

# *European Commission's Rule of Law Report*

## **2023**

## **Gap Analysis**

**Publisher**

Civil Liberties Union for Europe e.V  
Ebertstraße 2,  
10117 Berlin,  
Germany

# ***TABLE OF CONTENTS***

<b>About this brief</b> .....	4
<b>The state of the rule of law across the EU in 2023: gaps and discrepancies between the Commission's and Liberties' reports and findings</b> .....	5
Depth and tone of the Commission's analysis: general considerations	5
Structure and scope of the Commission's report	6
Critical assessment of the Commission's reporting	6
A persistent gap: systemic human rights violations and their relevance to the rule of law	10
<b>What impact? A reality check</b> .....	12
Country-specific recommendations and their implementation	12
Fostering discussions at national level	12
Raising awareness and mobilising public opinion	13
<b>More transparency, stronger engagement</b> .....	14

## **ABOUT THIS BRIEF**

Liberties has, since the very launch of the EU annual rule of law dialogue in 2019, applauded the European Commission's initiative and mobilised its members to actively engage and usefully feed into this exercise. Liberties' Rule of Law Report 2023, published in February this year, is the result of an intense joint reporting exercise which Liberties coordinated with its members across the EU to contribute to the Commission's annual rule of law report, the fourth edition of which was published this year.

Over the years, Liberties has equally engaged with the European Commission to provide constructive critical feedback on the reporting exercise itself, both as regards the Commission's approach to the reporting and the contents of its reports, and as regards the reporting process, with a particular focus on the involvement of and engagement with civil society organisations and experts, in particular at the national level.

As part of this continuous engagement, and against the background of ongoing discussions on improving and expanding the annual rule of law dialogue – including the Commission's announcement of its intention, from now on, to also cover candidate countries in the annual monitoring and reporting process, and the evaluation of the exercise by the member states – Liberties and its members have worked on this gap analysis in order to inform EU policy-makers' reflections.

Drawing on a critical assessment of the European Commission's report and reporting exercise, and using the Liberties Rule of Law Report 2023 as a benchmark, this brief conveys the feedback of Liberties and its members as regards the Commission report's findings, impact and underlying process.

# ***THE STATE OF THE RULE OF LAW ACROSS THE EU IN 2023: GAPS AND DISCREPANCIES BETWEEN THE COMMISSION'S AND LIBERTIES' REPORTS AND FINDINGS***

## ***Depth and tone of the Commission's analysis: general considerations***

Besides the punctual considerations which follow below as to the Commission's reporting in each thematic area, Liberties generally observes that both the horizontal report and the country reports drawn up by the Commission **overall fail, once again, to provide a contextual and intersectional analysis of rule of law trends.** In particular, the Commission seems reticent to engage in an analytical reporting as to how, in certain countries, the steady deterioration of rule of law standards reflects deliberate efforts by the governments in power to weaken safeguards in order to pursue their agendas and evade democratic scrutiny, or maintain their grip on power.

The limited contextual analysis also impacts on the **way the Commission reports about reform efforts:** announced or ongoing reforms are being devoted great attention and visibility in the majority of country reports, but often without a genuine assessment of their

pertinence, slow pace and impact of such initiatives in addressing the concerns identified. As a result, the tone of the Commission's reports can often be perceived as **exceedingly positive and optimistic towards apparent reforms and progress made to address identified challenges** in many member states and in most of the areas covered. Such findings, however, are often times not substantiated by evidence-based information on the real progress made on the ground – against the background of reports by Liberties' members pointing to generally minimal, shallow or slow efforts in most countries covered to resolve documented rule of law issues, with reforms being delayed or falling short of achieving the expected results.

Among the most striking discrepancies is the way the situation in **Hungary** is pictured, with the Commission making remarkable efforts to highlight the initiatives the government is taking to address systemic deficiencies in areas such as justice, corruption, and public participation in law making. Yet, it is clear from Liberties' Hungarian member's report that reforms being initiated are likely to lead

to only very modest improvements, and that at the same time the government continues to implement measures overtly designed to centralise power, silence opponents, control public opinion, and remain in power. The Commission's report also fails to draw attention to worrying developments in **Italy** and **Sweden**, where newly elected governments are increasingly engaging in rhetorical attacks against civil society and the media and have been championing reforms that fall short of international human rights standards.

