive's control over the financial resources of the judiciary (lack of financial autonomy), leading to low salaries, a shortage of qualified people willing to enter the judiciary, with long term effects on the overall efficiency and quality of judicial decisions (from the judges' perspective).
<p>Portugal</p> 	<ul style="list-style-type: none"> - Further inquiry into the allegations of corruption in the judiciary: A 2022 survey by the European Network of Councils for the Judiciary (ENCJ) signals that 26 per cent of Portuguese magistrates believe there is corruption in the judiciary. The only other countries with a higher percentage of judges attesting to the same are Italy (36 per cent) and Croatia (30 per cent). This coincided with the disclosure of allegedly corrupt practices in the second instance court of Lisbon.
<p>Slovenia</p> 	<ul style="list-style-type: none"> - <i>Ex lege</i> and imminent dismissal of all directors, managing and supervisory organs at the national broadcaster, which the new government put forward, in order to, as they claim, “de-politicise”

judgment, with a view to ensuring the consistency of case law. If they consider that a judgment is based on erroneous interpretation of the law or departs from the earlier holdings of the same court, or a section of that court, the registrations judge may refer the matter back to the deciding judge or chamber, with comments on how the original judgment should be amended. If the deciding judge or chamber disagrees with the registrations judge, the latter can refer the issue to the meeting of a relevant section of the court, which can then issue binding “legal position”, under the aforementioned Article 40(2) of the Law on Courts. These meetings of the sections of courts happen behind closed doors, are not governed by the national procedural rules, and the parties to the original proceedings have no insight or say in these meetings.

³⁹ Case C-727/21 *Udruga KHL Medveščak Zagreb*, request for a preliminary ruling of 30 November 2021.

The expert suggests that the Court of Justice will conclude that the national provisions in question are contrary to EU law requirements of judicial independence, at least for the manner in which they have been employed so far by Croatian high courts.

⁴⁰ Judges reportedly see the setting by the executive of performance criteria for judges under Article 79 (1) of the Law on Courts as problematic. These criteria determine the number of decisions judges are individually obliged to deliver during in the calendar year. For their part, judges openly complain that these criteria lead to overburdening, which results in the prolonged duration of judicial proceedings. In their view, judges would be on time to meet the set requirements, but do not have any incentive to do so before the deadline, since, by doing so, they would only risk being given an additional number of cases to handle by the court president. Hence, the expert wrote, these framework criteria potentially enable the executive to exert pressure on the judiciary.

COUNTRY	ISSUE
	<p>the organs “politicised” by the previous government. At the time of publication, the case is pending before the Constitutional Court, which stayed the application of the law until the final ruling on the merits.</p> <ul style="list-style-type: none">- Informal practices undermining democratic institutions.- Systemic discrimination against private universities, undermining academic freedom.
<p>Slovakia</p> 	<ul style="list-style-type: none">- Extensive power of the prosecutor general to annul prosecutorial decisions before they reach the court,⁴¹ with several criminal proceedings of high-level corruption cases being terminated through the application of this provision,⁴² without any possibility of a judicial review. The issue becomes more complicated, as the prosecutor general assesses the evidence in some cases. Details of the annulment procedure of valid decisions in preliminary proceedings are regulated by the prosecutor general himself, through an order. Therefore, the prosecutor general is solely responsible for applying this extraordinary remedy, and for deciding in which cases to do so. This order contains a demonstrative list of decisions that can be applied under Section 363 of the Criminal Procedure Code – as the most problematic of these appears to be an annulment of an indictment order, which was added to the list only at a later stage.⁴³ Even the Constitutional Court of Slovakia expressed its concerns about the application of this extraordinary remedy in connection to procedural decisions.⁴⁴
<p>Bulgaria</p> 	<ul style="list-style-type: none">- Need to address excessive prosecutorial powers, lack of checks and balances.- Politically controlled Supreme Judicial Council and political influence over courts, political dependencies; judges subject to political harassment (through bogus disciplinary or criminal proceedings,

⁴¹ Section 363 of the Act. No. 301/2015 Coll. Criminal Procedure Code.

⁴² Involving former Prime Minister Robert Fico and former Minister of Internal Affairs Robert Kaliňák (both from the SMER-SD party) in November 2022 (the so-called Twilight case), the governor of the National Bank of Slovakia and ex-Minister of Finance Peter Kažimír (SMER-SD party).

⁴³ [Order no. 3/2012 of the Prosecutor General of the Slovak Republic](#), dated 29 February 2012, amending the order of the Prosecutor General of the Slovak Republic, Lt. no. 4/2006 of 31 January 2006 on the procedure of prosecutors in criminal proceedings on extraordinary remedies.

⁴⁴ Resolution of the Constitutional Court of the Slovak Republic, II. ÚS 494/2014 of 22 August 2014.

