

Rule of Law FAQs

Debunking Common Myths

Volume 2 – 2023



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Debunking Common Myths

A number of politicians in Europe, notably from government parties in Poland and Hungary, are challenging established conceptions around the rule of law – the framework guaranteeing accountable governments and equal citizens' rights. The challengers pretend that the rule of law is a mere buzzword and claim that it is a political tool used to target them and their political agendas without justification. Other EU governments – most notably Spain, Greece and Romania – have at times sought to weaken independent oversight institutions, failed to implement necessary reforms or dismissed rule of law concerns.

Politicians' claims are packed with myths, lies and half-truths that hinder constructive debates around the rule of law. Our updated "Rule of Law FAQs" will help politicians, journalists, and other actors engaged in the European rule of law debate navigate these muddy waters. Get your facts straight and let's bust some myths!

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re:constitution

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Democracy Reporting International (DRI) is an independent non-profit organisation committed to defending and improving democracy worldwide. We analyse threats to democracy and advocate for solutions. By bringing impartial analysis and policy recommendations to policymakers, we encourage them to act before emerging concerns become pressing problems. We are present in 8 countries, with local teams and a wide network of partners. Our **re:constitution** project promotes an informed and fact-based public debate.



The **Meijers Committee** is a unique group of law professors, academic researchers, judges and attorneys based in the Netherlands and committed to a transparent and democratic European Union, which respects human rights and the rule of law. Since 1991, the Committee provides independent legal analyses of European decision-making and legislative processes in various fields of EU law – such as the rule of law – and makes concrete recommendations to address the identified issues.

Rule of Law FAQs | Navigate the cards

Rule of Law

Basic Questions

Countries

Hungary and Poland

Spain

Greece

Romania

Issues

The war in Ukraine: sanctions on individuals and the rule of law implications

Media pluralism

Secret surveillance/spyware and the rule of law crisis



1 Why is ensuring the rule of law so important for the EU?

The rule of law is essential for every aspect of the EU's functioning. It is a **precondition for Member States in fulfilling their EU obligations and ensuring EU citizens and companies benefit from all of their rights**. When citizens move to live or study elsewhere, or when European businesses invest in other Member States, they must be sure they can rely on EU law being applied the same way. For this reason, ensuring the rule of law is an explicit entry requirement that all Member States have accepted.

The rule of law is one of the four political conditions (under the 1993 Copenhagen Criteria) for becoming an EU Member State, alongside democracy, human rights and the protection of minorities.

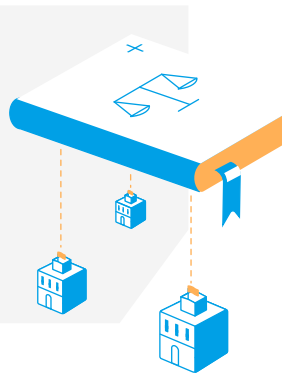
States can only apply for EU membership if they accept these conditions (Article 49 of the Treaty on European Union).



2 What is meant by “rule of law”?

The **rule of law** is a basic legal principle that has a **clear and precise meaning**. It is not a vague or solely political concept. It requires that all public powers must act within the constraints set out by clearly defined laws, in accordance with democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes:

- (a) Legality, meaning a transparent, accountable, democratic and pluralistic process for enacting laws;
- (b) Legal certainty, meaning laws need to have foreseeable effects;
- (c) The prohibition of the arbitrary exercise of executive power;
- (d) Effective judicial protection by independent and impartial courts, and effective judicial review, including respect for fundamental rights;
- (e) The separation of powers;
- (f) Equality before the law.

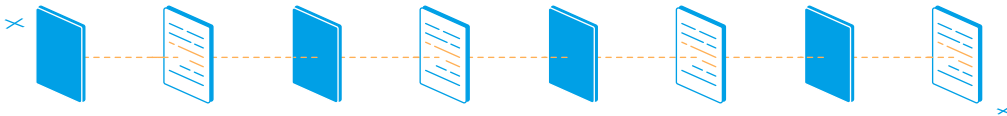


Each of these components of the rule of law is **indispensable**.

3 Where is the rule of law laid down?

The binding legal and political obligation for all Member States to comply with the rule of law is laid down in Articles 2 and 7 of the Treaty on European Union, which has been ratified by all EU Member States. Article 7 allows other Member States to hold a non-compliant Member State to account.

The essential elements of the rule of law are specified in different legally binding EU rules and, most recently, in Regulation 2020/2092 (the rule of law conditionality regulation). This regulation was adopted by the EU Council of Ministers, composed of ministers of all Member States, and by the European Parliament, elected by citizens of all Member States. The elements of the rule of law are also laid down in the constitutions and laws of all Member States, in the European Convention on Human Rights, and in UN human rights treaties ratified by all EU Member States.



4 Who defines the rule of law?

The rule of law is **not an externally imposed concept**. Member States **themselves have laid down its basic elements in their national laws, EU law and international treaties** they have negotiated and all accepted. The EU legislator – the European Parliament and Council of Ministers – sometimes also selects rule of law components particularly relevant to a specific policy area.

The EU Court of Justice and the European Court of Human Rights provide binding interpretations of elements of the rule of law in concrete cases. When applying or interpreting EU law on the rule of law, national courts are bound by the judgments of the EU Court of Justice. This Court, in turn, takes into account the judgments of the European Court of Human Rights on relevant rule of law elements.



