



# Unresolved Questions on the EU Rule of Law Report

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## Reshaping European Democracy

The European Commission (EC) recently released a communication titled “2020 Rule of Law Report: The Rule of Law Situation in the European Union.” The concept never passed the test of a feasibility study, and EC President Ursula von der Leyen did not even promise it as part of her original program. It was one of the pledges she had to make in exchange for political support during the hearings for her presidency. The report has been widely expected to offer a basis for the sanctioning of democratic backsliders such as Hungary and Poland. EC communications, however, have no binding power and can serve only to name and shame. The new report can therefore only bring some added value if its contents offer better arguments than those already in circulation. In fact, many are circulating already, as the European Parliament has not been idle and in the last two years alone interpellated Hungary, Poland, Romania, Slovakia, and Malta. Hungary and Poland are also fighting an Article 7 procedure. The European Justice Court is also involved and has already issued the first rulings on such problem countries.

The report covers four areas: the justice system, the anticorruption framework, media freedom, and other institutional checks and balances. The commission adopted the Council of Europe’s multifold definition of rule of law, but the report exceeds it by including media. This was actually a good decision, as freedom of the media has been declining in nearly all EU countries (except Romania, where it was never very high to start with) over the last decade, and media is an essential component for the control of corruption, aside from its more general role in a democracy. The country chapters are based upon contributions from the member states and a variety of already available, mostly European sources. The countries are not ranked on any dimension—this would have been impossible, given both the qualitative methodology used and the reticence of member states to any ranking.

The patient readers of the whole report will not find anything new. But in the event that a second edition will ever follow—and the exercise is not discontinued like an earlier anticorruption report was—a few questions are important to address and eventually debate.

## 1. Country Diagnoses Are Missing

Why is there not one fact-based problem statement for each country, stating clearly whether there is a problem with rule of law and if so, what does it consist of? Instead the report offers snapshots of judicial reforms in every country. The link between problems they were meant to address and these reforms is either missing or presumed. Some underlying assumption seems to exist that the *organization* of the judiciary is the source of its *independence* from government and private interests. If that is the case, this goes against academic evidence, which shows on the basis of the same data that the EC uses *the contrary*. The independence of the judiciary does not result from specific constitutional arrangements, or the countries with the best such arrangements would have the best and most independent judiciaries. It stems from the historically developed power balance in every given country. The neglect of this simple, although counterintuitive truth leaves the reader confused about the relevance of the reforms presented to strengthen the rule of law, from digitalization in Belgium to reshuffling of the judiciary in Malta. Furthermore, why are bureaucratic mechanisms which did not deliver measurable improvements in the past decade (like the Cooperation and Verification Mechanism) advanced for the next? Is it not significant

that Bulgaria—a country being assessed under the mechanism, which proposed a year ago for it to be lifted—was recently reprimanded by the European Parliament?

## 2. Corruption Levels Explain Anticorruption, Not the Other Way Around

Why is the corruption section defined as an “anticorruption framework”? An anticorruption framework makes sense only in relation to a given country’s corruption problems. Or is everybody supposed to have a similar framework regardless of their individual problems? If a relation existed between the density of regulation on anticorruption and a reduction of corruption, this would be more understandable. But again, the reality is exactly the opposite: the most successful national integrity frameworks in the EU (and the world) are not the most regulated, but the other way around. Hungary has far more extensive public accountability mechanisms than Finland. Yet still, it is Finland that better manages to control abuse of office for undue profit. Keeping track of all changes in regulation certainly has a value in itself, but it cannot replace a sound diagnosis of each problem and a matching policy solution, relevant to the context of every country. The report counts the existence of national anticorruption strategies as progress, instead of checking real developments. Such an approach has been already pioneered in accession and EU-neighborhood countries, which have all come to have five-year anticorruption plans (see Moldova, Montenegro, and other so-called champions). Yet the few successful countries of the last three decades—the likes of Estonia under its former prime minister Mart Laar, and Georgia under its former president Mikhail Saakashvili—evolved due to reform packages very different from such plans.

## 3. The Report Does Not Cover the EU’s Cross-Border Problems

Does not this piecemeal, country-by-country approach by the commission somewhat underscore the EU’s severe cross-border problems, which have showed the vulnerability of European common rule of law and public finance to organized crime, corruption, and money laundering? And is it not the role of EU institutions primarily to address such cross-border problems, which end up neglected because they require coordination across member states? There is very little in the report on the fundamental threats to European banks from organized crime and corruption, for instance.

## 4. There Is Little on Transparency

Why is transparency in general, despite being shown to be one of the most effective deterrents of abuse of power and corruption, so marginal in the report? Transparency is easy to monitor and to fix, and several initiatives in Europe monitor transparency in public procurement, spending, financial and banking operations, and so forth. It is the lack of transparency that hostile powers like Russia and others use to launder their money in EU banks and pose veritable security threats. Is it really a twenty-first-century strategy to rely on the underpowered European Public Prosecutor’s Office, which would anyway act well *after* the crime is produced and even investigated administratively (by the European Anti-Fraud Office) for issues such as VAT evasion? Only full digitalization and interconnectivity of EU data on financial transactions and public procurement will allow the prevention of such problems—and some instruments exist already. But why would any progress be made if the plan is that a massive problem will be addressed by a few lengthy prosecutions *after the fact*?