COUNTRY	ISSUE
	<p>or the threat thereof, media campaigns, and threats of physical violence).</p> <ul style="list-style-type: none"> - Avoidance of regular competitions for appointments/promotions, and use of secondments instead, allowing for the capture of various courts (The Sofia Court of Appeals named as an example), the president being in a position to then compose panels with seconded judges, thereby compromising the fairness of proceedings.
<p>Belgium</p> 	<ul style="list-style-type: none"> - Length of court proceedings. - Safety of journalists from abuse and threats, online and offline. - Reception of asylum seekers in Brussels (no housing provided while they wait for the result of asylum applications), non-execution of domestic courts' orders to provide temporary housing by the authorities.⁴⁵
<p>Czechia</p> 	<ul style="list-style-type: none"> - Reform of the judiciary: need for follow up, although the legislation was amended to address the lack of transparency in the selection and appointment of judges to individual courts, the system is <i>de facto</i> still rather decentralised, allowing for large informal and <i>de facto</i> influence on judges. While experts do not necessarily see Czechia's decision not to establish a judicial council as problematic, some mechanisms of judicial selection and accountability might eventually be viewed as problematic from the perspective of the current case law of the CJEU and ECtHR (the same would apply to Germany or any other country without institutionalised judicial self-governance). - Prosecutorial independence: Although there is a discussion on an amendment on the selection of prosecutors and the general prosecutor, the prosecution is institutionally dependent on the government at this time. - Corruption: The ongoing corruption case of former Prime Minister Andrej Babiš (investigated also at the EU level, the court case is open and, so far, the case is readable as an individual, not the state, violating EU law).

⁴⁵ The issue has already been brought before the ECtHR, which has also issued interim measures (f.e.: *Al-Shujaa and others v. Belgium*, nos. 52208/22 and 142).

COUNTRY	ISSUE
<p data-bbox="261 322 331 353">Italy</p> 	<ul data-bbox="432 322 1353 577" style="list-style-type: none">- Concerns regarding judicial independence, in view of the secondment of the members of the Council of State (the Supreme Administrative Court) to legislative offices of different ministries and governmental departments, and them returning to the judiciary after finishing those mandates, where they will most likely judge the legislation for which they contributed to the drafting.
<p data-bbox="229 640 363 672">Germany</p> 	<ul data-bbox="432 640 1393 1787" style="list-style-type: none">- Broad police competences lacking procedural safeguards; police checks gone undocumented; need for the Commission to request detailed data not only on the number of checks conducted, but also on the origin, religion, perceived race and ethnicity of the persons affected by checks; police controls and random identity checks being conducted without suspicion or concrete grounds of danger at certain places (railway stations, airports).⁴⁶ As these checks are not documented by the police, the systemic discriminatory pattern of the exercise of these powers is difficult to ascertain.- Increasingly far-reaching powers given to law enforcement officials under counter-terrorism law, even before danger for public places or people has become concrete. Of special concern is preventive police custody, which in Bavaria, for example, can be extended to up to two months (Art. 17, 20 Bavarian Police Act, BayPAG). In this regard, the Human Rights Committee also recently raised concerns vis-à-vis Germany (CCPR/C/DEU/CO/7, 30 November 2021, paras. 14-15).- No requirement for high-level decision-makers in the executive branch to declare their financial interests on a regular basis. Germany has been criticised on this account by the Group of States against Corruption (GRECO) of the Council of Europe. Such transparency requirements only exist for members of the German parliament. Also, the waiting period for employment of former state secretaries and heads of state department in the private sector after the termination of their civil servant status is too short (12–18 months). If the waiting period is not effectively monitored, there is, therefore, the high risk of and concern about undue influence.

⁴⁶ In October 2022, the ECtHR found that German state authorities had failed to comply with their duty to take all reasonable measures to ascertain, through an independent body, whether an identity check was discriminatory. The authorities regularly fail to carry out effective investigations in this regard (see ECtHR, Judgment of 18 October 2022, 215/19 – Basu v. Germany).

COUNTRY	ISSUE
<p>Malta</p> 	<ul style="list-style-type: none">- Concerns, as highlighted in the European Parliament Resolution of 22 October 2022, on the rule of law in Malta, including allegations of money laundering and corruption in relation to the ElectroGas deal” (EP Resolution, para. 6); and the “reported lack of cooperation from Maltese authorities with the EPPO in ongoing cases” (EP Resolution, para. 11).
<p>Luxembourg</p> 	<ul style="list-style-type: none">- Lack of available data, making it difficult to monitor violations.- The absence of judicial decisions on cases of discrimination against women, even though there are laws transposing EU legislation addressing this topic, as highlighted by the Committee on the Elimination of Violence against Women (CEDAW). This, according to the expert, suggests that there is an issue at the level of enforcement, and relevant actors need support to enhance their capacity to act.

Summary of Findings

Trends in political responses

Four types of political responses to the CJEU rulings emerge out of this study of state performance:

- (a) **Outright refusal** to comply, and complete inaction;
- (b) **Sham or façade reforms** that do not change the status quo substantially (essentially **disguised non-compliance**). This may take the form of dismantling one body, only to establish a similar one with the same problematic features, or canceling a criticised rule, only to reintroduce it in a slightly different form.
- (c) **Partial or incomplete implementation** – reform addresses some of the shortcomings in law or practice, but is insufficient, especially in view of the systemic nature of problems.
- (d) **Protracted reform processes**, with Member States generally expressing commitment to the reform, bringing forward various legislative proposals, but not showing any tangible progress.

Trends in the judicial responses

- Constitutional courts of several EU members have been contesting CJEU judgments. Judicial contestation orchestrated by the government through the capture of respective courts is alarming, as among other, it endangers the uniform application of EU law and cooperation between the CJEU and national courts.
- The study allows for discernment of formal and informal barriers faced by judges committed to the application of the EU law and to seeking preliminary references in quite a few EU Member States.

Messages to the Commission

Based on the above study, the Commission might be advised to:

- Use various tools available more consistently across countries and themes.
- Ascertain whether the problem lies in the use of the law or in informal practices as means of capturing or hindering independent institutions and weakening checks and balances; formulate its demands or recommendations accordingly.