5 What are the differences between the rule of law, democracy and human rights?

Democracy is a system where, in free and fair elections, citizens elect representatives who participate in the exercise of state and public power. Human rights are the rights of individuals (citizens and non-citizens) limiting the exercise of state powers. Although these three concepts each have a distinct meaning, **they are mutually reinforcing and interdependent**. Human rights, such as the right to vote and to be elected or the right to access to courts, give concrete expression and substance to democracy and the rule of law.

Without the rule of law, which requires impartial and independent courts, human rights and the limits of political power in a democracy are empty promises.

The essential role of independent courts in the months before and after the 2020 United States presidential elections provided a clear example of this.



6 Is the EU interfering in national sovereignty by pursuing rule of law issues?

At its heart, the EU is an exercise in pooling sovereignty. EU Member States exercised their sovereignty when they defined the basic elements of the rule of law in national law, EU law and binding international treaties. Having done so, **they cannot unilaterally pick and choose which EU rights and obligations they implement or not.**

In setting up the EU, they deliberately chose to give its political institutions and its independent Court of Justice the power to monitor compliance with the binding rule of law principles covered by EU law. By granting legislative and judicial competences to EU institutions, all Member States have shared part of their sovereignty with the EU.



7 Can the EU criticise how the Member States organise their judiciaries, considering the variety of accepted systems?

How judges are appointed, promoted, or disciplined varies considerably among the EU Member States. At the same time, Article 19 of the Treaty on European Union lays down a **minimum standard by obliging Member States to provide effective legal protection to citizens, private organisations, and companies through their national judiciary**. This leaves a lot of leeway as to how to achieve this result.



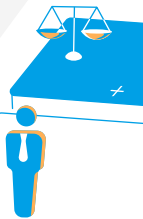
The EU Court of Justice has interpreted this requirement in connection with existing norms that **oblige judges to be independent of other state powers and impartial regarding the parties in front of them**. For judges to be able to provide effective legal protection, they need to be guarded against dismissal or early retirement motivated by anything other than their professional conduct, as assessed by actors equally independent from the executive branch.

8 Isn't the executive branch regularly involved in the appointment of judges in EU Member States?

It is common for the executive branch to be involved in judicial appointments, but it does not decide alone. It typically shares powers with independent judicial councils or appointment boards involving judges, lawyers, and university professors.

In Malta, for example, the Judicial Appointments Committee vets and evaluates candidates, and advises the prime minister on appointment decisions. In a recent judgment on Malta, the EU Court of Justice held that **such a committee can make the process more objective and less politicised, but only if institutional guarantees of its independence are in place.** It explained why the right to an effective judicial remedy sets limits on the prime minister's involvement in judicial appointments.

Other guarantees precluding politicians from unduly influencing judicial appointments include mandatory consultations with judges of specific courts, the engagement of a range of political parties, and transparency of decision-making processes.



9 Why should EU citizens care about the rule of law in all EU countries?

The EU is not only a common market, but also a community of values and source of rights for its citizens (Article 2 of the Treaty on European Union). To deliver on that promise, all EU Member States must remain functional democracies, adhering to the principles of the rule of law. If the EU does not ensure this, EU citizens working, living, or investing in another Member State cannot be certain that rights granted by EU law will be respected.

Rule of law issues can also erode the mutual trust needed for the legal cooperation between Member States.

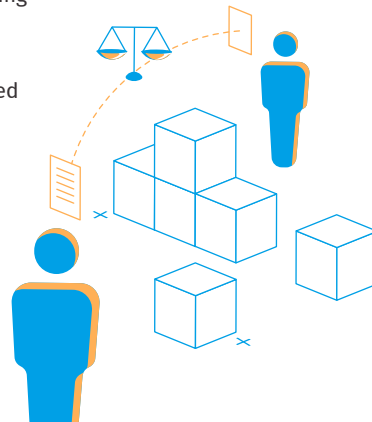
For example, if **judicial independence in one Member State is no longer guaranteed**, courts in other Member States may **no longer be able to arrest and transfer** serious criminals to that Member State or **recognise divorce decrees issued there**, directly affecting EU citizens' lives.



10 Why should EU businesses care about the rule of law in all EU countries?

The rule of law, and especially the effective prosecution of misconduct by an independent judiciary, is essential for doing business. This provides a secure, predictable, and **fair environment** for concluding contracts and handling potential disputes.

If there are severe rule of law deficits in an EU Member State, EU-based companies, shareholders, and customers **lose these important advantages**. A competitive company will not enjoy the advantage of the EU's internal market if public procurement procedures are rigged and there is no investigation or meaningful prosecution of fraudulent practices. An exporter of goods may run into trouble when their contractual issue cannot be resolved by an independent court.



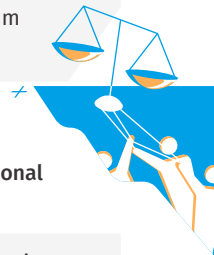
11 Haven't Hungary and Poland always complied with the judgments of the EU Court of Justice?

The governments of Hungary and Poland **have not complied** with various EU Court of Justice decisions.

