

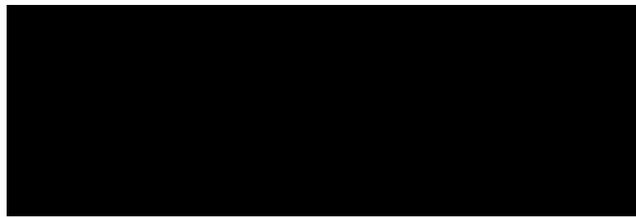


Comments on the methodology of the Rule of Law mechanism of the European Commission



1. Unclear definition of material scope of application of the Rule of Law Report (ultra vires approach and infringement of the principle of conferral of competences (Art 5 paragraph 2 TEU)):

- Firstly, some of the issues identified do not constitute rule of law related issues in the framework of an EU-wide analysis. It should be reconsidered whether some of the identified issues indeed have a link to the rule of law in general and even if they have relevance from the aspect of rule of law, whether they may be subject to an assessment by an EU institution outside the framework of Article 7 TEU.
- While the material scope of application of Art 7 is not limited to EU competences (which is per se an important problem as it infringes the principle of conferral of competences and provides the EU with a general and absolute competence on all national competences “through the back door”) the Rule of Law Mechanism does. It shall therefore be limited to the EU’s remit of competences and not become an “ultra vires” document as it did in 2020. This is essential to the credibility of the Commission’s monitoring.
- The applied methodology and the precedent of the 2020 Report evidence a negligent approach that allows the Commission to select “à la carte” the scope of application of the Report and the topic it will focus on, disregarding whether they strictly fall within the scope of application of EU’s competences.
- And within every chapter, the Commission does not systematically cover the same topics for every Member states, even in similar situations. To the contrary, it is free to omit or insist on some aspects without any clear guidelines justifying its approach. One example: In the 2020 exercise, the Commission elaborated in depth on the independence of the General Prosecutor in Poland but totally omitted this same question in Spain although the former Minister of Justice has been appointed General Prosecutor in a clear attempt to undermine its independence.



2) Deficient definition of standards/benchmarks against which the respect of the Rule of Law is assessed:

- The criteria on the basis of which the Commission selected the different standards referred to in the document is far from being obvious. In light of the diversity of national constitutional institutions (as mentioned under Point I.), a more detailed analysis is needed to define the standards of the analysis, especially whether there are any “well-established” European standards in case of the specific topics, whether these are clear and precise enough to be evaluated in an objective manner and whether they are equally applicable to all Member States. Without this prerequisite, the Rule of Law report could easily fall into the trap of double standards. This is especially problematic for the topics listed under “*constitutional and other issues*”. To the very least, whether such standards are available for “high-risk corruption”, “transparent allocation of state advertising” or “public information campaigns” or “access to public documents” in general remains very questionable.
- Thirdly, the Methodology document does not even specify the basic methods of assessment. It does not define the indicators to be monitored under the specific issues. It does not clarify how the Commission intends to synthesize the findings from different sources. Is there a weight attached to each source; if yes, how are these calculated? How will the Commission filter circular references (when information or statements are quoted or referred to in a number of different documents giving the false impression that they come from several independent sources)? How will contradictory findings influence the outcome? This is especially sensible in case of open consultation: how the Commission would and could verify the neutrality and reliability of the comments obtained?

3) Lack of diversity among the sources, prevalence of desk research over research , lack of criteria to process and assess the information received

- A detailed reading of the 2020 report shows a worrying lack of diversity in the source consulted and eventually quoted in the report among the civil society actors. Moreover, the Commission specifies little about its approach to make sur it listens to all the voices in a given country or on a given topic. How does it ensure the whole scope of the civil society is aware of the possibility to take part in the public consultation? Does the Commission make an effort to go beyond its usual circles? Does it favour the NGOs with which it has an established cooperation, notably the umbrella organisation with their headquarters in Brussels? If ever the consulted sources were diverse, does the Commission give more credibility to those it already know or are all treated equally?





- This, again, can lead to a perception of double standards that much undermines the credibility of the Rule of Law mechanism. A worrying example of it can again be found in the Spain Country Report, in the Media chapter: despite the recurrent attacks of
- Spain's Vice-president (Pablo Iglesias) on the media in 2019 and the questionable situation of Spain's main Public Broadcasting Corporation (RTVE) in terms of independence, the report only mentioned the case of a journalist boycotted in a meeting of a political party. What are the sources consulted by the Commission to reach this conclusion and omit the important topics mentioned in this example?
- The Commission mixes information from public bodies (which we deem as more reliable) with sources from private bodies and NGO's. How does the Commission select those players and assess their legitimacy to take their views on board? Does it systematically control the credibility of the organisations it mentions and if yes, against what criteria?
- The Commission relies mostly on desk work to draft the report and gives fewer importance to on the ground visits, although the latter are more helpful to form a consistent and independent opinion. The Commission should allocate more time and resources in conducting more visits and elaborate agendas that truly reflect the political, social and cultural diversity of players required to have a sound opinion.
- Finally, we also have doubts at the Commission's capacity and diligence in processing all the contributions it will receive for the 2021 Rule of Law report. If it does not provide explanations on how it weights and assess the information and opinions it receives, then I might give reasons to believe that this public consultation is more a formality, a "transparency washing" exercise than a sincere attempts to have its own opinion.