



# ESTABLISHED EU RULE OF LAW INSTRUMENTS

STATE-OF-THE-ART  
WORKING PAPER

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# LISTE OF ABBREVIATIONS

AG: Advocate General  
AMR: Alert Mechanism Report  
ASGS: Autumn Package consisting of the Annual Sustainable Growth Survey  
CEECs: the Central and Eastern European countries  
CP: Cohesion Policy  
CSRs: Country-Specific Recommendations  
CVM: Cooperation and Verification Mechanism  
DRF: EU Pact for Democracy, the Rule of Law and Fundamental Rights  
EAW: European Arrest Warrant  
ECA: European Court of Auditors  
ECB: European Central Bank  
ECHR: European Convention of Human Right  
ECJ: European Court of Justice  
ECtHR: The European Court of Human Rights  
EMU: Economic and Monetary Union  
EP: European Parliament  
EPPO: European Public Prosecutor's Office  
EU: European Union  
EUCO: European Council  
EUJS: EU Justice Scoreboard  
IMF: International Monetary Fund  
MFF: Multiannual Financial Framework  
MIP: Macroeconomic Imbalance Procedure  
MS: Member State(s)  
NCAs: national competition authorities  
NGEU: Next Generation EU package  
NGO: Non-governmental organization  
NRRPs: National Recovery and Resilience Plans  
OLAF: European Anti-Fraud Office  
OMC: Open Method of Coordination  
PRP: Preliminary Reference Procedure  
RLRC: Rule of Law Review Cycle  
RoL: Rule of Law  
RRF: Recovery and Resilience Facility  
SCPs stability and convergence programmes  
SGCY: the Support Group for Cyprus  
SGP Stability and Growth Pact  
SRSP Structural Reform Support Programme  
TEU: Treaty of the European Union  
TFEU: Treaty of the Functioning of the European Union  
TFGR: Task Force for Greece  
The Charter: EU Charter of Fundamental Rights  
TSI: Technical support instrument



## 4.2. The EU Justice Scoreboard

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The EU Justice Scoreboard (EUJS) is part of the EU's Rule of Law toolbox and essentially provides an annual overview of indicators on “the performance of national judicial systems” (A. Strelkov 2019, 15, see also A. Dori 2021, 281). Since its creation in 2013 (under the so-called “consecutive leadership of J. Barroso and J.C. Juncker, [Strelkov 2019, 15]), the EUJS represents a quantitative and qualitative tool in the hands of the European Commission, added to the pool of EU policy instruments in the field of Justice and Home Affairs. Examining the EUJS in the line of the EU Rule of Law instruments, it is a **soft prescriptive instrument**, drawing on modality that shapes behaviour through dialogue and persuasion (Coman 2022, 13). In the Communication “*The EU Justice Scoreboard. A tool to promote effective justice and growth*” [21], at point 1, the Commission sets out the general scope of the EUJS: “The objective of the EU Justice Scoreboard [...] is to assist the EU and the Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States. Quality, independence and efficiency are the key components of an ‘effective justice system’. Providing information on these components in all Member States contributes to identifying potential shortcomings and good examples and supports the development of justice policies at national and at EU level” (see also Dori 2021, 281, nt. 5). In this way, through the EUJS, the EU pursues access to an effective justice system as an essential right “at the foundation of European democracies and enshrined in the constitutional traditions common to the Member States” [22] (see also Velicogna 2013 and Coman 2015, 183) [23] and the guarantee of the effectiveness of EU law. Since the EUJS focuses on non-criminal justice, in particular civil, commercial and administrative litigation, it does not cover the entire judicial system.

The **main** (initial) **elements** of the Scoreboard are: – a comparative method for comparative data, which covers all Member States without paying specific attention to the national constitutional and administrative tradition; – an inter-temporal approach, meaning that through each annual report it is possible to evidence any evolution; – a non-binding instrument in an open dialogue with the Member States; and – an evolving tool in the light of the societal and political dynamics.

