

The missing dimension in rule of law policy

From EU policies to multilevel
capacity building

Clingendael Report

Adriaan Schout
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“Nothing is possible without men, but nothing lasts without institutions.”

(Monnet)

The EU is frantically searching for new instruments to ensure that member states adhere to its rule of law ambitions. Some form of national capacity building, amongst a whole range of other instruments, has been on the agenda for a long time. However, little attention has been devoted to building the necessary European networks. Such networks are important to institutionalise the required professional norms and values across the member states. Countries need to have functioning rule of law institutions so that checks and balances are part of the national landscapes. These national institutions (agencies) need to be embedded in the European multilevel system of checks and balances to give them an EU context and backing. The EU now needs to move beyond naming and shaming instruments and to start building dedicated EU networks (creating independent agencies at national and EU level and setting up inspections of national agencies). The network-building approach has been successful in other EU policies; now is the time to apply it to rule of law. This requires the unpacking of rule of law so that it is clear which national institutions are involved.

1 Introduction

Rule of law¹ is a persistent problem in Central Eastern and Southern member states. The current political difficulties with Poland and Hungary attract considerable attention, but (major) rule of law issues exist in (most) other member states as well. While the EU's rule of law instrumentation is developing, little attention is devoted to a multilevel public administration approach. A wide range of factors that play a role in ensuring the rule of law has been identified in the many expert and policy documents.² The core question to be addressed at this point in time is whether, to complement the current toolbox, the relevance of building European networks is being explored as a means of helping national institutions to become resilient.

Section 2 discusses the position multilevel networks has acquired in EU governance literature and elaborates the relevance of independent national and European agencies and bodies as building blocks of European networks. To identify the extent to which multilevel networks are part of the European toolbox, Section 3 reviews the emerging EU's rule of law policy framework. Section 4 examines rule of law trends in the member states to identify the extent to which the EU's attempts so far have been successful. This paper ends with conclusions and recommendations. While acknowledging the highly political nature of rule of law policies, this paper takes a public administration look at the EU's rule of law challenges to complement the ongoing legal and political debates.

1 Rule of law is defined by the European Commission as principles of 'legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law'. Hence, 'the rule of law is intrinsically linked to respect for democracy and for fundamental rights'. See Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law (March 19, 2014).

2 See e.g. Advisory Council on International Affairs, *The will of the people? The erosion of democracy under the rule of law in Europe*, No. 104 June 2017.

2 European networks, agencies and multilevel governance

Introduction: waves of European institution building

In general, new policy ambitions will require new instruments and changes in administrative systems. In other words, ambitious new policies demand careful attention to ensure that institutions are appropriately designed. In the context of the EU's multilevel administrative system, new EU policies need careful reflection on the quality of national and EU institutions, and of the networks in which the two levels operate. As has been noted before, the EU has a tendency to suffer from 'management deficits'.³ Policy makers tend to be less concerned with implementation and organisational design and in the EU any discussion of each other's administrative structures is generally taboo.⁴ Moreover, ensuring that EU policies are supported by the appropriate multilevel administrative systems is quite a challenge given the number of national and EU bodies involved and the great many differences between the member states in terms of resources, qualities of administrations and political cultures.

However, the EU has quite a strong reputation when it comes to taking on ambitious tasks successfully. One of the explanations for the EU's successes is that it has been able to create the European institutions and to improve national institutions by building subsidiarity-based networks in which weaknesses of national and European systems are actively addressed.⁵ EU integration required complex problems to be addressed for which solutions seemed improbable. When major advances were made in the 'completion' of internal market policies through the '1992 programme', the EU had to learn the hard way that further elaboration of market regulation and enforcement required new (multilevel) networks and institutions. The EU's internal market ambitions had overloaded the EU's abilities to act to the point that a serious credibility crisis

3 Metcalfe, L.M., 'Building capacities for integration; the future role of the Commission', *Eipascopes*, 1996/2: pp. 2-8.

4 Jordan, A., A. Schout, *The coordination of European Governance: exploring the capacities for networked governance*, Oxford: Oxford University Press, 2006.