- Be wary of: (a) sham reforms that do not change the status quo significantly, and essentially replace one problematic arrangement with another one; (b) partial, fragmented reforms that address only limited aspects of broader systemic problems; and (c) protracted reforms with no tangible progress, even if there is no open contestation and commitment is expressed.
- Be wary of the abuse of comparative arguments by governments when defending reforms, and unpack those arguments.
- Avoid premature approval of proposed or adopted reforms, even if they seem good on paper, keeping in mind that, even if given arrangements work reasonably well in other contexts (typically in well-functioning democracies), they might not work in a given context. This is to make sure that inadequate reforms are not legitimised and further efforts to change them are not hindered.

Recommendations for Actions by the EU

1. Analysing the level of implementation of the ECtHR and CJEU judgments in EU Member States in its annual Rule of Law Report, and including specific recommendations

a) Factoring the issue of non-implementation into the annual EU Rule of Law Report

The EU's annual Rule of Law Report should analyse the level of implementation of ECtHR and CJEU judgments in EU countries, while also setting out implementation recommendations for each Member State.

The systemic non-implementation of ECtHR and CJEU judgments is a profound sign that human rights, democracy, and the rule of law are under threat. The EU mechanisms relevant to the rule of law should, therefore, consider this non-implementation to provide a holistic representation of the level at which Member States uphold these values.

For the first time, in 2022, the European Commission's Rule of Law Report took into account the overall levels of implementation of leading judgments of the ECtHR. This development in the EU's rule of law reporting has been a welcome step in enhancing both the EU's rule of law procedures and the implementation of judgments of the ECtHR.

By maintaining this approach in rule of law reporting, the EU has the opportunity to monitor and assess the year-by-year evolution of states' overall rule of law records, while creating a systematic and consistent long-term approach to holistic rule of law monitoring.

Therefore, the EU should not stop at incorporating this implementation data into its annual Rule of Law Report. It should also zoom in on the judgments

of the CJEU, particularly those related to the four areas covered by the reports, highlighting the number of judgments and the delays in compliance. This would allow for a holistic representation of the level at which Member States implement the rulings of the two European Courts, thereby strengthening the rule of law.

The EU should, therefore, systematically factor the non-implementation of both European Courts' judgments into its assessments of the state of the rule of law in EU member states. In particular, its annual Rule of Law Report should maintain the analysis of the overall level of implementation of ECtHR judgments in EU Member States, as is done in this report. The Rule of Law Report should also take note of crucial cases of non-compliance with CJEU judgments, and capture the trend of systemic pushback against the court coming from Member State authorities.

b) Elaborating recommendations to Member States on non-implementation

The EU annual Rule of Law Report should also include sets of specific recommendations for each state. The Commission has not yet issued specific recommendations regarding compliance with ECtHR and CJEU rulings. In future reports, the Commission should also include specific recommendations for: (a) states with particularly concerning records of ECtHR implementation overall; and (b) states with ECtHR and CJEU judgments pending implementation concerning the areas covered by the Report, especially the independence and impartiality of the judiciary.

I. Recommendations to states with particularly concerning records of ECtHR implementation overall

The states with particularly concerning records of ECtHR implementation overall are Bulgaria, Hungary, Italy, Poland, and Romania. All of these states have over 30 leading cases pending, and the proportion of leading cases pending from the last ten years is above 30 per cent. The EU Rule of Law Report chapters for each of these states should include specific recommendations for the governments of the states to significantly improve the overall implementation of ECtHR judgments.

II. Recommendations to states with ECtHR judgments pending implementation concerning independence and impartiality of the judiciary

There is a partial overlap between the states with particularly concerning records of ECtHR implementation overall and those with ECtHR judgments pending implementation concerning independence and impartiality of the judiciary. Such ECtHR judgments are pending implementation in Bulgaria, Hungary, Poland, and Romania. A detailed list of cases is available in Appendix 4.

Poland has the most concerning ECtHR implementation record in terms of judgments concerning independence and impartiality of the judiciary, with four leading rule of law judgments pending implementation: *Xero Flor w Polsce sp. z o.o v. Poland*, which concerns grave procedural breaches in the appointment of a judge on the Constitutional Tribunal panel,

in violation of the right to a tribunal established by law; *Broda and Bojara v. Poland*, which concerns the premature termination of the mandates of high-ranking judges by the minister of justice, without reasons and without hearings; *Reczkowicz v. Poland*, concerning grave irregularities in the appointment of judges to the newly established Disciplinary Chamber in the Supreme Court, in violation of the right to a tribunal established by law; and *Grzęda v. Poland*, which concerns the premature termination of the mandate of a Supreme Court judge who had been elected as judicial member of the National Council of the Judiciary, without the possibility of judicial review.

In **Hungary**, the well-known *Baka* case, which concerns the undue and premature termination of the president of the Supreme Court's mandate, through targeted legislative measures, has been pending implementation since 2016. The implementation of this judgment requires measures to ensure, *inter alia*, "procedural fairness in cases involving the removal of a judge from office, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of the office of a judge, and of effective and adequate safeguards against abuse when it comes to restrictions on judges' freedom of expression". The Hungarian authorities have, on multiple occasions, requested the Committee of Ministers to end supervision of the case, without having taken necessary measures to implement the case.

In **Bulgaria**, the *Miroslava Todorova* judgment has been pending before the Committee of Ministers since January 2022. The case concerns the bringing of disciplinary proceedings and sanctions against the president of the judges' association, in retaliation against her criticism of the Supreme Judicial Council (SJC) and the executive, constituting a restriction of her freedom of expression for unauthorised purposes (to penalise and silence her on account of her criticism of the SJC and the executive). The Bulgarian authorities have already requested, in September 2022 to end the supervision of this case, arguing that it is of an isolated nature.