For example, Poland used to operate the Disciplinary Chamber of its Supreme Court and carry out disciplinary actions against judges over their decisions – in clear violation of the 15 July 2021 judgment of the EU Court in case C-791/19 and its interim order in case C-204/21.

Subsequent reforms of the disciplinary system, including dismantling the Disciplinary Chamber and replacing it with the Professional Liability Chamber, **did not address the roots of the problem** as identified by the Court, including **the politicisation of the National Council of the Judiciary**. Hence, these reforms **did not amount to compliance**.

Hungary, too, has failed to respect multiple rulings, such as in cases C-78/18, concerning a transparency law, C-808/18, regarding the protection of asylum seekers, and C-66/18, regarding the outlawing of Central European University.



12 Didn't the judicial reforms in Poland help root out communist-era judges?

While the Law and Justice (PiS)-led government claimed that the Polish judiciary was dominated by communist judges, only a small percentage of the then-sitting judges began their careers before 1989. All Polish judges born before 1972 underwent the process of lustration – a determination of whether they collaborated with the secret services of the communist-era government. **The PiS government has not been able to identify a single of professionally active judges who compromised the principles of judicial ethics in communist times.**

In contrast to this, in 2019, the PiS-affiliated President Andrzej Duda swore in the Constitutional Tribunal judge Stanisław Piotrowicz (a former PiS MP), who worked as a state **prosecutor** during the communist times and was **involved in cases against dissidents**. Piotrowicz was among the judges who declared the rulings of the EU Court of Justice incompatible with the Polish Constitution.



13 Didn't the Polish judicial reforms improve the quality and efficiency of the judicial system?

The judicial reforms implemented since 2015 have not improved judicial efficiency, digitalisation, the flexibility of procedures, or the user-friendliness of courts in Poland.

The excessive length of proceedings is widely acknowledged as a systemic problem in Poland, as it is in other EU Member States, such as Italy or Romania.

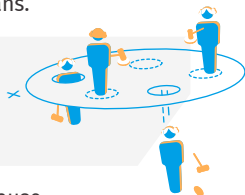
Poland remains under “enhanced supervision” of the Committee of Ministers of the Council of Europe for the length of civil and criminal proceedings. According to the Polish Ministry of Justice, the average length of proceedings at ordinary courts increased from 4.2 to 7 months between 2015 and 2020. The World Justice Project Rule of Law Index has shown deterioration since 2015 in terms of the speed of civil justice, as well as in the timeliness and efficiency of the criminal justice system, with the lowest scores recorded in 2021. **Poland is firmly placed in the bottom half of the regional rankings.**



14 Aren't political appointees in judicial councils an accepted way of making these councils more democratically accountable? If so, why criticise Poland?

While some presence of political appointees in judicial councils is defensible, the Polish government moved to **an almost entirely political body**: 23 of the 25 members of the National Council of the Judiciary are either politicians themselves or elected by politicians.

As the two European Courts highlighted, this undermines the Council's independence from political authorities, as well as its ability to prevent politicised appointments or dismissals of judges.



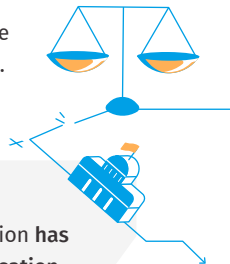
The risk of political meddling is higher in Poland than elsewhere in the EU because **politicians**, rather than judges, **hand-pick the Council's judge members**. The lack of party pluralism among non-judge members (who are politicians, not lawyers or university professors, as is in Italy and France) further aggravates this risk. The expulsion of the Polish Council from the European Network of Councils for the Judiciary attests to the widespread consensus on its lack of independence.

15 Poland is not the only country in which judge-members of judicial councils are elected by the parliament. Why is it singled out by EU bodies?

In EU Member States that have established judicial councils, judges typically propose and elect judge members. This is the case, for example, in Italy, France, and Portugal. **This method of election is widely regarded as a means of reducing the risks of politicisation** and is recommended by the Council of Europe to all states.

The Spanish Judicial Council is an exception, since its judge members are only proposed by judges, and then elected by the parliament. The European Commission **has urged Spain to implement changes to make its Council less vulnerable to politicisation.**

Hence, Poland is not the only EU Member State being criticised on this account. Notably, the role of judges in electing judge members is even more limited in Poland than it is in Spain. In Poland, their voice is only heard at the stage of the pre-selection of candidates.



16 Have Poland and Hungary not been victims of double standards when it comes to the assessments of their judicial reforms?

The current Polish and Hungarian governments claim the EU applies double standards on the rule of law, arguing that the other Member States also opt out from certain EU policies or defend the sovereignty of their national laws, but are not subject to the same criticism. **This comparison is flawed.**

While Member States may opt out of EU cooperation in fields such as defence, immigration, and asylum, or in criminal justice, **it is impossible for any Member State to opt out from the core obligations of states under EU law, which include the independence of courts.**



Hungary and Poland were not singled out in this regard. The two European Courts have handed down similar rulings against other Member States. The rulings against Poland and Hungary have been numerous and repeated, however, due to the systemic nature of defects in laws and practices undermining judicial independence.

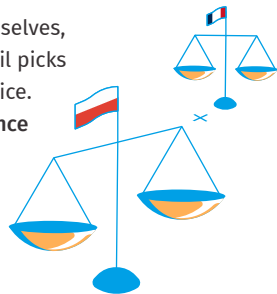
17

France is facing multiple rule-of-law issues, including political influence on the judiciary. Why isn't France being criticised the same way as Poland?