The **main** (initial) **indicators** used as a benchmark for measurement are: (i) the *efficiency* of the procedures through the *length of the proceedings* (i.e. time needed to decide a case at first instance), the *clearance rate* (meaning the ratio of the number of resolved cases over the number of incoming cases) and the *number of pending cases* [24]; (ii) the *perceived independence* of the justice system.

The **genesis** of the EUJS can be traced back to the EU economic and financial crisis of 2008, in which the EU institutions assumed that national justice systems could play a key role in the restoration of confidence and the return to growth. Indeed, the introduction of the EUJS “was presented by EU Commissioner Viviane Reding (2013) as an answer to the so-called Copenhagen dilemma” i.e. insufficient control over MS’ compliance with EU founding values after the accession (Strelkov 2019, 17; see also Coman 2022, 103; Benelli 2017, 189 and Pech 2021, 322), in particular on the independence of the judiciary (Guazzarotti 2022, 14 and, significantly, the so-called Tavares Report [25], on which see Scheppele 2013). For the first elaboration of this Scoreboard, the Council of Europe’s Commission for the Evaluation of the Efficiency of Justice (CEPEJ) was asked by the European Commission to collect data and provide analysis. The most relevant and representative information were used by the European Commission for the construction of the EUJS. Data from other sources, such as the World Bank, the World Economic Forum and the World Justice Project, were also included in the first scenario (Communication, COM(2013) 160 final, 3; see also Pech 2021, 322-323 and Alina Onțanu, Velicogna 2020, 250). Given the construction, the **methodology** used for

the EUJS implied the collection of a large amount of data from three main categories of sources: data collected at the EU interinstitutional level, pilot exercises or field studies, and EU external sources in line with the CEPEJ methodology (Dori 2015, 24). The first category - data collected at the EU inter-institutional level, which is the vast majority (87% until 2015, cf. Dori 2015, 24) - involves the cooperation of the ministerial and judicial offices of the Member States, with the result that there isn't any kind of verification mechanism on the reliability of such data. The reason for this is that data do not come from an external and independent source, but rather from the Member States themselves.

On this basis, the Commission proposes Country-Specific Recommendations (CSRs) in the European Semester, as discussed in section 5.1.

As a symbol of the “inevitable **evolution** of such tools, the dimensions covered by the Scoreboard have changed over time to focus on new and pressing issues, such as the independence of the judiciary” (Coman 2022, 105), as happened, for example, in 2021 when the EUJS was used to provide an overview of the institutions involved in the appointment of judges to the Supreme Courts of the MS (Coman 2022, 105).

Looking at the **praxis**, the Commission has adopted ten communications (2013-2022) from which it is possible to draw some preliminary evidence, which are taken as a basis in the following analysis of the *dissensus*. The first formal evidence is the increasing length of such communications: from 22 pages in 2013<sup>26</sup> to 62 pages in the 2022 Report [27]. In terms of substance, a number of important steps have been taken to get to the current features of the EUJS. In the 2014 Report (Communication, “*The 2014 EU Justice Scoreboard*” COM/2014/0155 final), the Commission tried to overcome the gap between the *perception* of judicial independence and *structural* judicial independence, through the provisions of several elements that strengthen the above mentioned independence (these are five indicators: the safeguards regarding the transfer of judges without their consent, the dismissal of judges, the allocation of incoming cases within a court, the withdrawal and recusal of judges and the threat against the independence of a judge [28]). One year later, in its 2015 Report [29], the European Commission underlined the importance of intensifying *dialogue* with the MS as a basis for structural cooperation aimed to improve the reform of the national judicial systems. This cooperation

