

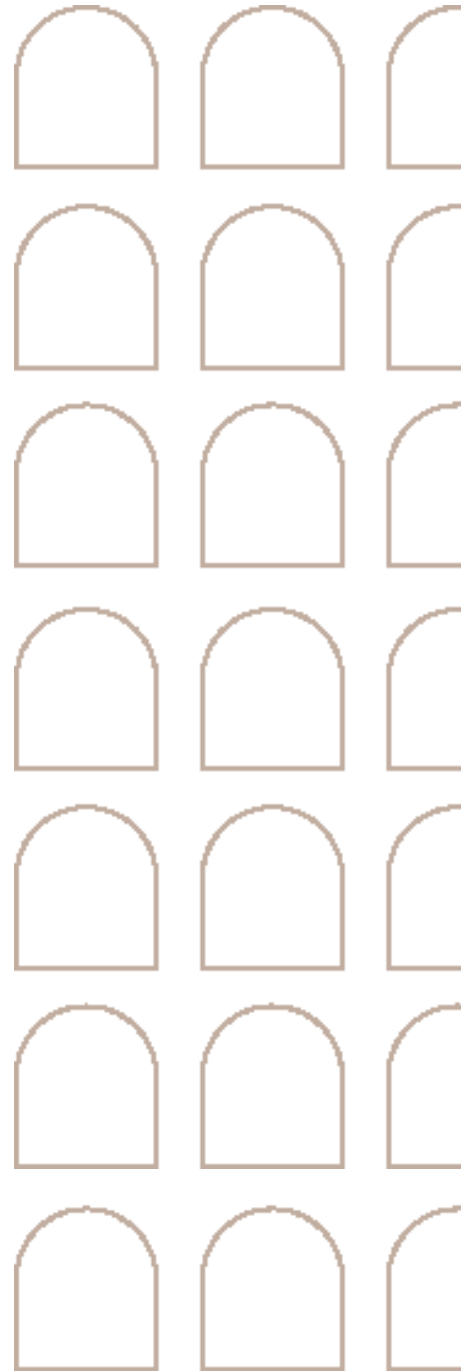
STG Policy Papers

# POLICY BRIEF

## FROM SCRUTINY TO IMPLEMENTATION: REINFORCING THE IMPACT OF THE RULE OF LAW REPORT

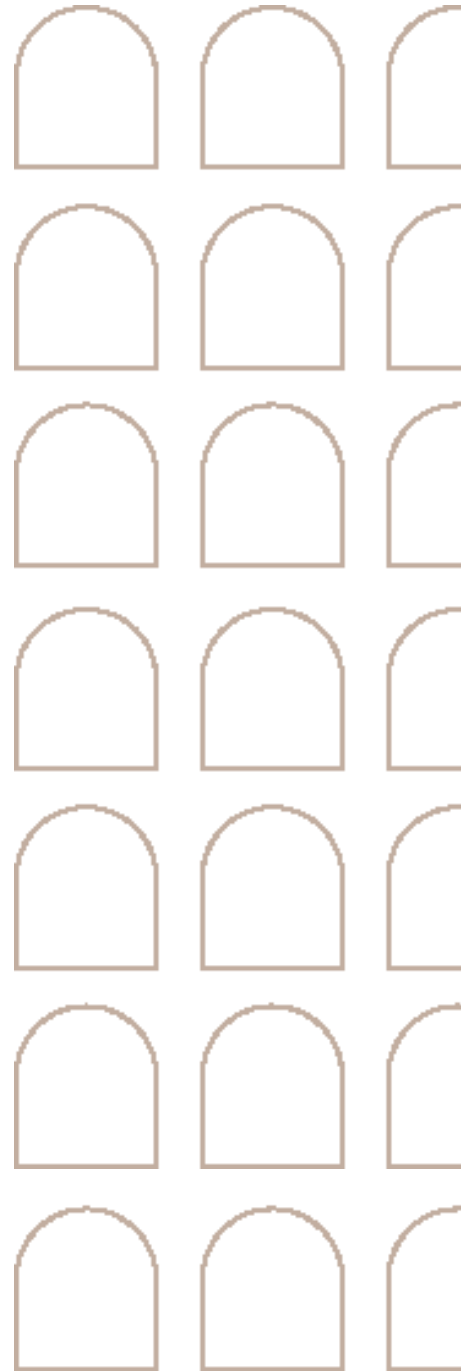
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## EXECUTIVE SUMMARY