The French and Polish systems of judicial governance have some similarities, with the formal powers divided between judicial councils and ministries of justice. A closer look into their respective institutional arrangements shows, however, that **the French judiciary is better insulated from political pressure and/or capture than Poland's**.

In France, judge members of the Judicial Council are elected by judges themselves, while in Poland the parliament elects them. While the French Judicial Council picks court presidents, in Poland this power is in the hands of the Minister of Justice.

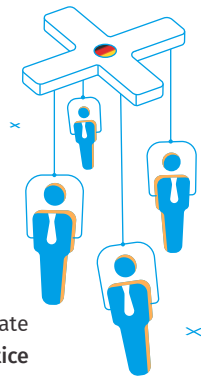
In France, the coexistence of the council and the Ministry helps secure balance and prevents abuse by either. In Poland, the system lacks balance, due to the political subordination of the council to the ruling party. These differences make the different assessments by the European Commission understandable and justified.



18 The EU Court of Justice found that Germany's prosecutors aren't independent either. So why criticise only Poland and Hungary?

In 2019, the power of the Ministers of Justice of Germany's Länder (or states) to issue instructions to prosecutors in individual cases prompted the EU Court of Justice to conclude that German prosecutors are not sufficiently independent to issue European Arrest Warrants. Consequently, the German authorities shifted the power to issue arrest warrants in all cases to judges.

The EU Court of Justice's pronouncements did, however, trigger broader reform discussions in the government coalition. The November 2021 agreement of the new centre-left coalition explicitly mentions the intention to reduce the power of the Länder Ministers of Justice in this regard. These discussions and actions illustrate **the recognition by the German government of the authority of the EU Court of Justice** and a commitment to change laws and practices in line with its conclusions, irrespective of the political composition of the government at the time.



19 The German Federal Constitutional Court in Karlsruhe constantly challenges the EU Court of Justice. Why is only Poland criticised?

The 2020 German Constitutional Court (FCC) ruling on the partial unconstitutionality of the Public Sector Asset Purchase (PSP) Programme of the European Central Bank (ECB) is not comparable to the October 2021 decision by the Polish Constitutional Tribunal (PCT) on the primacy of EU law. There are two key differences:

- First, the FCC acted on its own, **whereas the PCT acted at the request of the government.**
- Second, the FCC case concerned the isolated issue of an ECB bond-buying scheme, and the issue was resolved, whereas the PCT questioned the primacy of EU law in general.

The Polish government **has continued attacks on the EU law, lodging new cases with the PCT.** In 2021, the European Commission initiated an infringement procedure against Poland regarding the state and actions of the PCT and, after an exchange with the Polish government, the Commission decided in 2023 to bring Poland before EU Court of Justice.



20

People in Poland are in favour of the reforms of the judiciary. Isn't opposing them anti-democratic?

Poles had been keen for judicial reforms long before the current ruling party came to power. It promised to make courts work better for ordinary people, but **has largely failed to fulfil this promise.**

With an ever-increasing caseload, understaffed and under-resourced courts take months to carry out tasks as simple as writing a person's ownership and mortgage in the land registry. Due to the slow pace of digitalisation, the Polish judiciary has not moved away from a paper-based system. The length of proceedings has even increased in some areas.

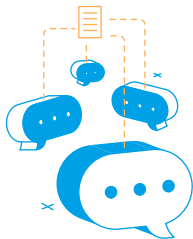
Issues with the efficiency and effectiveness of courts **negatively affect public trust in the judiciary.** Opinion polls show that **only 14 per cent of Poles view the reforms implemented since 2015 as satisfactory.** Hence, people are in favour of real judicial reforms, not a dismantling of checks and balances that makes judges vulnerable to pressure and intimidation.



21

Isn't EU opposition to reforms in Poland and Hungary political, tied to party politics and based on a Euro-federalist agenda to weaken nation states?

The 27 EU Member States and the political parties in those states have widely different views on EU integration and its future. Some want to return certain competencies from the EU to the Member States, while others want greater economic cooperation. Some want more integration on taxation and social security, while others advocate for stronger defence capabilities for the bloc.



EU reforms have always followed fierce debate, but with eventual agreement among the Member States. **The decision-making process within the EU makes it practically impossible for one person, political party or country to impose its agenda.** The EU is frequently criticised for the exact opposite – its inability to push through a strong agenda, due to a lack of unanimous agreement among the Member States. The opposition to attacks on the independence of the judiciary comes from many political parties, lawyers and expert bodies, in addition to strong domestic opposition to these measures in Poland.

What about the Polish and Hungarian governments' argument that the EU imposes an ultra-liberal ideology, demanding equality for LGBTIQ people at the expense of a cultural and national identity that has never accepted them?

The EU Member States are legitimately different in many respects, as is reflected in the EU's motto "united in diversity". The Treaty on European Union, in Article 4(2), also clarifies that the EU shall respect the national identity of Member States. Member States have **wide leeway** in regulating "moral politics" (for example, allowing same-sex marriage or not).