At the beginning of 2023, **Romania** had three pending leading judgments concerning the independence and impartiality of the judiciary. *Brisic v. Romania* concerns the undue removal from office of a chief prosecutor for exercising his freedom of expression by making legitimate statements to the press about an ongoing investigation. The *Camelia Bogdan* case concerns the impossibility for judges to contest their automatic suspension from duty during the examination of their appeal against exclusion from the bench.

The *Kovesi v. Romania* case, which concerned the premature termination of the mandate of the chief prosecutor of the National Anticorruption Directorate, due to her expressing views and criticism of legislative reforms relevant to the judiciary, was closed in early June 2023 by the Committee of Ministers. Civil society concerns remain, however, about the ongoing arbitrary sanctioning of judges.

All of these cases are important breaches of the rule of law. In order for the judgments to be fully implemented, the underlying problems identified must be addressed through wider

reforms. The EU rule of law reports should explicitly recommend that the judgments in these cases are implemented fully and promptly.

2. Consistently using other tools available to tackle significant failures to implement ECtHR and CJEU judgments

Non-implementation of judgments of the European Courts is not only an issue concerning the specific matters covered by the judgments, but also a general rule of law problem that threatens the respect for Article 2 of the TEU in EU Member States. To ensure the compliance of EU Member States with common values and to counter attempts to damage the rule of law, the European Commission should mainstream the issue of non-compliance with CJEU and ECtHR judgments across its entire rule of law toolbox and other policies and tools that, despite serving other policy goals, include respect for the rule of law as one of their underlying conditions and parameters. This concerns both descriptive tools present in the EU rule of law toolbox, such as the EU Justice Scoreboard, and financial instruments, such as cohesion funds and the Recovery and Resilience Facility, as well as the rule of law conditionality procedure. Including an analysis of the respect for judgments of the European Courts in all these tools and any new procedures and measures would strengthen the impact of the EU's rule of law enforcement.

In assessing the degree of compliance of EU Member States with judgments of the CJEU and ECtHR, the Commission should pay particular attention to attempts by Member States to only partially implement the court judgments, and attempts to negotiate a “compromise” on implementation. European Court judgments must be implemented to the fullest extent and ability of the Member State, with delayed or partial implementation being acceptable only in extraordinary circumstances. Inadequate reforms and half-hearted attempts to pay lip service to court judgments should not be accepted as compliance under any circumstances. Similarly, superficial implementation, followed by the introduction of new laws and policies that suffer from the same deficits as identified earlier by the European Courts, in particular, should be monitored and followed up on.

3. Raise concerns about ECtHR and CJEU non-implementation with Member State governments and national parliaments

The EU should continue to pay attention to the non-implementation of ECtHR and CJEU judgments beyond its annual Rule of Law Report, and take opportunities to raise concerns based on the data in the Report in their meetings with Member State governments and national parliaments.

Raising ECtHR and CJEU non-implementation concerns in bilateral contacts with Member State governments and national parliaments is an impactful way to directly engage national authorities who have a central role in the implementation process of European Court judgments. This type of approach is key to ensuring that relevant ministers and members of parliament are aware of the obligations they must fulfil to implement European judgments, and are encouraged to take the necessary measures to do so, especially when these require legislative reforms and public policies.

This type of engagement will go beyond the European Commission's Rule of Law Report findings and recommendations, increasing its impact on the overall rule of law record of Member States through a more targeted approach. EU bodies with mandates concerning rule of law and human rights issues are in the best position to bring up these concerns during bilateral contacts, based on the data in the Rule of Law Report, and to set out recommendations in their contacts with relevant state authorities. Following up in a consistent manner on national records of non-implementation can bring forward concrete results.

4. Support for civil society and Council of Europe cooperation projects

The EU should fund civil society activities designed to enhance ECtHR and CJEU judgment implementation, as well as Council of Europe activities aiming to promote ECtHR judgment implementation.

Civil society activities

There are a wide variety of organisations across Europe that are working on the implementation of judgments of the ECtHR and the CJEU.

Their work demonstrates that civil society has a vital role to play in the implementation of court judgments. Civil society activities include calling for the formation of institutional structures to systematically promote the implementation of ECtHR and CJEU judgments; calling for the

implementation of individual judgments in the media and through advocacy with the national executive, parliament and/or judiciary; monitoring of the implementation plans published by governments, to assess whether they are sufficient to ensure timely and effective execution of judgments; and engaging with the implementation supervision process at the Council of Europe's Committee of Ministers and with the European Commission.

The work of civil society in this area is therefore crucial. It is not, however, well-supported. A survey of European human rights NGOs indicated that the most common reason why civil society organisations did not do more to promote the implementation of ECtHR judgments in their country was a lack of funding for such work.⁴⁷ To the knowledge of the authors of this report, there is no large-scale funding mechanism devoted to supporting civil society's work to promote the implementation of ECtHR or CJEU judgments.

The EU's Citizens, Equality, Rights and Values Programme (CERV) has been provided with a significant grant-making budget to assist civil society in its activities to protect human rights, democracy and the rule of law. The CERV calls for tenders published to date, however, focus on the EU Charter of Fundamental Rights⁴⁸ or citizen's participation in democracy – not the implementation of judgments of the ECtHR or the CJEU.

This report, therefore, recommends that the CERV programme, or other EU grant-making programmes, initiate calls for proposals that are specifically designed to support European civil society in its work to promote the implementation of judgments of the ECtHR and CJEU.