is backed up by financial support from the European Structural and Investment Funds (ESI Funds), which support the Member States' efforts to improve the functioning of their judicial systems. 2016 [30] marks the transition from country-based data, which to a certain extent is not entirely impartial or complete, to a (cautious) *technicalisation* of the indicators and the sources. In this sense, in order to assess the quality of the justice systems, the Commission started to work with the group of contact persons on national justice systems specifically on the standards related to the functioning of justice systems (in particular, two contact persons, one from the judiciary and one from the ministry of justice). The centrality of the justice system and the protection of its independence have become a primarily political objective. Indeed, in the 2017 Report [31], the first consideration was a quotation of former Commission President Barroso in which he emphasised the link between (the protection of) the EU Rule of Law and judicial independence: “*The rule of law is not optional in the European Union. It is a must. The rule of law means that law and justice are upheld by an independent judiciary*”. 2018 (Communication “The 2018 Eu Justice Scoreboard” [32]), was the year of expansion of the tool: the European Commission extended its monitoring of the judicial system through the News Indicators. This was achieved mainly by assessing the independence of the Councils of the Judiciary, developing a section dedicated to criminal justice systems (in particular money laundering) and introducing some indicators on the organisation of prosecution services in the Member States. After 2018, the EU Justice Scoreboard became part of the EU's toolbox. The Communication on Further strengthening the Rule of Law within the Union - State of play and possible further steps (COM(2019) 163 final) identified the EU Justice Scoreboard as part of the EU's toolbox to strengthen the Rule of Law by contributing to supporting judicial reforms and rule of law standards. A confirmation of the new approach came from the actions taken: for instance, in September 2018, the Commission referred Poland to the ECJ for violation of judicial irremovability and independence by the Law on the Supreme Court (see Pech, Wachowiec, Mazur, 2021;

Bárd 2022; section 2.2. here). At the same time, (inversely) several national courts seized the ECJ through the PRP (article 267 TFEU), requesting clarifications on the EU law requirements for judicial independence<sup>[33]</sup>, see also Pech 2021, 323; section 2.3 here). As announced in the political guidelines of President von der Leyen, the Commission has established a comprehensive European Rule of Law Mechanism to deepen its monitoring of the situation in Member States in which the implementation of the EU Justice Scoreboard has experienced problems (EUJS Report 2020 and EUJS Report on 2021).<sup>[34]</sup> Finally, ten years after its launch, the EUJS 2022 Report focuses on the implication of the Covid-19 pandemic on the justice systems.

*The EUJS is a soft & prescriptive instrument drawing on modalities that shape behaviour through dialogue and persuasion.*

What **dissensus** (and what *type of dissensus*) exists on these tools? For the sake of clarity, it is useful to provide subcategories: (i) **chronologically** (ii) **categorially** (in respect of which there is, obviously, an intersection). (i) In the beginning of the established tool, as observed by Ramona Coman (2016 and 2022), some MS fearing the empowerment of the Commission “by stealth”, opposed that this type of quantitative and qualitative data (i.e.: statistics and indicators) on the performance of the judiciary was already provided by other regional organisations, such as the Council of Europe and the Venice Commission, and therefore the Commission should not reproduce them<sup>[35]</sup> (Coman, 2016; cf. Velicogna 2016 that emphasised the misunderstanding of MS concerning the tool). Moreover, in its early days, the EUJS was criticised not only by the Member States but also by (some) academics. For Cappellina, the method by which the EU Commission selected the team of experts demonstrated the lack of socio-legal measurement and evaluation (in fact, most of the experts mentioned are lawyers with no experience in the specific field of socio-legal measurement and evaluation, cf. Cappellina 2020, 148).