At the same time, **EU law lays down a limited number of binding minimum norms** Member States have agreed to apply. **The rights to equality and non-discrimination for LGBTIQ people**, laid down in Article 21 of the EU Charter of Fundamental Rights, **is one such norm**. This is why the law banning LGBTIQ content in schools and effectively censoring LGBTIQ-related content in media prompted the European Commission to launch infringement proceedings against Hungary. It is also why the European Commission decided to halt EU funding for Polish cities where so-called "LGBTIQ-free zones" were introduced.



23

Do the Polish and Hungarian governments not have a point when they claim the EU has no competence to deal with “reforms” in their national media landscapes?

The financing and regulation of national media are subject to various rules of EU internal market law, such as state aid rules and the Audiovisual Media Services Directive.

Moreover, without access to independent media, citizens cannot meaningfully exercise their freedom of speech or their right to cast an informed vote in elections, including those covered by EU law, such as elections for the European Parliament.

Hence, the **national media landscape is already covered by EU law** in different respects. This is why the European Commission decided to sue Hungary after Klubradio, an independent radio station, lost its appeal to extend its broadcasting license. This is also why the Commission could decide on a similar course of action if the Polish government decided, once again, to try and curb the activities of the independent Polish television channel TVN24.

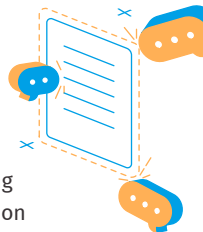


24

The Hungarian government claims to have restored judicial independence with the 3 May 2023 legislative changes and, hence, should be given access to COVID recovery and cohesion funds. Is this true?

Hungarian civil society organisations have highlighted a few remaining defects – Hungary **has not removed all obstacles to the submission of references for preliminary rulings** to the EU Court of Justice. While under the new rules **the president of the Kúria** (Hungary's supreme court) cannot be re-elected, they can still be **kept in office indefinitely** by a parliamentary minority by blocking the selection of a substitute.

Finally, while the National Judicial Council has been strengthened, certain rules enabling the effective exercise of its new powers are lacking: the Council cannot give an opinion on the ministerial decree on the system for the assessment of applications for judicial posts if the Ministry does not amend it first. Importantly, this legislation was **adopted without proper public consultation** and debate and, therefore, **violates a key rule of law requirement** – the principle of legality. This principle calls for a **transparent, pluralistic lawmaking process**.



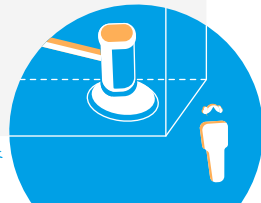
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Did the Hungarian government's 3 May 2023 judicial reform address and resolve all issues of concern with regard to the Hungarian judiciary?

Hungarian civil society organisations have justified concerns that, even if the authorities have improved the legislation, **this will make no difference in practice, so long as the constitutional and supreme courts remain captured**, i.e., packed with judges loyal to the ruling party.

Moreover, a **strengthened National Judicial Council could become a new target for capture** during the renewal of its membership. Court presidents appointed by the National Office of the Judiciary, led by a political appointee, could easily be elected as Council members in the absence of legislative restrictions and due to their influence – both formal and informal – in the courts.

The limitlessly renewable “state of danger” that allows the government to rule by emergency decrees and override acts of parliament, including those related to the judiciary, is also problematic for the rule of law.



26

Can the European Commission withhold COVID recovery funds from Hungary and Poland over the rule of law concerns? What about cohesion funds?

While **the recovery fund** is not directly a tool intended to protect the rule of law in EU Member States, its disbursement conditions **require the recipient state to be free from corruption and have a court system that guarantees independent oversight over the use of EU funds**. In the case of Poland and Hungary, **these conditions are not being met**.

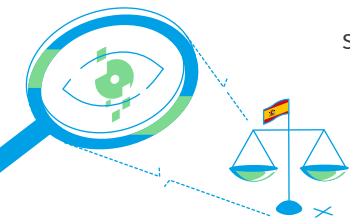


Misuse of EU funding in Hungary is pervasive, and the lack of independence of the judiciary in both countries might lead to non-independent judges presiding over cases related to EU funding. The same issues persist regarding the EU **cohesion funds**, with the added caveat that the disbursement of EU funding is also linked to the Member States **respecting fundamental rights – also a problem in Hungary and Poland**. A fair trial cannot be ensured where courts lack independence and the prohibition of non-discrimination is at risk.

27

In view of the politicisation of the Spanish judiciary and spyware scandals there, is it justified to say that Spain is on the same track as Poland and Hungary?

With regard to judicial and non-governmental checks on the government, **Spain scored slightly below the regional average** and placed around the middle of the World Justice Project's 2022 Rule of Law Index. Poland and Hungary placed in the bottom half.



Spanish civil society organisations have expressed concern about the weakening of mechanisms of oversight and accountability. They have also criticised the Spanish government for a lack of efforts to de-politicise the judiciary, reinforce prosecutorial autonomy, and improve the anti-corruption framework in line with European Commission recommendations.

The decline in the rule of law, however, is **not yet as pronounced in Spain as in Poland and Hungary**, as **judicial independence, media freedom and civic space are not as endangered**. Spain has also not challenged the authority of the two European Courts.