Council of Europe activities

The Council of Europe is the body responsible for supervising the implementation of judgments of the ECtHR. For the period 2021-2024, the Committee of Ministers of the Council of Europe have named the leading strategic priority of the organisation to be the implementation of the ECHR at the national level – including the full implementation of ECtHR judgments.⁴⁹

This prioritisation is reflected in the recommendations of the [Council of Europe's High Level Reflection Group Report](#) published in October 2022, which addresses the implementation of ECtHR judgments. Furthermore, following the 4th Summit of the Council of Europe, in the Reykjavík Declaration, the heads of state and government underlined the responsibility of national authorities for complying with the judgments of the Court, and affirmed the need to

⁴⁷ External Evaluation of the European Implementation Network, July 2019. The respondents to the survey were 27 human rights organisations from across Europe that engage in work to promote the implementation of ECtHR judgments. They were asked the question, “[w]hat are the main barriers and limitations (if any) that prevent you/your organisation from engaging in advocacy to advance the implementation of ECtHR judgments?” The majority of organisations identified a lack of funding for this work.

⁴⁸ For example, the call CERV-2023-CHAR-LITI.

⁴⁹ See: Committee of Ministers Decision CM/Del/Dec(2021)131/2a, “The Strategic Framework of the Council of Europe and forthcoming activities”, 21 May 2021, Hamburg.

“scale up co-operation programmes to assist Member States in the implementation of ECtHR judgments”.

These conclusions will lead to a wide range of Council of Europe initiatives to promote ECtHR implementation, including technical support projects, a larger budget for the Department for the Execution of Judgments, and parliamentary co-operation initiatives. The ambitions of these projects will be far greater than the budget available to enable them to happen. As the main funder of Council of Europe project activities, the EU will have a key role in supporting new initiatives to promote ECtHR implementation and making sure that these happen in practice.

Appendix 1

Methodology

Methodology for the ECtHR judgments

The data for this report is accurate as of 1 January 2023. The number of pending leading judgments in each country has been taken from the [Council of Europe’s 2022 Annual Report for the Supervision of Judgments and Decisions of the European Court of Human Rights](#). The other data points have been calculated using data from the Council of Europe’s “Hudoc Exec” website.⁵⁰

When reading the report, it is important to bear in mind the following:

- The data in the report refers to “leading” ECtHR judgments pending implementation, rather than all ECtHR judgments pending implementation. After the ECtHR issues a final judgment that identifies a violation of the ECHR, the case is classified by the Council of Europe’s Department for the Execution of Judgments as “leading” or “repetitive”. Judgments that identify new structural or systemic issues are classified as “leading”. Subsequent judgments that concern an issue already identified in a leading case are classified as “repetitive”. In order to successfully implement a leading case, states must ensure that the underlying problems that caused the ECHR violation have been resolved. This often requires changes to laws or government practices. If the Convention system is to produce real human rights protections, states have to carry out substantive changes in response to the Strasbourg Court’s judgments. The best way to measure whether this is happening or not is by looking at how many leading judgments remain pending implementation.
- Certain descriptive words are applied in the report, according to a classification grid. The report follows a uniform way of describing the number of leading cases pending for each country, the number of leading cases pending, the proportion of leading cases pending for the last ten years, and the average length of time that leading cases have been pending. The grid setting out how this analysis was conducted is presented below.

⁵⁰ For this purpose, data was extracted from the Hudoc-Exec database in March 2023, and adapted to show the situation at the start of January 2023.

- The overall assessment of each country's record is not subject to a uniform formula. The overall categorisation of countries (as "Excellent", "Good", etc) is not carried out according to a rigid formula, as this would have prevented a sufficiently flexible analysis for the different situations in the 27 EU states. The categorisation is based on an assessment of what the three data points mean for the overall level of implementation in each state, bearing in mind any relevant contextual information. When making an assessment of the categorisation, the following factors were taken into account:
 - The overall number of leading judgments pending implementation was the most important indicator.
 - The second key indicator was the proportion of leading judgments from the last ten years pending implementation. It is possible for a state to have a relatively low number of leading judgments pending implementation, but for the implementation record to be problematic because the country is not implementing those judgments that are pending (e.g., Finland). Meanwhile, other states might have a relatively high proportion of leading judgments pending, but this does not indicate an implementation problem, because of the recent date when those judgments were delivered (e.g., Denmark).
 - The average time leading judgments have been pending is the final, and least important indicator. A lengthy delay in the implementation of leading judgments is often an indicator of a poor implementation record (e.g., Bulgaria). It is also possible, however, for states with an overall good record to have a small number of leading judgments that have been pending for a long period, leading to a high figure under this heading (e.g., Ireland). Furthermore, in some cases a decrease in the average time pending compared to the previous year is not interpreted positively, because it is only due to a delivery of new judgments in the past year, or due to very old cases (pending implementation for more than ten years) being factored out of the calculation for this indicator.
- Cases that are pending implementation may be the subject of ongoing reforms. Many cases that are pending implementation may be in the course of being addressed by national authorities, while many others are not.
- The report does not quantify the severity of violations or the complexity of the needed reforms. Some countries have a relatively low overall number of pending leading judgments, but the violations involved in the judgments might be very serious. Other countries might have comparatively less serious issues identified in a high number of judgments. The nature of violations is not assessed in this report.