The Rule of Law Report is an annual exercise to monitor Member States' compliance with this core EU value. First published in 2020, the latest edition of the Report has introduced country-specific recommendations to guide Member States' action in correcting the problems identified. This Policy Brief examines the evolution of the Report and suggests some proposals to further strengthen its soundness and legitimacy in subsequent editions. Methodologically, the Report could benefit for a more comprehensive assessment based on robust standards and indicators, as well as for a more developed justification of the selection of sources. In terms of enforcement, this Brief proposes to further work on the Report's fit with the other instruments, particularly with the recently developed Conditionality Regulation. The Report might also seek to exploit its full potential as a promotion tool if the Commission invests in an enhanced communication strategy. This brings added value since a civil society supported rule of law culture promotes institutional changes for better compliance with the EU's fundamental values.



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## 1. INTRODUCTION

Ensuring compliance with the rule of law (RoL) value on the part of member states' national governments remains a top priority of the agenda of the European Union (EU). Far from being an exclusively national issue, the EU should and does care about the protection of the RoL in the member states. This is, first, because the Union is a community of law based on mutual recognition. In turn, recognition is possible because member states trust each other. This trust covers both, the law and the authority to enact it. The erosion of the RoL in a member state fundamentally affects trust, and therefore endangers mutual recognition. Hence, the EU's safeguarding of the RoL means safeguarding the very foundations of the European project. Second, breaches of the RoL do not only affect institutions and authorities, but also citizens and companies beyond the borders of the member state in which this value is breached. National offences against the RoL therefore jeopardise the rights of the whole of EU society. Finally, EU concerns on shielding the RoL within follow a principle of consistency on both temporal and territorial dimensions. As for the temporal dimension, since the Union demands candidate countries to comply with the RoL, it necessarily needs to maintain those standards for its own member states. In territorial terms, the EU has strong requirements regarding democracy and fundamental rights protection, two dimensions essentially linked to the RoL. Consequently, EU demands should be equally strong for its own member states.

[The Rule of Law Report](#) (henceforth "the Report"), firstly published in 2020, has proven to be a significant improvement in the Union's RoL "toolbox" in terms of prevention: it provides an annual exercise of review which anticipates RoL related problems and possible deviations in all the member states. Its general scope (it covers several issues rather than focussing on a single one) allows for a broad debate and permits certain resilience if required by changing situations (e.g., to adapt the level of attention paid to the issues depending on its urgency to be addressed).

Nevertheless, the Report, as a relatively new

instrument, can still be developed further. This could comprise a refinement of the indicators and standards used for conducting the review, a more exhaustive list of the sources consulted for inputs, a better fit with the rest of enforcement mechanisms, and further exploiting its potential as a tool for the promotion of the RoL.

The Report already identifies the issues addressed and the sources for their evaluation. However, refining the standards applied and complementing qualitative evaluation with quantitative indicators would have a positive impact on the quality of the assessment. In methodological terms, the Report could also benefit from a more comprehensive justification of the authority of the sources consulted for its elaboration. Moreover, the Report in its current form lacks self-enforcement capacity. Naturally, the Commission may lack competence for "strong" enforcement but future follow up may introduce an element of "soft" enforcement. Benchmarking reforms following Report's recommendation would provide a solid basis for monitoring compliance. Additionally, further integration of the Report with the rest of the EU toolbox, particularly with the Conditionality Regulation and infringement proceedings, would enhance the possibilities of the reforms to be carried out by national authorities. Finally, the Report should try to exploit its potential as a tool for the promotion of a RoL culture in the whole EU. Institutional functioning, both at EU and national level, could benefit from an increase in civil society's knowledge of the EU's fundamental values and how they should be protected.

## 2. HOW CAN COMPLIANCE BE BETTER MEASURED? STRENGTHENING THE ELABORATION AND LEGITIMACY OF THE REPORT

### 2.1 Improving the quality of the data

Improving the quality of the data used for the Report would enhance the clarity, impartiality and legitimacy of the assessment produced. The Report identifies a number of topics assessed under each of the main issues (i.e. justice systems, anti-corruption framework, media pluralism and media freedom, and

other institutional issues related to checks and balances). However, the list does not include specific indicators on how to measure each of these characteristics (e.g., which features are taken into account to consider that the appointment of independent authorities of a member state, such as the ombudsperson, is not captured by the government? How is the level of dissemination of disinformation and fake news through the media measured?), nor examines all of them in every country chapter. The generality of the assessment, while allowing for some flexibility as argued above, also undermines the quality of the Report, as it loses systematicity.

