# The Missing Chapter

## The EU's Own Adherence to Rule of Law Standards

**Joelle Grogan & Barbara Grabowska-Moroz**

28.10.2024 doi: 10.59704/741e5a78e11dc5f2

The European Commission's *Annual Rule of Law Report* aims to help prevent further rule of law backsliding within the EU by examining the rule of law situation in Member States. However, the report is missing an important chapter: the EU *itself*. Despite repeated calls from the European Parliament, neither the Commission nor the Council have issued a similar report nor supported an independent review of the rule of law at EU level within EU institutions. On 28 October 2024, the Rule of Law Clinic (CEU Democracy Institute, Budapest), together with experts from across Europe, began to bridge this gap by publishing the first report on the EU's adherence to rule of law standards.

The report argues that without a meaningful self-assessment of its own compliance with rule of law principles, the EU weakens its credibility, particularly when addressing systemic non-compliance with EU law by Member States. By acknowledging potential rule of law issues at the EU level, these concerns can be effectively addressed. This post outlines some of the initial findings of the report across the areas of the EU justice system, anti-corruption framework, media freedom, and other major institutional issues related to checks and balances, in conscious mirroring of the framework of the Commission's Annual Report.

### Examining the rule of law at EU level

Access to the EU justice system is primarily based on a very limited and privileged access to the Court of Justice. Recent decisions of the CJEU underline how this limited access to courts at the EU level for private parties, paired with a restrictive interpretation of the court's jurisdiction, can hinder effective oversight of EU institutions and actions. In *Medel*, the General Court found that judicial associations did not have standing in a case concerning judicial independence. In the *Sharpston* cases, the Court ruled that acts of state representatives were not subject to judicial review, even though they concerned the dismissal and appointment of Advocates General. Similarly, the General Court found it lacked jurisdiction to review the *EU-Turkey Deal*, despite grave concerns about human rights violations within Turkey implicitly condoned by the agreement.

CJEU case-law regarding mutual recognition in criminal matters also poses risks to the rule of law. The decisions in *LM* and *Openbaar Ministerie* indicate that general suspension of mutual recognition is not allowed unless a Member State has been subject to the sanctioning process under Article 7 TEU and has *actually* received a sanction. The high bar set by the *LM*-test means that both a general and a case-by-case suspension of the European Arrest Warrant are essentially impossible to be applied in practice, and hardly any surrenders have been halted by way of properly applying the test. In so doing, the EU and the Member States may sometimes overlook key legal principles, like fair trial rights and the presumption of innocence, to prioritise mutual recognition and prevent alleged criminals from avoiding punishment. Seeking remedies beyond the EU justice system is also limited. Despite monitoring Member States' compliance with ECHR judgments in the Commission's Annual Rule of Law Report, and a Treaty-based obligation to accede, the EU remains outside the system of human rights protection established under the ECHR.

In terms of anti-corruption, the reputation of EU institutions has been damaged by successive scandals including Uber Files and Qatargate. Although mechanisms like the transparency register and whistleblower protections exist, anti-corruption reform has been piecemeal and fragmented within a complex system.

Ongoing challenges, such as weak or even non-enforcement, inconsistent regulations, and inadequate parliamentary immunity protections, undermine the effectiveness of the EU's anti-corruption strategy.

There is not an entirely negative picture of rule of law compliance at EU level. Reforms aimed at promoting media pluralism and freedom demonstrate the EU's commitment to safeguard media integrity and transparency. The European Media Freedom Act and the anti-SLAPP directive are the main indicators of how the EU legal framework has improved in recent years, ensuring the accessibility of diverse media sources and opinions within Member States. These measures also guarantee journalists the ability to report without undue influence or restriction, both of which are essential for a healthy democracy. However, the success of these initiatives relies on robust monitoring and prompt enforcement, which is untested. The track record on this point is a concerning indicator. During 14 years of the rule of backsliding in Central Europe, the Commission has initiated only one EU law infringement action regarding media freedom.

In terms of other checks and balances, the Fundamental Rights Agency remains underutilised, particularly given its expertise on various aspects of the rule of law crisis in EU Member States. Meanwhile decisions taken by the EU Ombudsman (regarding e.g. access to documents or migrants' rights) require implementation by EU institutions to be fully effective.