Methodology for the CJEU part of the study

The study focuses only on a portion of the CJEU rulings that are related to the rule of law, particularly those falling under the four areas covered by the European Commission's rule of law reports. It includes the cases referred to the CJEU by the European Commission, as well as those referred by national courts seeking the CJEU engagement through preliminary rulings. The relevant non-implemented judgments were identified by national experts, who agreed to fill in our questionnaire.⁵¹ They were asked to reflect on the extent to which respective EU Member States have made their laws and practices consistent with the requirements of EU law and CJEU judgments. They highlighted the CJEU rulings that have yet to be fully complied with,⁵² critically assessing, where relevant, the changes in law and practice meant to bring national legal systems into compliance with CJEU rulings, and highlighting any shortcomings of reforms or flaws in implementation. The experts were invited to reflect on the Commission's record of referring cases to the CJEU, as well as on any formal and informal barriers faced by national judges in enforcing EU law and engaging with the CJEU. Finally, experts were asked to highlight significant or systemic rule of law issues that have not been sufficiently addressed by the Commission and have not reached the CJEU. While this is not technically a non-implementation issue, the intention was to highlight that there are rule of law issues that will not reach the CJEU, and to identify any barriers in this regard.

This report breaks down state responses to CJEU rulings into two groups – political and judicial. Based on careful analysis of the national experts' overviews of the measures implemented, it discerns four problematic patterns of non-compliance in the responses of political actors, including sham reforms that are meant to disguise non-compliance, and partial reforms that are insufficient, especially where the flaws in laws and practices are systemic. As regards judicial responses, one alarming trend is that of resistance to European Courts by constitutional courts, independently or as orchestrated by governments. The study also reveals positive practices, with the national courts serving as guardians of the rule of law and seeking to apply EU law and CJEU prescriptions, even at the risk of disciplinary sanctions.

51 The questionnaire was filled in by experts from Belgium, Bulgaria, Cyprus, Croatia, Czechia, Finland, Germany, Hungary, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Sweden.

52 One limitation of this research is that it does not take into account already implemented rulings and, hence, does not provide an idea of overall performance. It mainly focuses on unimplemented rulings at this time.

Appendix 2

Classification Grid

Classification Grid							
	Very low	Low	Moderately low	Moderate	Significant	High	Very High
Pending leading judgments	Less than 5 leading cases pending	Between 5 and 10 leading cases pending	Over 10 leading cases pending	Over 20 leading cases pending	Over 30 leading cases pending	Over 40 leading cases pending	Over 50 leading cases pending
Percentage of unimplemented judgments from the last 10 years	Below 10%	10-15%	15-25%	25-30%	30%-45%	45-60%	Over 60%
Average time	Less than 1 year	1-2 years	2-3 years	3-4 years	4-6 years	6-7.5 years	More than 7.5 years

Appendix 3

Data comparison between the status of (non-) implementation of leading cases by European countries in 2021 and 2022

(=equal; ▲ increase; ▼ decrease)

Country	Year	Category	 Number of Leading Judgments Pending Implementation	 Proportion of Leading Judgments Pending Implementation from the Last Ten Years	 Average Time Leading Cases Have Been Pending Implementation
Luxembourg	2021	Perfect	0	0	0
	2022	Excellent	1 ▲ (Very low)	25% ▲ (Moderately low)	12 months ▲ (Very low)
Czechia	2021	Excellent	2 (Very low)	5 % (Very low)	7 years and 8 months (Very high)
	2022	Good	4 ▲ (Very low)	18% ▲ (Moderately low)	4 years and 7 months ▼ (significant)
Denmark	2021	Excellent	3 (Very low)	60% (Very High)	6 months (Very low)
	2022	Very Good	3 = (Very low)	60% = (Very high)	1 year and 6 months ▲ (low)

Country	Year	Category	 Number of Leading Judgments Pending Implementation	 Proportion of Leading Judgments Pending Implementation from the Last Ten Years	 Average Time Leading Cases Have Been Pending Implementation
Estonia	2021	Excellent	1 (Very low)	5% (Very low)	3 months (Very low)
	2022	Very Good	3 ▲ (Very low)	14% ▲ (Low)	11 months ▲ (Very low)
Latvia	2021	Very good	7 (Low)	12% (Low)	1 year and 5 months (Low)
	2022	Good	8 ▲ (Low)	16% ▲ (Moderately low)	1 year and 3 months ▼ (Low)
Slovenia	2021	Very Good	4 (Very low)	12% (Low)	1 year and 10 months (Low)
	2022	Very Good	4 = (Very low)	13% ▲ (Low)	1 year and 5 months ▼ (Low)
Sweden	2021	Very good	2 (Very low)	13% (Low)	3 years and 1 month (Moderate)
	2022	Good	2 = (Very low)	17% ▲ (Moderately low)	4 years and 1 month ▲ (Significant)
Austria	2021	Good	6 (Low)	26% (Moderate)	4 years and 7 months (Significant)
	2022	Very Good	3 ▼ (Very low)	22% ▼ (Moderately low)	1 year and 3 months ▼ (Low)
Ireland	2021	Good	2 (Very low)	33% (Significant)	9 years and 7 months (Very High)
	2022	Good	2 = (Very low)	50% ▲ (High)	10 years and 7 months ▲ (Very High)
The Netherlands	2021	Good	8 (Low)	40% (Significant)	2 years and 10 months (Moderately Low)
	2022	Good	4 ▼ (Very low)	29% ▼ (Moderate)	3 years and 7 months ▲ (Moderate)