28 Is the parliamentary appointment of the judicial council members as problematic in Spain as it is in Poland?

In EU Member States, judges typically elect judge members of judicial councils (if the state has one). **The Council of Europe recommends this method to reduce the risks of politicisation of the process.** Such risks are high in Poland and Spain, due to parliamentary appointments of judicial council members. There are differences, however.

In Poland, the members of PiS-controlled Sejm, the lower chamber of the parliament, and judges appointed by the Sejm dominate the Council; the votes of the senators from the opposition have no weight.

In Spain, a high decision-making threshold gives the opposition a say in the judicial council's composition. This, however, turns appointments into a battleground of party politics and typically results in a council divided along party lines. Also, ruling parties, the opposition, or both, may block appointments altogether, hindering the renewal of the council (as has been the case in Spain since 2018).



29 What are the consequences of the politicisation of the Spanish Council for the Judiciary?

The politicisation of the Council adversely affects its functioning and public image. Due to the blockage in the renewal of the Council – a direct consequence of politicised processes for appointing its members – the institution has been functioning *ad interim* since 2018. It has been precluded from appointing Supreme Court judges and court presidents by Organic Law 4/2021.

This has affected the quality and efficiency of the justice system, and especially that of the **Supreme Court**, which has to function with fewer judges and cannot process cases as quickly. The politicisation of the Council has also led to the **blockage in the renewal of the Constitutional Court**, most recently in December 2022.

Unsurprisingly, as shown by surveys of the European Network of Councils for the Judiciary, **Spanish judges rate the Council's independence as very low** and 65 per cent believe high-level judicial appointments are not merit-based.



30

Spain has failed to reform its politicised system of appointing Judicial Council members. Why did the Commission not respond to the situation in Spain as harshly as in Poland?



The European Commission has **consistently expressed concern about the failure of the Spanish parliament to renew the Judicial Council**. Where warranted, it has criticised legislative proposals advanced by the government to overcome the deadlock created by the opposition to keep a conservative majority in the Council.

In its 2022 Rule of Law Report, the Commission called for the renewal of the Council and for reforming it, in line with European standards. **The differences in the tone of the statements, if any, may be explained by the differences in the effects of politicisation on judges' independence in Spain and Poland.** The ruling party in Spain has not sought full control over the judiciary. Neither has it systematically targeted disobedient judges through disciplinary procedures. After the European Commission criticised the Spanish government's initiative to lower the decision-making threshold and sidestep the opposition, the proposal was withdrawn.

31 Are constitutional court appointments in Spain any different from those in Poland and Hungary?

In Hungary, the ruling Fidesz party changed the Constitution to be able to **appoint** constitutional court judges **without opposition input**. In Poland, PiS captured the constitutional tribunal by denying judges appointed by the outgoing parliament their seats and **appointing loyal judges** instead. In its 2021 Xero Flor ruling, the European Court of Human Rights concluded that **irregularities in appointments undermined the legitimacy of the process**.



Appointments to the Spanish Constitutional Court are also highly politicised. The 12 nominations come from the legislature (eight), the government (two) and the judicial council (two). Due to the requirement for a three-fifths majority in each parliamentary chamber, the ruling party typically has to reach agreement with the opposition. If the ruling party and opposition equally divide all other seats, the government's two appointees could tilt the balance in its favor. The setup allowing the government to secure a favorable majority in the Court affects the latter's ability to act as a check on the government.

32

According to various rule of law and democracy indexes, Greece has not experienced a major decline. What justifies the recent wave of criticism?

Rule of law issues in Greece have largely **remained under the radar** in recent years. The government's pro-EU stance may have resulted in the EU turning a blind eye to these issues. While the World Justice Project's Rule of Law Index has not shown significant deterioration since 2015, it indicates **weak checks on the government**.

The European Commission has expressed concerns over the politicisation of high-level appointments to the courts and prosecution. Courts have been pressured through legislative initiatives and government officials' statements on pending cases. The disruption of the activities of independent oversight institutions is cause for concern. The government's surveillance of journalists and failure to investigate the murder of a reporter, Giorgos Karaivaz, **earned Greece the lowest place in the EU (107th globally) in the 2023 Reporters without Borders World Press Freedom Index**. The 2022 Eurobarometer on Corruption shows that **98 percent of respondents consider corruption to be widespread** in Greece.



33

Greece's Prime Minister insisted that media freedom is not an issue in the country, and called the Reporters without Borders report placing Greece in the last spot in the EU rankings "crap".
Where do the problems lie?

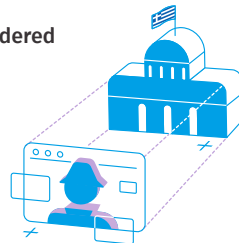
The Minister responsible for media appoints the members of the governing board of public service media, a procedure that **puts the public broadcaster's independence at risk**, according to the European Commission's 2022 Rule of Law report. Some owners of private media outlets have close ties to the ruling elite, allowing the government to shape public opinion in its favour. State **subsidies are allocated** to pro-government media outlets **through non-transparent processes**, leaving opposition media largely out in the cold.

The Media Pluralism Monitor for 2022 reported **a suffocating climate for independent journalism**, due to the obsession of the ruling party with limiting critical voices. The government has hindered media coverage of sensitive topics (migration and corruption, for example), and restricted journalists' access to areas such as Evros, a border province. Strategic lawsuits against public participation (SLAPPs) are commonplace, and can lead to self-censorship.