The lack of well-defined standards and indicators hampers the possibilities for comparisons between Member States. Although the institutional set-up varies widely across EU countries and it is important to take context-specific elements into account when carrying out the assessment, standardisation of some indicators would increase the accuracy of the report. Indicators could facilitate the identification of analogies and contrasts between Member States, as well as to identify situations where similar institutional design does not lead to similar results (e.g., What characteristics make some Councils for the Judiciary less vulnerable to political pressures than others?). This would also help to diagnose national factors that favour or hinder certain institutional designs.

In this respect, the Commission could build on existing indicators developed by independent experts and bodies. For example, [V-Dem](#) or the [World Justice Project Rule of Law Index](#), among others, provide a set of indexes that allow comparison, which are currently not included in the Report. By using these indicators, the qualitative assessment would be complemented by a quantitative one, thus being more comprehensive. Furthermore, the [Venice Commission](#) (i.e. the Commission for Democracy through Law, a specialised body of the Council of Europe for the protection of democracy and the RoL) has already developed a set of applicable standards to several topics (including on the independence

of the [judicial system](#), [judicial appointments](#), the [ombudsperson institution](#), or [constitutional reform](#), among others), that could be used as benchmarks for the assessment.

Alternatively, the Commission could develop its own indicators and standards, which would probably be more adapted to the EU context and enjoy greater legitimacy vis-à-vis national governments. However, given the high resource costs of developing and maintaining a set of indicators, the Commission could mix the two options and build on existing indicators, supplementing and improving them with its own standards where necessary. The use of indicators does not necessarily mean to create a “one size fits all” model, but rather to facilitate the assessment and allow for transnational comparisons.

## 2.2 Justifying the legitimacy of the sources consulted

The Commission’s evaluation currently relies on consultations with Member State authorities, as well as with other national and international bodies, specified in the methodology of the Report and listed exhaustively in the country chapters. However, the methodology does not justify the selection of sources: although the Commission identifies the actors whose contributions are of importance to the Report, it does not justify their relevance and legitimacy for the assessment of national systems.

This can become a source of legitimate concern if some national governments decide to criticise the data used in the Report in order to challenge the assessments provided by the EU and the measures suggested to address them. Needless to say, the problem of legitimacy of sources may become crucial if the Report establishes the existence of serious RoL problems in that Member State. To avoid criticism that the data used in the Report is biased, it would be advisable to better develop in the methodology the rationale for the selection of the sources providing the inputs, both national and international, by justifying their relevance and legitimacy. Although costly in methodological terms, this exercise would enhance the Report by increasing its reliability

and authority. An exhaustive list of sources, providing information on who the authority is, what its activities are, how it carries them out, who finances it and why its contribution is significant to the Report, would reinforce the legitimacy of the exercise.

In addition, enhancing the involvement of stakeholders who contribute with information to the Report would have a positive impact on both its preparation and follow-up. In this sense, greater flexibility could be introduced in terms of the dates for contributions, as well as a longer deadline for their submission. Providing organisations with information on how their input has been introduced into the Report would also strengthen their engagement in monitoring whether national governments have subsequently addressed the issues they raised.

Finally, the fact that some organisations and national governments choose not to make their contributions public diminishes the transparency of the Report. It would be advisable that all the contributions were publicly available in the Report's website, or at least to introduce some mechanisms to encourage actors to agree to make their contributions public.

### **3. FROM PREVENTION TO REACTION: HOW TO IMPROVE THE REPORT'S ENFORCEABILITY**

#### **3.1 Enhancing the accuracy of the recommendations**

The 2022 edition of the Report includes several new features, such as observations on the implementation of European Court of Human Rights (ECHR) judgments, as well as a follow-up on public service media and the use of spyware. The introduction for the first time of country-specific recommendations has been one of the major improvements, consensually perceived as a positive element, as it complements the preventive nature of the Report with a reactive character. Nonetheless, some concerns arise on their enforceability. Further clarity and precision on the recommendations would advance this point.

The recommendations are currently formulated in a general way, which, while leaving Member States room for manoeuvre in implementing them, also runs the risk of leading to dubious or misleading results. In this sense, the recommendations could be made more concrete by precisising the benchmarks that the national governments are expected to achieve. Specificity could be increased by further clarifying whether the objective is achievable in the national context and institutional framework, in how much time it is expected to be implemented, which actors should be involved in its implementation, and through which reforms or developments. Making the milestones required by the Commission more exact would help and guide national governments in implementing them.