## **Structure and scope of the Commission's report**

The structure of the Commission's 2023 Rule of Law Report did not fundamentally change compared to previous years, with its focus being on the same thematic areas as in previous years: (i) justice systems; (ii) anti-corruption frameworks; (iii) media pluralism and media freedom; and (iv) checks and balances on power.

As regards the report's structure and scope, Liberties and its members regret that the Commission once again **failed to dedicate a standalone chapter to civic space and challenges facing civil society actors**. This is particularly disappointing given the crucial importance of a thriving, free and open civic space to the rule of law framework, and the critical role of independent civil society actors in ensuring an effective and transparent reporting process.

In addition, the fact that different issues are combined under an overarching chapter on "other institutional issues related to checks and balances" **fails to offer a clear understanding of each different components of the system of checks and balances, and an in-depth analysis of related shortcomings**. This approach also detracts from efforts to ensure equal treatment of, and an even reporting about, all member states.

Liberties also notes that, besides limited considerations related to independent bodies and cases pending before the European Court of Human Rights, conflated in the chapter on checks and balances, there is still **no comprehensive and contextual analysis of the human rights frameworks and of states' performance** as regards compliance with international and regional human rights standards – in particular systemic human rights violations, and accountability thereof, impacting on the rule of law environment.

## **Critical assessment of the Commission's reporting**

### **Justice systems**

The Commission's report gives an extended overview of the state of the justice system in all countries. The main trends it highlights include a general lack of independence, as well as lack of financial and human resources necessary to ensure an effective respect for the right

to access to a court and to an effective remedy and a fair trial. Although these **main findings are in line with Liberties' report overall**, Liberties and its members continue to note a number of gaps affecting the Commission's analysis.

First, the situation in some countries, as reported by Liberties' members, appears inconsistent with the findings of the Commission's report. In fact, the Commission sometimes adopts a **very optimistic tone with regard to judicial reforms** being implemented, but without engaging in a critical assessment of the pertinence and impact of such reforms. This inconsistency is mostly noticeable as regards **Hungary**, where the current state of the justice system was deemed deteriorated in 2022 by Liberties' member, which drew attention to numerous cases of corruption of the judiciary and a persisting lack of independence of courts and prosecutors. These issues mostly go unreported by the Commission, which focuses instead on pointing to several new laws which purportedly reform the justice system and address previously identified concerns. This inconsistency is also visible in other country reports, such as **Romania**, where Liberties' member expressed concerns over ongoing justice reforms praised by the Commission, and **Sweden**, where the report drawn up by Liberties' member strongly reiterates the need for the government to further improve the system of constitutional review, while the Commission's report points with satisfaction to the efforts by the Committee on Inquiry to implement recommendations made.

A second discrepancy stems from the fact that a number of issues which would clearly fall within the scope of the Commission's analysis as regards the functioning of justice systems remain overlooked. These include **respect for procedural rights, in particular in criminal proceedings** – an issue which goes unmentioned in the Commission's report, even with respect to those countries where challenges, as reported by Liberties' members, seem to be systemic, such as in **Belgium, Italy and Ireland**.

A third gap relates to the general reticence of the European Commission to genuinely report about **political interference with, and pressure on, the justice system** – something which does get through Liberties' member reports in a number of countries including **Bulgaria, the Czech Republic, Germany, Hungary, Poland, Slovakia and Spain**.

### **Anti-corruption frameworks**

Reporting on anti-corruption frameworks by the Commission heavily focuses on the implementation of the EU whistle-blower protection directive. This is of course a very important and relevant area, and the Commission's findings in that respect are overall consistent with those of Liberties' members. At the same time, however, Liberties notes that a number of other issues related to corruption practices and the failure to address them are not, or are only superficially, mentioned by the Commission.

Examples of overlooked issues include **public procurement practices**, in relation to which Liberties' members in various countries,

including **Croatia, Czech Republic, France** and the **Netherlands**, denounce a general lack of transparency; systemic and high-level corruption practices, with **Hungary** being the most notable example, together with Croatia; and the inefficient implementation and enforcement of codes of conduct and ethics, as reported for example by Liberties' member in the **Netherlands**.