5 Kassim, H., 'Revisiting the management deficit', in: E. Ongaro, *Multi-Level Governance: The Missing Linkages*, Bingley: Emerald, 2015; Schout, A., 'Framework for assessing the added value of an EU agency' *Journal of Public Policy*, Volume 31(3) (2011): pp. 363-384;

emerged.⁶ For example, European competition policy became overburdened and had to be redesigned⁷, re-regulation of public utilities such as energy and telecoms demanded new regulatory networks and institutions, food safety suffered major economic and trust crises⁸, national statistical bureaus varied enormously in terms of quality⁹, and regulation and enforcement in aviation safety fell far behind the liberalisation of air traffic.¹⁰ The EU has been able to solve many of these challenges in the internal market through multilevel capacity building – i.e. setting up EU and national agencies and creating strong networks.¹¹

The creation of the euro resulted in a similar wave of governance challenges. Mutual commitments to respect the rules of the Stability and Growth Pact and to converge economic structures were fragile, and (southern) governments have been too weak to respect agreements they had signed up to. At this stage, the EU is involved in rule making (e.g. Six and Two packs, the Fiscal Compact, Banking Union) and has started to work on multilevel capacity building, e.g. by setting up EU and national agencies such as the European Fiscal Board, Independent Fiscal Institutions, and National Productivity Boards.¹² In addition, existing networks are being reinforced such as the network of statistical offices (the European Statistical System), e.g. by formalising the independence of national offices in the Six Pack.¹³ It is too early to judge the outcomes, but developments are being set in motion to create independent national institutions and create the necessary European networks in which these bodies cooperate. After the developments in the internal market, the Eurozone may now be on its way towards strengthening multilevel governance.

6 Majone, G., 'Nonmajoritarian Institutions and the Limits of Democratic Governance', *Journal of Economic and Theoretical Economics*, no. 157 (2001): pp. 57-78.

7 Kassim, H., K. Wright, 'Network governance and the European Union: the case of the European Union competition network', paper for 'The Transformation of the Executive Branch of Government in Europe', ARENA Workshop, University of Oslo, 4-6 June 2009.

8 Vos, E., 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', *Journal of Consumer Policy*, Volume 23.3 (September 2000): pp. 227-255.

9 Sverdrup, U., 'Administering Information: Eurostat and Statistical Integration', in M. Egeberg (ed.) *Multilevel Union Administration*, Palgrave, 2006.

10 Schout, A. (2011) 'Framework for assessing the added value of an EU agency' *Journal of Public Policy*, 31(3), 363-384; Kassim, H., and H. Stevens, (2010.) *Air transport and the European Union*, Palgrave Macmillan.

11 Kassim 2015, *ibid*.

12 Schout, A., A. Mijs, 'Wat de Europese CPB's zeggen over economic governance', *Internationale Spectator*, 69/2, 2015; Mijs, A., The unsustainability of independent fiscal institutions, *Clingendael Policy Brief*, April 2016.

13 Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, O.J.L. 306.

Eastward enlargement now highlights a third wave of ambitions, this time concerning the quality of rule of law.¹⁴

EU governance and the relevance of agencies and agency networks

As underlined by the European Public Administration Network, Europeanisation of national governance is an “immense” capacity-building effort in which different administrative levels agree to work with “similar” models and methods supported by “hundreds of networks among public administrations in order to exchange good practices and experiences”.¹⁵ This underlines the focus on the numerous administrative capacity-building exercises. However, it leaves the question open as to the extent to which these networks are merely loosely coupled exchanges of information or structured networks with discipline and bite. When it comes to upgrading national administrations, many reports are being produced that assess and share best practices.¹⁶ This gives the impression of the EU as an administrative system composed of parallel national administrations with little in common other than non-binding benchmarking exercises, rather than a multilevel system in which administrative systems manage their common problems and interdependencies. This voluntary governance of European networks may be insufficient to solve the EU’s management deficits. The effectiveness of EU policies depends on the quality and independence of numerous national institutions and the European networks that bind member states and EU institutions together in the EU’s multilevel system.¹⁷

Ensuring multilevel capabilities involves the setting up of independent institutions (‘agencies’¹⁸) that operate at national and European levels and interconnecting these in European networks. Advanced societies require credible governmental bodies

14 As the First Vice-President of the European Commission, Frans Timmermans, stated: ‘the rule of law is not just an inspiration, it is also an aspiration; a principle that guides both our internal and external actions; it is what we are and what we want to be’, The European Union and the Rule of Law - Keynote speech at Conference on the Rule of Law, Tilburg University, 31 August 2015.

15 EUPAN, *Thematic Paper: Enhancing institutional and administrative capacity*, 5 February 2015 http://www.eupan.eu/files/repository/20150205171037_RomeDG_-_13_-_Institutional_Capacity_Building.pdf, p12.