Additionally, greater precision facilitates the identification of mechanisms for tracing and follow-up the implementation of the recommendations. This could also result helpful to prevent reforms that, while formally complying, do not really solve the substance of the RoL problems they are trying to address. More precision would be beneficial to monitor not only that legal reforms have been carried out, but also that they are being properly implemented.

Finally, introducing more order, precision and detail would also allow for a more accurate reflection of the different rule of law situations in EU Member States and make it easier to justify the activation of other enforcement instruments when national governments refuse to implement the recommendations and continue on a path of erosion of fundamental values.

#### **3.2 The compliance puzzle: linking the instruments of the "toolbox"**

One of the main concerns with regard to the Recommendations relates to their enforceability. The Report does not contain sanctions nor legal consequences for non-compliance with the Recommendations. Enforcement capacity could be indirectly improved through better integration with the other instruments that the Commission has

developed and used in recent years to uphold the RoL. The “toolbox” of RoL enforcement is now complete, what is needed is to strengthen the complementarity of mechanisms and their synergies to make it work coherently.

The Report could introduce time frames for national governments to comply with the recommendations. This would not only help to improve the specificity discussed above but would also facilitate monitoring and serve as a deadline for the Commission before taking other action. In this respect, the Commission could use the failure on the part of the national governments to address the raised concerns as a basis for activating infringement procedures or the Conditionality Regulation. This would be a key step towards improving the Report’s enforceability and contribute to making the use of enforcement instruments more systematic, thus reducing the possibilities for national governments to complain about a given activation on the grounds that the Commission is acting in a discretionary manner. In addition, it would be worth exploring the legal possibilities of using the information provided by the Report as evidence when making decisions in other areas of EU law (e.g., when deciding on access to the Schengen area or participation in the European Arrest Warrant system).

## 4. THE PROMOTION OF A RULE OF LAW CULTURE

### 4.1 The necessity of developing a culture of the rule of law in the EU

Working to develop international standards for state institutions that function as checks and balances to control abuses of executive power is essential to protect the RoL and the proper functioning of liberal democracies. However, they are not sufficient if they are not rooted in a culture of the RoL. Although the majority of European citizens (89%) consider it important that the RoL is respected both in the EU and in the Member States, more than half of them (56%) do not feel well informed about the EU’s fundamental values, [according to a recent Eurobarometer](#). These

data present a worrying trend: EU citizens are convinced of the importance of the RoL, but lack the sufficient knowledge to engage in its safeguarding. The protection of the RoL, democracy and fundamental rights needs to become “part of the everyday language” of civil society.

In this sense, the Report has made a positive contribution to promoting an EU culture of the RoL. First, the notion of the RoL has evolved in recent years from a highly judicialized notion to a broader understanding. This has been a difficult process, which has forced stakeholders to rethink the issue beyond institutional frameworks, towards a broader notion of the RoL. The Report reflects this process well, covering a wide range of issues beyond the mere evaluation of judicial systems. Secondly, the Report has shifted the debate on the RoL from those member states where awareness on the importance of protecting EU’s fundamental values was already high to the EU as a whole. Indeed, the Member States where the RoL debate was most developed also coincide with those where trends are less worrying.

Promoting and embedding a RoL culture among EU citizens is a complex task that the Report alone cannot accomplish. However, further improvements can help it to enhance its promotion role, which can be instrumental in enhancing citizens’ commitment to the EU’s core values.

### 4.2 Improving the communication strategy of the Report

A first path towards improving the Report impact would be to work on its communication strategy. Not only it is necessary that the report engages with a core audience, but also to wide that audience. In this regard, the Report is not currently reaching its whole potential. In order not to lose momentum, an enhanced communication strategy might include the following points:

The Report could develop a parallel, shorter, and visually more attractive edition aimed at citizens. The Report, in its current form, may

result too dense or difficult to understand for non-specialised public. The development of a more user-friendly edition of the Report (which does not need replace the current presentation, but rather complement it) could make it easier for citizens to follow and thus appeal to a wider public. The more people who read and use the Report, the better informed the public debate on the RoL in the EU will be.

It could be useful for the user-friendly version of the Report to classify the recommendations into categories. One option could be, for example, to use the colours of a traffic light to identify positive trends (GREEN), reforms that need to be continued until fully implementation (YELLOW) and practices to be reversed (RED).