The Commission's report also only timidly addresses the **root causes behind lengthy and ineffective responses to corruption**, in particular as regards investigations and prosecutions. While the lack of financial resources is observed by the Commission in relation to most countries, the country reports fail to give account to the existing legal and political obstacles to corruption investigations, as reported, for example, by Liberties' member in **Belgium**. The need to strengthen criminal provisions to fight against high-level corruption cases is also raised by Liberties' members in countries like **Germany** and **Slovakia**, but is not mentioned by the Commission in its country reports.

The Commission's overall approach to the situation in **Hungary** as regards corruption is also worth mentioning – with the Commission being very positive and optimistic about announced or allegedly ongoing reforms, compared to Liberties' member, which describes the state of corruption in Hungary as a persistent state of systemic corruption at the highest level, with no real and genuine efforts to change that in sight.

## **Media pluralism and media freedom**

While the Commission's report rightly raises the alarm over existing threats to media freedom in many countries, the Commission's assessment in this area has a rather **restricted focus**. Most country reports concentrate on two main issues: the need to strengthen transparency in media ownership, and the lack of independence of media regulators. The Commission's findings on these issues are consistent overall with Liberties' report, even though where measures to address identified challenges are reported, it remains to be seen whether these will succeed in driving concrete progress on the ground; and the **evolving situation in certain countries**, like **Italy, Slovakia** and **Sweden**, could have deserved closer attention.

Liberties also observes that a number of other issues raised by Liberties' members in their reports remain overlooked.

The most prominent gap relates to verbal and physical **attacks on journalists**. While the focus kept by the Commission on the worrying use of spyware on journalists is welcome, also against the background of discussions on the extent to which surveillance on journalists may be accepted in the context of negotiations of the Media Freedom Act, the Commission only covers other types of threats and attacks to a very limited extent – despite the issue being prominent in many country reports drawn up by Liberties' members, including **Bulgaria, Croatia, the Czech Republic, Estonia, France, Hungary, Germany, Ireland, Italy,**



the Netherlands, Poland, Romania, Sweden and Spain. The Commission also falls short to report on the lack of effectiveness of investigations into such attacks, as reported for example by Liberties' member in **Belgium**; or on the gendered dimension of such attacks, as reported, for example, by Liberties' member in **Italy**. The incidence of and threats posed by **strategic lawsuits against public participation (SLAPPs)** could also have deserved more attention, with the Commission's report being focussed on the few steps taken in some member states, which seem far from capable of improving the situation, especially considering the retrogressive position taken by the bloc on the EU Commission's proposal for an anti-SLAPP directive. The frequency and impact of **smear campaigns targeting** journalists is also downplayed in the Commission's reports – as illustrated, for example, when looking at the Commission's and Liberties' member report on **Croatia**.

The Commission is equally seemingly shying away from thoroughly documenting the **political influence and pressure over media**, an issue vocally raised by Liberties' members in **Hungary** and **Poland**, as well as in other countries such as **Bulgaria** and **Slovenia**.

Another issue which is rather overlooked by the Commission is that of **obstacles and challenges to the enjoyment of the right to access information** – a gap which is well exemplified comparing the Commission's and Liberties' reports on **Ireland**.

## **Checks and balances on power**

As already mentioned above, Liberties finds that this section of the Commission's reports **conflates too many issues**, therefore failing to offer an in-depth understanding and analysis of the different components looked at.

As regards institutional checks and balances, for example, the Commission extensively mentions issues related to the legislative process, including as regards the use of accelerated procedures and the extension of emergency regimes. However, its assessment does not go into depth to explain how these practices actually impact on the rule of law. This can be seen, for example, in the Commission's reports on **Croatia, the Czech Republic, France, Germany, Ireland, Hungary, Romania** and **Slovakia**, which fail to mention allegations made by Liberties' report of governments **using fast-track procedures to bypass legislative scrutiny** in relation to certain controversial laws.

Similarly, while the Commission does include in the scope of its reporting **national human rights institutions (NHRIs) and other independent bodies**, Liberties would welcome a more thorough assessment about the actual factors impacting on these bodies' establishment, independence and effectiveness – something which many Liberties' members devoted particular attention to, namely in **Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy** and **Ireland**.

The issue of **law enforcement accountability**, including the effectiveness of judicial control, is also barely mentioned by the Commission. Examples include the **judicial review of decisions made by border police**, which Liberties' members in **Croatia** and **Estonia** denounce as ineffective and unfair; or the **discriminatory practices of law enforcement authorities**, as reported for example by Liberties' member in **Belgium**, or in **France** as regards the enforcement of the so-called anti-separatism law.