34 What rule of law concerns did the surveillance scandal reveal in Greece?

As reported by journalists, the National Intelligence Service **systematically ordered the surveillance of politicians and journalists, invoking national security**. The Greek authorities imposed restrictions on the disclosure of such surveillance to affected persons until three years after its completion. There have also been reports about the **illegal use of Predator spyware**. While the government denied its use, journalistic investigations revealed links between government officials and the company trading with the spyware.



Moreover, the Greek government provided licenses permitting the export of Predator to repressive regimes in Sudan and Madagascar. **Effective investigation into these practices is not in sight**. The Government obstructed the checks of the Hellenic Authority for Communication Security and Privacy (ADAPE) on the matter.

These practices are damaging to the rule of law, since they signal arbitrariness and the abuse of power on the part of the authorities, and risk weakening the mechanisms of oversight.

35

The European Commission lifted the Cooperation and Verification Mechanism (CVM) on Romania in November 2022. Does this imply that there are no longer rule of law concerns in Romania?

When Romania acceded to the EU in 2007, it did not comply with all rule of law standards, as there were remaining issues in the judicial system and with regard to corruption. As an inherent part of Romania's accession process, the CVM was established to monitor the country's progress in these areas.

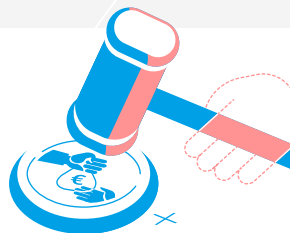


After substantial progress by Romania and the arrival of its annual Rule of Law Report, the European Commission lifted the CVM in November 2022. **The mere lifting of the mechanism does not, however, remove all rule of law concerns in Romania – the final CVM report still identified various shortcomings.** In its 2022 rule of law report, the European Commission called for improving anti-corruption legislation, reforming the disciplinary regime for judges, and addressing remaining concerns regarding the investigation of criminal offences in the judiciary. These various shortcomings were highlighted in EU Court judgments from 2021 and 2022.

36

In Romania, the Superior Council of Magistracy, a body consisting mainly of judges and prosecutors elected by peers, decides on judicial careers and discipline. Why is this not sufficient to guarantee judicial independence?

As the Superior Council of Magistracy consists mainly of judges and prosecutors elected by their peers, it is formally independent from executive power. **This formal insulation of the Council from political interference does not, however, eliminate indirect or informal pressure on the judiciary** or on individual judges, especially in major corruption cases.



While the Council has reacted to attempts at undermining judicial independence in the past (including by issuing negative opinions on controversial laws), it has not always been able to suppress them. At the same time, in view of the extreme concentration of powers in the Council, **the lack of transparency and accountability** – the absence of external and internal checks – **emerges as a major issue of concern**. This includes the limited involvement of courts or judicial associations in decision-making and the lack of administrative and financial independence at the court level.

37 What differentiates the Romanian Constitutional Court's situation from the Polish Constitutional Tribunal's clash with the EU Court of Justice?

With its 8 June 2021 decision, the Romanian Constitutional Court **challenged the authority of the EU Court of Justice and the primacy of EU law**, preceding a similar ruling, in October 2021, by the Polish Constitutional Tribunal. It asserted that national courts could not disregard national law provisions contradicting EU law if these provisions had already been declared constitutional.

As a result, judges faced a choice between respecting EU court rulings or constitutional court decisions. If they chose the former, they could be subject to disciplinary sanctions. **This hindered national courts' application of EU law** and undermined effective cooperation with the EU Court.

After the EU Court condemned this practice, in December 2022 Romania removed the provisions allowing the imposition of disciplinary sanctions on judges for non-compliance with constitutional court decisions contravening the EU law. However, as of June 2023, **the Romanian Constitutional Court had not formally revised its initial decision.**



38

How come the EU can sanction individuals? Isn't this the competence of the UN or other organisations?

The EU has its own system of sanctions, parallel to that of the UN, which it also implements. EU sanctions focus on a wider range of thematic areas than the UN sanctions do. They may be applied to reinforce EU values, including the rule of law. EU sanctions are much easier to implement, given that they require an agreement between aligned countries. UN sanctions are imposed by the UN Security Council, in response to threats to international peace and security. They must be **approved by all permanent members** (the United States, Russia, China, France, and the United Kingdom).

EU sanctions can be helpful when the UN Security Council is unable to reach an agreement, especially in cases directly involving the behaviour of a permanent member. As of June 2023, the EU had sanctioned over 1,400 individuals connected to Russia's war against Ukraine since 2014.



39 Why are the people sanctioned allowed to challenge these decisions before EU courts?

The rule of law is for all, regardless of their actions. For access to justice to work properly, it must be provided to everyone, including to those who engage in criminal or nefarious activity. In the EU, justice is intended to work for everybody; this is a stark contrast with Russia, where authoritarian politicians decide who is worthy of seeking court protection and who is not.



Organisations such as the broadcaster Russia Today and people such as the mercenary warlord Yevgeniy Prigozhin are widely considered as enablers and supporters of the Russian regime. Nonetheless, they must be provided with the opportunity to seek recourse before EU courts and to have their cases heard by EU judges. In March 2023, the EU Court ruled in the case of Prigozhin's mother (T-212/22) that merely being his family member was not enough to warrant placement on a sanctions list, and the Court annulled the mother's listing.