It would not be possible to consider adherence to the rule of law at the EU level without also considering the actions taken by EU institutions in defence of it within Member States. In this regard, the Commission's overall enforcement record against Member States on rule of law issues is insufficient. A number of rule of law-related decisions made by the EU Commission – including delayed infringement actions, inconsistent or even non-enforcement, and the premature closure of rule of law procedures – could indicate that political expediency may be influencing how both the Commission and the Council address problematic rule of law developments within Member States. Relatedly, the Commission's assessments on when to release funds to Hungary and Poland, the closure of the Cooperation and Verification Mechanism (CVM) regarding Bulgaria and Romania, as well as ending Article 7 procedure against Poland are seen as politically motivated and lacking legal rigour. The evidence suggests that the Commission has ignored systemic issues related to judicial independence in these states.

Some of the most serious concerns relate to migration management. The legality of actions, and particularly soft law arrangements within the area, is questionable. Deals with third states usually lack independent monitoring mechanisms and effective legal remedies for victims to obtain redress or reparation. Barriers to accessing the courts, a lack of oversight and transparency of Frontex operations, and the use of EU funding beyond EU borders create an area that appears unaccountable to the law. Within EU borders, the new Pact on Migration and Asylum seeks to enhance mutual trust among Member States, however, it risks perpetuating a trend of exclusion and externalisation of EU policy without safeguarding fundamental rights. Enforcement also remains politically contentious: the Commission appears hesitant to act against manifest and systemic violations.

## Why the EU must address its own adherence to the rule of law

For the EU to function properly, it is essential that both the Member States and the Union *itself* adhere to rule of law standards. The rule of law is "a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order". When EU institutions responsible for safeguarding the rule of law are seen as prioritising political expediency and failing to conduct or allow rigorous independent review or self-assessments, their legitimacy and credibility are compromised. This erosion of credibility weakens their role as protectors and promoters of the rule of law, raising doubts about their ability to objectively and effectively enforce rule of law standards across Member States.

An arguably short-sighted argument against the call for the EU to explicitly seek, find and address its own shortcomings on rule of law requirements is that

it gives fodder to autocratic or authoritarian governments. But this is already a reality: the state of the rule of law in the EU is frequently used by political leaders from backsliding governments as a form of "whataboutism" to deflect attempts to improve the situation domestically and to justify systemic non-compliance with EU law, including disregard of CJEU orders and judgments. Taking control of the narrative by acknowledging shortcomings and committing to improvements counters these critiques.

By failing to consider rule of law adherence, there are already negative consequences for *all* Member States. First, in Member States that are backsliding on their rule of law commitments, governments may continue to delay compliance or attempt to evade enforcement altogether by claiming "double standards" and asserting that they are being unfairly targeted by a compromised system. Second, decisions made at the EU institutional level can inadvertently weaken the overall legal framework, leading to a deterioration of rule of law standards even in states that are otherwise committed to upholding them. Thus, both the integrity of the rule of law and the integrity of the EU's common legal order are weakened.

Only by addressing rule of law deficiencies, and subjecting themselves to annual and ideally independent review, can the EU become a stronger rule of law actor capable of defending EU values throughout the Union and its Member States.

*This blog post draws from the new report, "*Rule of Law beyond the EU Member States. Assessing the Union's Performance" *edited by the blog's authors and published by CEU DI Rule of law Clinic (Budapest). The CEU DI Rule of Law Clinic is a project funded by Stiftung Mercator. The full report is available for download here: https://ruleoflawclinic.com/wp-content/uploads/2024/10/Rule-of-Law-beyond-the-EU-Member-States-CEU-DI-RoLClinic.pdf*

## ABOUT THE AUTHORS

**Joelle Grogan**
Dr Joelle Grogan is Head of Research at UK in a Changing Europe based at King's College London; a Research Fellow at the CEU Democracy Institute, and visiting Senior Research Fellow at the UCD Sutherland School of Law.Joelle Grogan is the Head of Research at UK in a Changing Europe at King's College London, Co-Academic Director of the Rule of Law Clinic at the CEU Democracy Institute in Budapest, and Presenter of The Law Show on BBC Radio 4.

**Barbara Grabowska-Moroz**
Barbara Grabowska-Moroz ist Research Fellow am CEU Democracy Institute in Budapest.Barbara Grabowska-Moroz is the Director of the Rule of Law Clinic and a Senior Research Fellow at the CEU Democracy Institute in Budapest.

## SUGGESTED CITATION

Grogan, Joelle; Grabowska-Moroz, Barbara: The Missing Chapter: The EU's Own Adherence to Rule of Law Standards, Verfassungsblog, 28.10.2024, doi: 10.59704/741e5a78e11dc5f2.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20241029-000126-0.