### **Civic space**

As already expressed above, Liberties regrets that **civic space issues** are still not examined and illustrated in a standalone section of the Commission's reports.

As a result of this approach, despite efforts to make reporting on these issues more comprehensive and systematic, Liberties finds that the Commission's report still **falls short of underlining the crucial importance of civic space as a core component of a healthy rule of law environment**, and only provides for a **partial account and assessment** of the enabling and obstructing factors affecting civic space across the EU. Indeed, while the Commission's reports do enumerate a number of relevant issues related to civic space in each country, they overall fail to provide for a detailed and encompassing account of its components, and related restrictions.

There are also a number of issues which the Commission does not report about and which clearly affect the enabling civic space environment. These include obstacles to the

enjoyment of **freedom of association, freedom of expression and freedom of assembly**, against the background of persisting or increasing restrictions denounced as politically motivated by several Liberties' members, including in **Belgium, Bulgaria, the Czech Republic, Estonia, France, Germany, Italy, the Netherlands, Spain and Sweden**.

The issue of **criminalisation and legal harassment** is particularly overlooked, as is the incidence and spread of **smear campaigns** - something which, on the contrary, many Liberties' members drew attention to, in particular in **Croatia, France, Germany, Ireland, Italy, Slovenia and Sweden**.

The Commission's report also fails to properly give account of the particularly severe toll that restrictions and threats are having on human rights defenders and civil society organisations working to protect people who migrate and to protest against governments' inaction to address climate change.

## **A persistent gap: systemic human rights violations and their relevance to the rule of law**

The inclusion of the level of implementation of judgments of the European Court of Human Rights as a rule of law indicator since last year has marked a welcome evolution of the Commission's approach to the scope of its

reports. Nonetheless, Liberties believes that the reticence of the Commission to include in the scope of its reports further considerations as regards systemic human rights violations impacting on the rule of law environment, as Liberties has been consistently calling for, **remains a major gap affecting the comprehensiveness and credibility of the reporting exercise.**

Indeed, the rate of implementation of judgments of the European Court of Human Rights is not a sufficient indicator of governments' performance in abiding by their obligations under international and regional human rights instruments.

As Liberties' report once again illustrated, backsliding on human rights standards, systemic violations and impunity thereof continue to be a stain on the rule of law record of many member states. Blatant examples include the **systemic violations of rights of people who migrate** (as reported by Liberties' members in **Croatia, Estonia, France, Germany, Hungary, Italy, Ireland, Lithuania, Slovenia** and **Spain**); the persistent failure to promote and protect the rights of people from ethnic minorities (as reported in **Bulgaria, France, Ireland, Sweden**) and **people in detention** (as particularly reported in **Ireland**); and the **retrogression on the rights of LGBTIQ persons** (as reported in **the Czech Republic, Hungary** and **Slovakia**).

# WHAT IMPACT? A REALITY CHECK

## Country-specific recommendations and their implementation

The Commission presents its report as a ‘*key driver for change and positive reforms*’, arguing that ‘*65% of recommendations (made in the previous year) have been, fully or partially, addressed.*’

As already mentioned, Liberties has always looked at the annual rule of law reporting exercise as a **valuable tool** to monitor rule of law developments and help inform responses to identified concerns. The inclusion by the Commission, since last year, of **country-specific recommendations**, and its commitment to report on the implementation of such recommendations in subsequent reports, has been a very welcome step which Liberties had for years encouraged the Commission to take.

However, Liberties finds that the recommendations formulated by the Commission, especially compared to the country-specific recommendations formulated by its members, **continue to lack articulation and detail** and **do not seem targeted enough** to the concerns identified and the relevant national legislative and political context. This casts doubts as to the extent to which these recommendations could truly be seen, at this stage, as genuine accountability tools. The fact that the recommendations are not embedded in the country

reports, but are instead listed in a separate document, also detracts from their contextualisation and pertinence.

Liberties also finds that the **assessment of the implementation of recommendations remains very opaque**: the Commission does not substantiate the indicators and related data which brought it to the 65% implementation figure it purported, nor does such an assessment rest on a structured and transparent process.