This criticism could lead to question whether the EUJS is an appropriate instrument to assessing outputs consistent with indicators since the choice of the method, that implies the choice of indicators, directly affects the final results. This point emerges evidently if one considers the specific indicators set out by the European Commission through which it measures the effectiveness of judiciary. In the European Parliament Report “*On the EU Justice Scoreboard - civil and administrative justice in the Member States*”<sup>[36]</sup>, rapporteur T. Zwiefka emphasized the importance of meeting certain fundamental criteria such as the equal treatment of MS, objectivity and the comparability of data. In general, MEPs represent a stimulus for the Commission. In this sense, MEPs pushed for the extension of the scope of the tool (to include corruption) and one MEP asked for the introduction of the mandatory transmission of data by Member States.<sup>[37]</sup>

(ii) With regard to the category of contestation, scholars focus on **methodology** and **data evaluation**. In particular, scholars have dealt with how the result is processed and whether the process is capable of explaining the dimension of judicial effectiveness. In this sense, “the way in which data is collected and reported at national level for these European initiatives generates and perpetuates this difficulty in gathering comparable data sets” (Onțanu, Velicogna 2021, 454). Dissensus on the method chosen to collect data persists and leads to a second question, namely whether the data collected impartially reflect the inner meaning of each indicator set by the EU Commission. When one considers the use of this data in political debates and court cases, it is easy to see the importance of this point (in the CJEU’s case-law, the only official document that expressly mentioned the EUJS is the AG E. Tanchev Opinion in Joined Cases C-585/18, C-624/18 and C-625/18, see Pech 2021, 324, nt. 104<sup>[38]</sup>). On the merits of the data collected, most of the criticism comes from the MS. The most striking case is Poland. The Polish government uses EUJS data according to its needs. In this sense, when the EUJS provides a positive assessment on the justice system (for example, on

the public expenditure for the justice system), the government highlights the result in comparison with other MS, even though it was condemned by the European Court of Human Rights for the excessive length of the procedure (see *Rutkowski and Others v. Poland*). On the contrary, when EUJS lead to a negative evaluation, as in the case of above-average effectiveness of the Polish judicial system “the Polish government merely suggested this could be due to unreliable statistics” (Pech 2021, 323). At the same time, Hungary started using the EUJS data as an argument in support of the independence of its own judiciary (e.g. in the context of art. 7 TEU procedure, see Pech 2021, 323-324 and section 2.1. above). The cases mentioned lead to a preliminary conclusion: a distinction must be made between general criticism and dissensus, whereby the essential distinction is that dissensus is impossible to overcome within the political confrontation that marks democratic systems. This is also identifiable in this specific tool (Coman 2022). The proliferation of dissenters, particularly at the level of the Member States, brings with it the technical dimension of data and evaluation. For this reason, in order to improve the use of the EUJS (which implies the effectiveness of this tool), it could be essential to overcome the problems of methodology and data evaluation.

## References

Bárd, P. (2021), In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law, *European Law Journal*, 27:1-3, 185-210.

Benelli, M., (2017). Carrots, sticks, and the rule of law: EU political conditionality before and after accession, *IANUS*, 15-16, 171-200.

Bustos Gisbert, R., (2022). Judicial Independence in European Constitutional Law, in *European Constitutional Law Review*, 18:4, 591-620.

Cappellina B., (2020). Legitimising EU Governance through Performance Assessment Instruments European Indicators for a Judicial Administration Policy, *International Review of Public Policy*, 2:2, 141-158.

Cappellina, B., (2018). Quand la gestion s’empare de la Justice : de la fabrique européenne aux tribunaux, *Science politique*, Université de Bordeaux, (Thèse doctorale).

Coman R., (2016). Strengthening the Rule of Law at the Supranational Level: The Rise and Consolidation of a European Network, *Journal of Contemporary European Studies*, 24:1, 171-188

Coman, R., (2022). *The Politics of the Rule of Law in the EU Polity: Actors, Tools and Challenges*, Palgrave MacMillan.

Dori, A. (2015). *The Eu Justice Scoreboard – Judicial Evaluation as a new Governance Tool*, in *MPILux Working Paper 2*.

Dori, A., (2021). In Data We Trust? Quantifying the Costs of Adjudication in the EU Justice Scoreboard, *Erasmus Law Review*, 4, 281-297

Guazzarotti, A., (2022). Tutela dei valori e democrazie illiberali nell’UE: lo strabismo di una narrazione “costituzionalizzante”, *costituzionalismo.it*, 2, 1-59.