## 5. The Report Uses Vague and Imprecise Data

Why is the report so reliant on subjective data based on perceptions, such as Eurobarometer surveys on rule of law and corruption with leading questions (such as the rule of law is important, corruption is intolerable), and the Corruption Perception Index (CPI) from Transparency International? The Eurobarometer surveys are not panels using the same respondents to allow sound comparisons over time—that would probably make them even more expensive than they already are. Academics have long proven that CPI, an average of expert perceptions, is not a proper tool to be used to measure corruption across years. If these surveys miss a measurement or lack a clear fact-based diagnosis of the causes of a particular problem, what can be monitored instead to track progress? Citizens’ perceptions, or the amount of regulation, despite their poor correlation with problems? Compliance with EU regulation and its implementation must be monitored, of course. But they cannot replace measuring the problems directly (judicial independence, lack of transparency, and corruption) to assess whether reforms manage to reduce them or not.

## 6. There Is Little on Public Procurement

Why is the area most related to EU funds, public procurement, so underrepresented in the report? After all, if the goal is to sanction countries by cutting their EU funds, surely the case will be made easier (in the courts as well) *if a more direct link were presented between funds and misbehavior?* An example is the red flag procurement indicators (such as lack of open call for tenders or single bidding) from the European Single Market scoreboard, where several poor performers openly breach EU policy targets. Yet such indicators are barely mentioned despite data repositories now tracing corruption in procurement in the European Union in real time. For instance, Poland has been leading for years in noncompetitive bidding at very high proportions, which could have offered an indication that all was not well there. Similarly, research on procurement has showed Hungarian manipulation of EU funds years before OLAF opened an investigation into Viktor Orbán, so such fact-based indicators do exist and deliver.

## 7. Gaps and Biases

Why are major country facts, even for the previous year, simply missing from the report, and what methodology determined what is included and what is excluded? Is not the case of the Airbus corruption, for instance (a footnote in the France country report on the financial settlement mechanism) showing that rule of law was clearly imperfect if such practices were systematic over decades (and leaders above the law)? No word on the fact that the U.S. Foreign Corruption Practice Act seems to be behind the most important investigations into European companies—and not OECD antibribery convention? Surely this deserves an analytic paragraph, as it touches also on compliance and implementation, keywords of the rule of law. How can the report on Germany miss the Wirecard scandal entirely? There is now an investigation by the German parliament looking at the regulators' conflict of interest and their failure to address the problem in time (instead, they acted against the *Financial Times* whistleblowers, relevant to press freedom, too). How can the report on Romania praise both the National Integrity Agency and the Anti-corruption Directorate, and not remark that the latter charged the head of the former with corruption, only for a court to finally clear him? Would it not be better to order a deep audit of this and several high-profile cases closed by the courts, before asking for more cases? Why is there no analysis of why the commission recommended a year ago that the cooperation and verification mechanism be suspended for Bulgaria and now it seems a problematic country again (given that nobody claims that its problems appeared last year, only that last year was when the protests stepped up). Finally, although the list can be much longer, how can Luxembourg's judiciary be praised as top of Europe, when a prison sentence of a court there against the LuxLeaks whistleblowers was part of the motivation for the EU regulation on whistleblowing?

## In Conclusion

Although some critics have complained that negative comments are spread across too many countries, it is commendable that the report tries to cover all EU member states equally and not discriminate against a few countries. However, the lack of clarity and transparency of the criteria for including or excluding facts in the absence of a clear methodology has backfired, leading journalists to assign degrees of seriousness and make diagnoses themselves. This does not necessarily result in more objectivity or depth of understanding of either problems or potential solutions.

It is undeniable that European Union member states have been backsliding on rule of law and democracy, and that action should be taken. But do we have fresher and better evidence after this report than before? And apart from backsliding on democracy, don't we also need more awareness of what seem to be older problems of corruption and impunity? The issues at companies such as Airbus and Wirecard, in addition to those at many banks, have long been in existence and have been ignored by regulators despite warnings. Effective action needs to be based on serious audits and fact-based research on problems by professionals, not on public opinion surveys. Questions like the ones above need to be raised and answered for the EU to effectively confront its rule of law problems. It may be that the infringement of rights and the control of media are in a different category of problems from corruption or the imperfect independence of the judiciary, needing different solutions. If so, this must be discussed openly.

However, this does not mean deterring action. To start, why not connect the procurement scoreboard with the allocation of EU funds? The same suspects will be targeted, but with clearer and less controversial evidence: benchmarks already exist and are clear. Recovery funds should not go to the political clienteles of government parties trespassing on rule of law, but to the broader community of citizens and businesses of every EU member state.

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Promoting Good Governance Across Borders (*Cambridge University Press, 2020*) and was principal investigator in the main EU research projects on corruption, such as *ANTICORRP* or *DIGIWHIST*.

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