16 E.g. European Commission, *Quality of Public Administration – A Toolbox for Practitioners* (April 2015).

17 Everson, M., G. Majone, L. Metcalfe and A. Schout, *The Role of Specialised Agencies in Decentralising EU Governance*, Commission of the European Commission, Commission of the European Commission, 1999.; E. Vos (ed.) *European Risk Governance: its Science, its Inclusiveness and its Effectiveness*, Connex Book Series: Mannheim University Press, 2008.

18 Agencies can be defined as ‘a part of government that is generally independent in the exercise of its functions’. Majone, G., ‘Functional Interests: European Agencies’, in J. Peterson and M. Shackleton (eds), *The Institutions of the European Union*, Oxford: Oxford University Press, 2002: pp. 292-325.

with clearly defined tasks and supervisory mechanisms.¹⁹ The private sector needs guarantees that investments with long-term timeframes are possible, international actors need to rely on the stability of legal systems, and European publics need to be able to rely on their own governments as well as on the governments of other member states to deliver on agreed objectives. The credibility of governments is an essential precondition for trust and, as the Eurobarometer has shown, governments have grave problems in terms of trustworthiness.²⁰ Independent agencies, if properly designed, can make major contributions to ensuring that obligations are effectively implemented, monitored and enforced.²¹ Through their independent execution of democratically agreed tasks, agencies offer the checks and balances in advanced societies and allow for professional management of tasks that political institutions such as governmental departments cannot offer. Importantly, agencies are not bound by short-term political horizons. 'Short-termism' is the cause of one of the intrinsic problems of credible democratic governance.²² The statutory independence helps to prevent political micro-management in the implementation and enforcement of tasks.

In the EU's multilevel context, agencies do not operate in isolation but (need to) work together across borders. Cooperation between national and EU agencies prevents centralisation by working together in subsidiarity-based networks. Being staffed with independent experts, these agency networks serve to create communities of professional expertise that support the professional values required to be credible at the national level. Such networks help to exchange information and their European peer networks enhance their independence vis-à-vis their national (political) environments. Participation in formal networks supports the independence of experts in their political home environments.²³

Emerging governance literature shows that managed networks perform better than voluntary networks.²⁴ To ensure the credibility of national agencies, the network not only has to ensure exchange of information but also has to manage quality control mechanisms based on regular on-site visitations. Weaknesses in national systems have to be detected and exposed. This also necessitates transparency of inspections so that all involved – including NGOs, stakeholders, political supervisory bodies and

19 Majone, G., *Regulating Europe*, Routledge: New York, 1996.

20 Schout, A., M. Holdried, Public support for European: Not an EU problem, Clingendael, Policy Brief, July 2017.

21 Everson et al., 1999; Kassim, H., 'Revisiting the management deficit'.

22 Everson et al., 1999, p.4.

23 Kleef, D. van, T. Steen, C. Schott (2017), 'Informal socialization in public organizations', *Public Administration*. 2017;1–16.

24 Maccio, L., and D. Cristofoli, 'How to support the endurance of long-term networks: The pivotal role of the network manager', *Public Administration*. 2017;1–17.

the public at large – are informed of the soundness of the network. This means that monitoring of quality is a major plank in the design of an effective agency network. In terms of transaction cost theory, agency networks require organisational functions that make it easier and cheaper to exchange information, to monitor the implementation of agreements, and to ensure that experts involved respect professional values.²⁵

This discussion of EU agencies and their national networks leads to an analytical model to assess the strengths of the 'institutionalisation' of a specific field²⁶:

- **At EU level**, an agency-type body has to be available that has the authority and tasks to supervise a specific field. The set of tasks can be broad or narrow and a specific field can also be served by different agencies with specific tasks. These EU-level agencies need to have sufficient independence, e.g. in terms of programming, management of on-site inspections, design of methodologies and personnel policy. In addition, to ensure the credibility and legitimacy of the agency, it will have to have clear task descriptions, resources, rules regarding decision making, transparency and cooperation with stakeholders. To some extent, these rules can be general to all EU agencies (e.g. concerning regulatory impact assessments or other Codes of Conduct of EU staff).
- **At network level**, the network needs operating rules that are strong enough to deal with the tasks at hand. This involves provision for management tasks, inspections of national agencies and authorities, and rules on matters such as the transparency of inspections and of decision-making. Networks can be weak or strong. Weak networks are characterised by fewer meetings, a largely non-formalised organisation, and little or no leadership role. Strong or enduring networks include well-defined leadership roles ranging from secretarial roles (calling meetings and supporting the chair, facilitating policy planning, horizon scanning) to undertaking strategic organisational tasks (e.g. overseeing the design of the network, stimulating new parties to join, auditing its activities). Importantly, a strong network organisation includes diagnosing the way in which national agencies are set up and binding quality inspections of national authorities. Research²⁷ has shown that managed networks are stronger than informal networks.
- **At national level**, a well-designed EU network depends on national agencies with comparable tasks, resources and working methods ('isomorphology'²⁸).