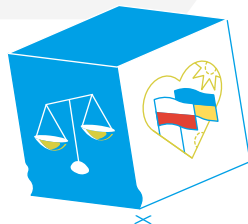


40 Why is the EU withholding COVID recovery funds from Poland, when the country has done so much to help Ukraine?

Poland has written a bright chapter in its history by supporting Ukraine in many ways. Yet these actions **do not undo the damage the Polish government has done to the rule of law in its own country.**

Despite Poland's positive role in supporting Ukraine, the independence of the Polish judiciary and the condition of the Polish legal system are in peril, as found by Polish courts, the EU Court of Justice and the European Court of Human Rights.

The EU continues to apply financial pressure on Poland over the rule of law concerns, even as it supports the country financially to mitigate the impact of the war. The European Commission has refrained, however, from initiating the rule of law conditionality procedure against Poland, despite earlier indications that it would do so.



41 Why is media pluralism so important from the perspective of the rule of law?

Free, independent and reliable media reporting is critical for informing society about various aspects of the rule of law, from the state of the judiciary to the legality of authorities' actions. Some of the greatest scandals regarding illegal activities of governments, such as the Watergate affair in the United States, have been uncovered by journalists.

Thus, preserving media pluralism and journalistic freedoms is vital to ensuring quality public debate on the rule of law. At the same time, robust rule of law helps protect journalists and media outlets from overreach by governments and malicious actions by public and private actors.



In particular, independent and efficient courts are vital to protecting journalists from strategic lawsuits against public participation (SLAPPs), which are often used in attempts to silence media and dissuade journalists from reporting.

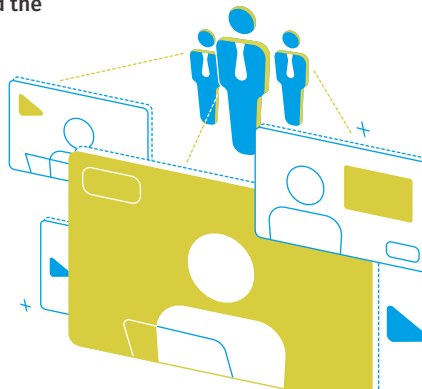
42

Why single out Hungary for a lack of media pluralism, while, in other EU countries, such as Poland, a large share of media outlets are owned by partisan foreign enterprises or large foundations?

In Hungary, the lack of media pluralism stems not only from the concentration of media ownership, but also from so-called **“media capture”** by incumbent political parties.

This occurs through the politicisation of public broadcasters and the state funding – for example through advertising – of biased private media outlets.

Whereas there are also instances of media capture in Poland, its media landscape is strong, pluralistic, free, and, therefore, less problematic. Moreover, foreign-owned media, which in Poland are often more willing to criticise the government, contribute to media pluralism.



43

Greece, Malta, and Bulgaria have legislative safeguards to protect freedom of the media. Why is media pluralism in these Member States still at risk?

Greece and Malta have constitutional provisions safeguarding freedom of the media. Also, Bulgaria provides for minimum standards in line with the requirements set out by the European Court of Human Rights. **Despite these guarantees, violations of media freedom occur regularly, making these countries the worst-scoring EU Member States in terms of media pluralism** (according to the Reporters Without Borders Press Freedom Index and the European University Institute's Media Pluralism Monitor).



In Greece, journalists have been arbitrarily wiretapped by the National Intelligence Service and strategic lawsuits against public participation (SLAPPs) against reporters are commonplace. SLAPPs against journalists also occur regularly in Malta, where, every request for access to information by independent media outlets is challenged by the Maltese authorities. Similar concerns have been raised in Bulgaria, where violations of media freedom are facilitated by corruption, insufficient independence, and the poor efficiency of the justice system.

44

Do EU law requirements apply in the sphere of Member States' national security? Is it not acceptable to use secret surveillance for national security purposes?

While the EU does not have competence over Member States' national security, EU law requirements, such as the EU Charter of Fundamental Rights, do apply. **A Member State cannot invoke national security concerns to justify secret surveillance in violation of the right to privacy, as set out in the Charter.** Given the impact of secret surveillance of individuals on policy areas where the EU has shared or exclusive competence, the EU has a vested interest in ensuring that its Member States respect fundamental rights while protecting national security.



According to the case law of the European courts, **secret surveillance can be used only in extraordinary circumstances and when subject to judicial authorisation.** Individuals subject to secret surveillance have to be informed after the monitoring. Legal requirements are high, due to the depth of intrusion in the privacy of the target and the potential for politically motivated misuse.

45 What makes illegal secret surveillance and authorities' responses to such allegations particularly alarming from the rule of law perspective?

The use of covert surveillance is not only a threat to one person's privacy; it is also dangerous from a broader rule of law perspective. Mass use of secret wiretapping leads to situations such as in Poland, where, despite the strict requirements, judges overwhelmingly approve surveillance measures based on sparse information provided by law enforcement officials. This, in turn, **erodes trust in the judiciary**.

Another broader danger in the use of surveillance is when defenders of the rule of law – **journalists, judges, scholars, and activists** – become **targets of covert wiretapping**. The mere awareness of being targeted by such measures is enough to **create a chilling effect** that might dissuade individuals from speaking up against the government.