Country	Year	Category	 Number of Leading Judgments Pending Implementation	 Proportion of Leading Judgments Pending Implementation from the Last Ten Years	 Average Time Leading Cases Have Been Pending Implementation
Germany	2021	Moderate	13 (Moderately low)	37% (Significant)	3 years and 2 months (Moderate)
	2022	Moderate	12 ▼ (Moderately low)	43% ▲ (Significant)	4 years and 2 months ▲ (Significant)
Lithuania	2021	Moderate	16 (Moderately low)	24% (Moderately low)	3 years and 9 months (Moderate)
	2022	Moderate	19 ▲ (Moderately low)	31% ▲ (Significant)	3 years and 4 months ▼ (Moderate)
Croatia	2021	Moderate	25 (Moderate)	25% (Moderate)	4 years and 3 months (Significant)
	2022	Moderate	26 ▲ (Moderate)	29% ▲ (Moderate)	2 years and 8 months ▼ (Moderately low)
France	2021	Moderate	25 (Moderate)	28% (Moderate)	2 years and 11 months (Moderately low)
	2022	Moderate	29 ▲ (Moderate)	36% ▲ (Significant)	2 years and 10 months ▼ (Moderately low)
Portugal	2021	Moderate	17 (Moderately low)	41% (Significant)	3 years and 10 months (Moderate)
	2022	Moderate	15 ▼ (Moderately low)	39% ▼ (Significant)	5 years and 1 month ▲ (Significant)
Slovakia	2021	Moderate	20 (Moderate)	41% (Significant)	2 years and 10 months (Moderately low)
	2022	Moderately poor	24 ▲ (Moderate)	51% ▲ (High)	2 years and 11 months ▲ (Moderately low)
Belgium	2021	Moderately poor	21 (Moderate)	49% (High)	3 years and 3 months (Moderate)
	2022	Moderately poor	22 ▲ (Moderate)	48% ▼ (High)	3 years and 5 months ▲ (Moderate)

Country	Year	Category	 Number of Leading Judgments Pending Implementation	 Proportion of Leading Judgments Pending Implementation from the Last Ten Years	 Average Time Leading Cases Have Been Pending Implementation
Malta	2021	Moderately poor	13 (Moderately low)	45% (High)	5 years and 1 month (Significant)
	2022	Moderately poor	15 ▲ (Moderately low)	45%= (High)	5 years and 4 months ▲ (Significant)
Cyprus	2021	Problematic	10 (Moderately Low)	71% (Very High)	2 years and 7 months (Moderately low)
	2022	Moderately poor	9 ▼ (Low)	59% ▼ (High)	3 years and 3 months ▲ (Moderate)
Finland	2021	Problematic	9 (Low)	60% (Very High)	11 years and 11 months (Very High)
	2022	Problematic	9= (Low)	50% ▼ (High)	12 years and 11 months ▲ (Very high)
Spain	2021	Problematic	23 (Moderate)	61% (Very High)	3 years and 1 month (Moderate)
	2022	Moderately poor	21 ▼ (Moderate)	53% ▼ (High)	2 years and 9 months ▼ (Moderately low)
Greece	2021	Significant problem	34 (Significant)	35% (Significant)	6 years and 5 months (High)
	2022	Problematic	27 ▼ (Moderate)	34% ▼ (Significant)	6 years and 7 months ▲ (High)
Poland	2021	Significant problem	38 (Significant)	48% (High)	5 years and 10 months (Significant)
	2022	Very serious problem	46 ▲ (High)	56% ▲ (High)	5 years and 6 months ▼ (Significant)
Bulgaria	2021	Very serious problem	92 (Very High)	55% (High)	6 years and 4 months (High)
	2022	Very serious problem	93 ▲ (Very high)	55%= (High)	6 years and 10 months ▲ (High)

Country	Year	Category	 Number of Leading Judgments Pending Implementation	 Proportion of Leading Judgments Pending Implementation from the Last Ten Years	 Average Time Leading Cases Have Been Pending Implementation
Hungary	2021	Very serious problem	47 (High)	71% (Very High)	6 years and 3 months (High)
	2022	Very serious problem	43 ▼ (High)	76% ▲ (Very high)	6 years and 8 months ▲ (High)
Italy	2021	Very serious problem	58 (Very High)	58% (High)	5 years and 10 months (Significant)
	2022	Very serious problem	59 ▲ (Very high)	63% ▲ (Very high)	6 years and 2 months ▲ (High)
Romania	2021	Very serious problem	106 (Very high)	57% (High)	4 years and 2 months (Significant)
	2022	Very serious problem	113 ▲ (Very high)	60% ▲ (Very high)	4 years and 8 months ▲ (Significant)

Appendix 4

List of ECtHR Judgments Pending Implementation Concerning the Independence and Impartiality of the Judiciary

Bulgaria

The *Miroslava Todorova* judgment has been pending before the Committee of Ministers since January 2022. The applicant, a judge and president of the magistrates' professional association, was disciplinarily sanctioned (by being demoted to a lower-level court and having her salary reduced) by the Bulgarian Supreme Judicial Council (SJC). The Court found that this was done as retaliation for criticising the SJC and the executive for, *inter alia*, the appointment of a court of appeal president who was suspected of corruption, and suspicions of corruption on the part of SJC members in relation to procedures for the promotion of magistrates. The Court concluded that Todorova had been subjected to abusive restrictions, and that her freedom of expression as a magistrate had been violated. The Bulgarian authorities have already requested, in [September 2022](#), that the supervision of this case be ended, arguing that it is of an isolated nature.

Hungary

The *Baka* case concerns the undue and premature termination of the mandate of the president of the Supreme Court through targeted legislative measures, without the possibility of review, following his criticism of major reforms of the judicial system. The legislative act terminating Baka's mandate, adopted in the context of a substantial judicial reform, was not subject to review by the Constitutional Court. The ECtHR found that the very essence of Baka's right to access to court was violated, since the measure was neither reviewed, nor open to review by a body exercising judicial powers. Furthermore, since the measure was prompted by legitimate criticisms he expressed in his professional capacity, as president of the Supreme Court, in relation to reforms affecting the judiciary, it violated his freedom of expression, discouraging him and other judges and court presidents from participating in public debate in the future.