Finally, there is a need to improve the Commission's communication in the Member States on the Recommendations, as well as on the work the Commission itself realises to protect the RoL in the Union. In this respect, strengthening collaboration with national media, as well as to further work on the development of a European media, will facilitate the communication of the Report's findings and recommendations.

### **4.3 A specific chapter for EU institutions**

Recent events have eroded public confidence in the EU. Particularly relevant in this regard has been the Qatar-gate scandal (i.e., a corruption scandal in which some Members of the European Parliament allegedly received payments in exchange for lobbying in favour of Qatari interests). Ensuring that all European institutions work in a transparent and accountable manner, independently and free from external pressures, and in order to protect the general interest of the EU, is essential to foster citizens' trust in them. The EU must not only assert its legitimacy to monitor the RoL situation in member states, but also defend it by taking action to address potential RoL problems that it itself may face.

In this sense, the Report may benefit from the introduction of a chapter on the EU, dedicated to identifying RoL deficiencies that may arise in the functioning of EU institutions, and proposing recommendations to address them. The introduction of an "EU Chapter" would

reinforce the legitimacy of the Commission in carrying out the evaluation, bringing the functioning of the Union closer to the citizens, as well as helping to prevent RoL problems from arising in the functioning of the EU itself.

## **5. CONCLUSIONS**

The Rule of Law Report not only is an innovative instrument, but also one of the most comprehensive in the whole "toolbox". Although conceived as a preventive mechanism, it has also played an important role in fostering a RoL culture in the EU and the introduction of the recommendations in the 2022 edition have helped it to move towards reaction. Providing the Report with a more exhaustive methodology to assess the same issues for all country chapters on the basis of well-established standards and indicators strengthens its accuracy and validity. Developing the rationale for the selection of sources providing inputs will make the evaluation more well-founded and legitimate.

Overall, the Report has the power to function as the key juncture in the RoL law enforcement "toolbox". It has yet to exploit its full potential by improving its fit with other enforcement mechanisms and strengthening its role in promoting fundamental values among citizens. Work on reinforcing its robustness and legitimacy vis-à-vis national governments and civil society is essential to ensure that it does not miss its window of opportunity.

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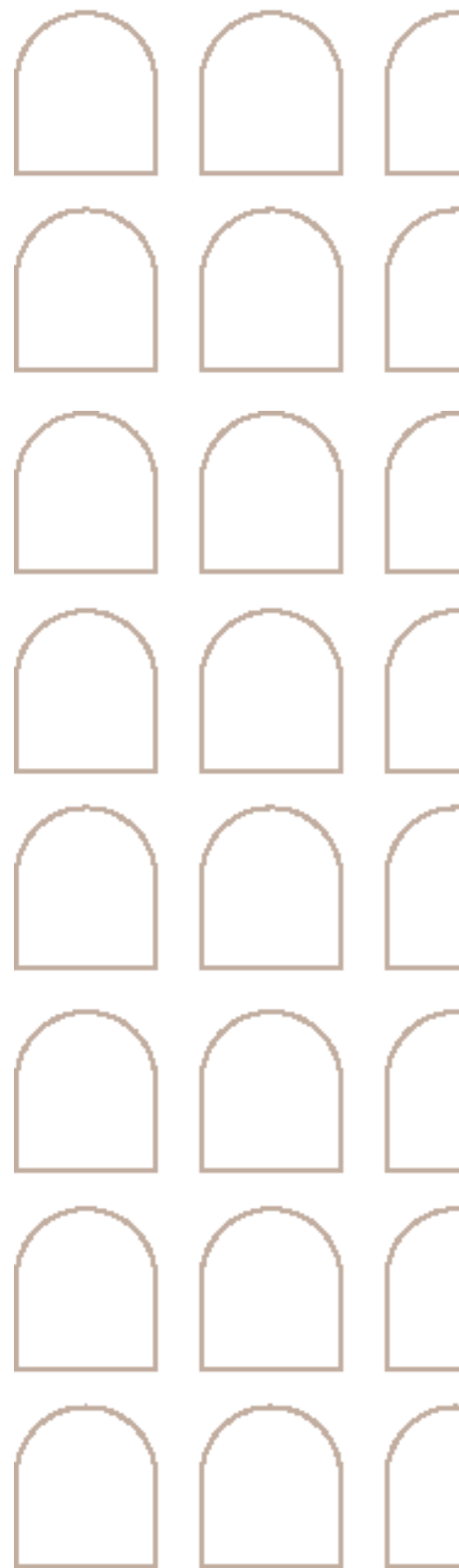
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