## Fostering discussions at national level

Efforts by the Commission, with the support of its country representations and the EU Fundamental Rights Agency, to **facilitate national rule of law dialogues** building on the report’s findings represent an important step towards a more impactful reporting exercise. Indeed, multi-stakeholder engagement and follow-up at national level is critical to achieve change on the ground.

Liberties understands, however, that **the organisation of such dialogues is not grounded in a structured and planned-ahead process**. In fact, the dialogues are organised based on the expression of interest of stakeholders at national level – with civil society organisations being particularly encouraged to

take such initiative, in the absence of a proactive engagement of governmental actors in the majority of member states. While Liberties and its members are committed to continue exploring avenues for engagement, including in the context of national rule of law dialogues, **ambitions and efforts by civil society would need to be better promoted and supported**, through a more systematic and regular reach out to national civil society actors, a transparent engagement approach, and targeted financial support.

Liberties also draws attention to the fact that **the impact of the Commission's reports at national level is inevitably affected by the gaps and loopholes which characterise the reports themselves**: the limited uptake of issues reported by civil society organisations in the Commission's reports, and the lack of a critical attitude from the Commission towards a given member state in one or more areas, can result in a distorted picture of the national rule of law environment and of government's efforts to address concerns, and thus **prevent a frank and meaningful discussion** between authorities and stakeholders, including civil society, at national level. This also risks **progressively alienating grassroots civil society organisations from the process**, frustrating their commitment and reducing their engagement in the reporting exercise, as they see no tangible benefits from participating. This is particularly true for organisations with limited resources where participation in the reporting process can place a significant burden on staff who would otherwise be engaged in national-level policy work which is seen as more impactful and pressing.

## ***Raising awareness and mobilising public opinion***

Liberties finds that overall, the Commission's approach to reporting and dissemination of the reports is **not prone to raising awareness and mobilising public opinion** around the importance of keeping the rule of law frameworks across the EU strong and healthy.

The way the reports, and in particular the EU-wide report, are worded and disseminated makes them rather inaccessible to non-experts. Yet, the rule of law reporting exercise bears relevance to every citizen who cares about the direction the EU and its countries are heading. Liberties believes that the Commission's reports would benefit from efforts to illustrate and substantiate findings with **concrete cases and examples** in addition to statistics, from using a **more simplified language** and avoid complex jargon and acronyms, and from **more user-friendly dissemination tools**, spinning a narrative inspired by values-based framing.

The timing of the publication of the report, in July, is also a matter of concern, as many national parliaments are entering summer recess and political reporting is often winding down for the summer. This has meant that the publication of the report has failed to generate the degree of public awareness that it could possibly have if it was published, for example, in the autumn.

# **MORE TRANSPARENCY, STRONGER ENGAGEMENT**

Liberties takes note of and welcomes the Commission's **efforts to increase the transparency of the reporting process**, including by making public the calendar of the country visits conducted in preparation of the reports.

Nonetheless, **the Commission's engagement with independent non-state actors, and in particular civil society organisations, throughout the monitoring and reporting process remains deficient.**

Liberties strongly encourages **further reflections on how to make the monitoring and reporting exercise more transparent and participatory vis-à-vis non-state actors**, in order to **counterbalance the privileged position member states continue to retain throughout the cycle** (including in particular the possibility to review and comment on draft country reports). Steps should be taken, in particular:

- to allow for input/feedback on the consultation questionnaire;
- to create a space for targeted consultations for the purpose of the formulation of country-specific recommendations;
- to ensure a structured engagement with national civil society actors as regards the country reports' follow-up and the implementation of recommendations,

in order to gather critical feedback and recommendations on the way forward.

Liberties believes these efforts are necessary to **strengthen the credibility** of the annual rule of law dialogue, **improve its impact on the ground and maintain the engagement of civil society organisations** in the process.

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

**Website:**

[liberties.eu](https://liberties.eu)

**Contact info:**

[info@liberties.eu](mailto:info@liberties.eu)

**The Civil Liberties Union for Europe e. V.**

Ebertstraße 2,  
10117 Berlin,  
Germany

**Subscribe to our newsletter**

<https://www.liberties.eu/en/subscribe>

**Reference link to study**

Please, when referring to this study, use the following web address:

<https://www.liberties.eu/f/npuiwa>

**Follow us**



Co-funded by  
the European Union

The contents of this publication are the sole responsibility of Liberties and its authors and do not necessarily reflect the opinion of the European Union.