The implementation of this judgment requires measures to ensure "*procedural fairness in cases involving the removal of a judge from office, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of*

the office of a judge, and of effective and adequate safeguards against abuse when it comes to restrictions on judges' freedom of expression". Furthermore, Hungary must take measures to ensure that a decision by parliament to remove the president of the Supreme court is subjected to effective oversight by an independent judicial body.

Poland

Poland has the most concerning ECtHR implementation record in terms of judgments related to independence and impartiality of the judiciary, with four such leading rule of law judgments pending implementation.

Xero Flor w Polsce sp. z o.o v. Poland concerns the violation of the right to a tribunal established by law, due to grave breaches of the procedure for the appointment of a judge on the Constitutional Court panel, in contravention of domestic law, in the context of a series of judicial reforms weakening judicial independence. The Polish government must take rapid remedial action to ensure that the Constitutional Tribunal is composed of lawfully elected judges. Unfortunately, following the ECtHR judgment, the Polish authorities took the position that the European Court acted beyond its legal authority in adopting this judgment.

In *Broda and Bojara v. Poland*, the applicants, vice-presidents of a regional court, had their mandates prematurely terminated, based on 2017 legislative amendments to the Polish Law on the organisation of the ordinary courts, which enabled the minister of justice to order such dismissals without giving the reasons for the decisions and without a hearing. The fact that the applicants could not have their dismissals examined by a judicial body violated their right to access to court. To implement this judgment, the Polish authorities must enact measures to protect high-ranking judges from arbitrary dismissals, and introduce the possibility of judicial review for such dismissals.

The *Reczkowicz v. Poland* group of judgments was delivered in the context of a disciplinary order suspending the applicant, a lawyer, from practicing law. Her case was dealt with by the Disciplinary Chamber, the Chamber of Extraordinary Review, and the Civil Chamber of the Polish Supreme Court, and the case was ultimately dismissed. Judges in these chambers had been appointed "in an inherently deficient procedure" (§ 280), because the National Council of the Judiciary (NCJ), which issued recommendations for the appointment of judges in the Disciplinary chamber, was not independent from the legislature and from the executive. In fact, the NCJ was constituted following a 2017 reform that deprived the judiciary of the right to elect judicial members of the body. The Court assessed this in the context of coordinated amendments to Polish law aimed at changing the judicial system, and concluded that the applicant's right to a tribunal established by law had been violated. The implementation of this case requires the Polish authorities, *inter alia*, to carry out a legal reform to secure the independence of the NCJ, by guaranteeing the right of the Polish judiciary to elect judicial members of the body. Since the *Reczkowicz* judgment was delivered, three new repetitive cases were added

in this group: *Dolińska-Ficek and Ozimek v. Poland*, *Advance Pharma Sp. Z o.o. v. Poland* and *Juszczyszyn v. Poland*. In *Juszczyszyn*, a judge was suspended from duties by the Supreme Court's Disciplinary Chamber for verifying the independence of another judge appointed based on the recommendation of the reconstituted NCJ. This was done for the unauthorised purpose of sanctioning and dissuading him from verifying the lawfulness of the appointment of judges based on the recommendation of re-constituted NCJ.

The *Grzęda v. Poland* judgment concerns the premature termination of the mandate of a Supreme Court judge who had been elected as judicial member of the NJC for a full mandate. The 2017 judicial amendments “deprived the judiciary from the power to elect judicial members of the NCJ” and removed from office judicial members elected under the previous system. Since the termination was carried out *ex lege*, there was no possibility of a judicial review. The applicant's right to access to court was therefore violated.

Romania

In January 2023, Romania had three pending leading judgments concerning the independence and impartiality of the judiciary: *Brișc v. Romania*, *Kovesi v. Romania*⁵³ and *Camelia Bogdan v. Romania*. However, in early June 2023, the Committee of Ministers ended supervision of the Kovesi judgment following a broader judicial reform.

In the *Brișc* case, the applicant, the chief prosecutor of the Prosecutor's Office attached to the Maramureș County Court, was unduly reprimanded and removed from office for making legitimate statements to the press and in a television interview about an ongoing criminal investigation about alleged influence peddling within the judiciary. He did so while acting in his capacity as a staff member designated to maintain contact with the press. The European Court found a violation of his freedom to impart information in a democratic society, noting that the sanction had not been based on relevant and sufficient grounds, and that the purpose of his statements to the press was only to inform the public about a matter of public interest. The case has been pending implementation since 2019, and the authorities argue that no legislative or other general measures are required for implementing this case.

The *Camelia Bogdan* case concerns the inability of judges to contest their automatic suspension from duty during the examination of their appeal against exclusion from the bench.

⁵³ The *Kovesi* case addressed the fact that the former chief prosecutor of the National Anticorruption Directorate had her mandate prematurely terminated by the minister of justice, through a removal decree she could not effectively challenge, in the context of her criticism of legislative reforms affecting the judiciary and the fight against corruption. The ECtHR found that she did not have access to court, and that there had been an unlawful interference with her freedom of expression. A recent judicial reform has taken place in Romania, bringing forward positive developments. The reform foresees the possibility for high-ranking prosecutors to challenge removal decrees before the High Court of Cassation and Justice, as well as provisions strengthening the freedom of expression of judges, by allowing them to express opinions on public political issues and legislative reforms regarding the judiciary, or in other non-political matters of public interest.