Jakab, A. & Kirchmair, L., (2022). Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights, *Cambridge Yearbook of European Legal Studies*, 24, 239 – 261.

Moxham L. & Stefanelli J., *Safeguarding the Rule of Law, Democracy and Fundamental Rights: A Monitoring Model for the European Union*, Report, 15 November 2013.

Oñtānu, E.A., Velicogna, M., (2021). The challenge of comparing EU Member States judicial data, *Oñati Socio-Legal Series*, 11:2, 446–480.

Pech, L., (2021). The Rule of Law, in Craig, P. De Búrca G. (eds.), *The Evolution of EU Law*, Third edition, Oxford, Oxford University Press, 2021, 307-338.

Pech, L., Wachowiec, P., & Mazur, D., (2021).

Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action, *Hague Journal of Rule of Law*, 13:1, 1–43.

Scheppele, K.L., In Praise of the Tavares Report: Europe finally said No to Viktor Orbán, in *Verfassungsblog*, 5 July 2013.

Strelkov, A., (2019). EU Justice Scoreboard: a new policy tool for “deepening” European integration?, *Journal of Contemporary European Studies*, 27:1, 15–27.

Velicogna, M., (2013). *The EU Justice Scoreboard and the Challenge of Investigating the Functioning of EU Justice Systems and Their Impact on the Economy of the Member States*, Paper presented at the SISP Conference, Florence.

Von Bogdandy, A., & Ioannidis, M., (2014).

Systemic deficiency in the Rule of Law: What It is, what has been done, what can be done, *Common Market Law Review*, 51:1, 59-96.

# Endnotes

[21] Available [here](#).

[22] The Eu Justice Scoreboard. Available [here](#).

[23] See also article 47 of the Charter of Fundamental Rights of the European Union.

[24] Other indicators directly related to the efficiency are: the monitoring and evaluation of court activities, the Information and Communication Technology (ICT) systems, the alternative dispute resolution (ADR) and the training of judges (see Communication, COM(2013) 160 final, 4-5, available [here](#)).

[25] See point 36: “Welcomes the Commission’s proposal for a permanent scoreboard on justice in all 27 EU Member States as put forward by Vice-President Reding, which shows that safeguarding the independence of the judiciary is a general concern of the EU; underlines the fact that in some Member States serious concerns might be raised on these issues; calls for an enlargement of the justice scoreboard also to cover criminal justice, fundamental rights, the rule of law and democracy, as already requested”.

[26] See The 2014 Eu Justice Scoreboard. Available [here](#).

[27]. See The 2022 Eu Justice Scoreboard. Available [here](#).

[28] See Communication, “The 2014 EU Justice Scoreboard” COM/2014/0155 final.

[29] Available [here](#).

[30] Available [here](#).

[31] Available [here](#).

[32] Available [here](#).

[33] See Communication from the Commission “The 2019 EU Justice Scoreboard”, COM(2019) 198 final. Available [here](#).

[34] Available [here](#) and [here](#).

[35] On the denouncing of duplication see also the oral speech in the EP by Rebecca Taylor (ALDE): “Mr President, the oral amendment on behalf of the ALDE Group is as follows: “Takes note of the EU Justice Scoreboard with great interest; calls on the Commission, in consultation with the European Parliament, to take this exercise forward in accordance with the Treaties with the engagement of the Member States, while bearing in mind the need to avoid unnecessary duplication of work with other bodies” ([www.europarl.europa.eu/doceo/document/CRE-7-2014-02-04-INT-2-118-000\\_EN.html](http://www.europarl.europa.eu/doceo/document/CRE-7-2014-02-04-INT-2-118-000_EN.html)).

[36] Available [here](#).

[37] Question for written answer by Antony Hook, E-002534-19 to the Commission, Rule 138. Available [here](#).

[38] The information is also updated at 3 march 2023.