It is ultimately up to the Commission to assess whether the EU has the capacities (agencies and their networks) to manage its policy ambitions.²⁹

25 Coase, R. H. (1937). The nature of the firm. *Economica*, 4(16), 386-405.

26 Schout, J.A., A.J. Jordan, 'Coordinated European governance: self-organising or centrally steered?', *Public Administration*, 83(1) (2005): pp. 201-220.

27 Maccio, L. and D. Cristofoli, *ibid.*

28 Sorensen, E., J. Torfing (2007), *Theories of Democratic Governance*, Palgrave/Macmillan.

29 Metcalfe, L. 'After 1992: Can the Commission Manage Europe', *Australian Journal for Public Administration* 51, no. 1 (1992): pp. 117-30.

Networks of national and European agencies need to be sufficiently strong to withstand political resistance and power play³⁰ particularly during their set up phases. One important question in the design of agencies and agency-type networks is: which agencies and networks are needed? The creation of networks is related to the specific problems and challenges at hand. At the end of the 1990s, the internal market called for EU agencies to regulate market activities such as food safety, aviation safety, telecommunications, etc. The post-2008 economic and financial crisis resulted in seminal agency-type arrangements related to fiscal, financial and economic governance. The migration crisis following the civil war in Syria has propelled investments in the tasks and organisation of border control agencies.

Two caveats are in order. First of all, agencies are often not very popular among politicians because their independence limits their room for manoeuvre. More generally, 'technocracy' complements but also conflicts with democracy. Agencies need proper democratic checks themselves, but by reinforcing democratic systems with independent checks and balances, agencies and their expert networks also create the famous principal-agent problems.³¹ Secondly, it has to be understood that administrative structures are only part of the many factors that determine the outcomes of policies such as political leadership, economic circumstances, national cultures and resistances, personalities, etc. Importantly, even an established national agency can be the victim of political interferences. For example, illiberal governments staffed rule of law agencies with party members and drastically cut their budget.³² Yet such examples also underline the need for well-designed EU networks to act as a counterbalance by defending professional values, carrying out independent quality controls and supporting national bodies with funding if member states suffer from deficiencies or by setting up EU-funded projects as happened in other EU networks.

30 Kelemen, R.D. and Tarrant, A.D. (2011) 'The Political Foundations of the Eurocracy'. *West European Politics*, Vol. 34, No. 5, pp. 922-47. Egeberg, M., J. Trodal (2017), 'Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?', *JCMS* 55/4 pp. 675-690.

31 Chiti, E. (2009), 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review*. 46, 1395-1405.

32 Bugari, B., *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, London: LSE discussion paper series. 79/2014.

3 The EU's rule of law debate and rule of law instruments

The EU Treaty defines the rule of law principles that member states have to respect and the European Commission communicated its latest definition in 2014.³³ 'Rule of law' (*Rechtsstaat, État de droit* – compared to the more limited concept of 'legality') is not just an impersonal application of rules to government and citizens alike. More fundamentally, it is a system of checks and balances that no political entity (including a political majority), elite or individual can change at will. While mostly linked to independent judiciaries, the rule of law is intrinsically linked to democracy and fundamental rights. Broadly viewed (and going beyond the European Commission's operative rule of law framework), the rule of law is about political, democratic, legal and administrative internal and external checks on all kinds of authorities. The aim of these checks and balances is to distribute decision and executive powers to ensure legitimate and credible governance.³⁴ These ensure adherence to principles of good governance such as: legality, integrity, transparency, accountability, fundamental rights, duty to state reasons, proportionality, and democracy.³⁵

Although rule of law principles are laid down in the Treaty and, for accession countries, in the Copenhagen criteria³⁶, the application and its elaboration has remained wanting. Credible assessments and standards were lacking in the process of enlargement and

33 See e.g. Articles 2, 4.3 and 7 TEU, Charter of Fundamental Rights and Hillion, C., 'Overseeing the rule of law in the European Union. Legal mandate and means', *SIEPS European Policy Analysis* (January 2016).

34 Kochenov, D., 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law* (2015): pp. 1-23.; Everson, M., et al., *The Role of Specialised Agencies in Decentralising EU Governance, Commission of the European Commission*.

35 The rule of law is intrinsically linked with fundamental rights and democracy and as such implies good governance, see e.g. AIV, *De wil van het volk? Erosie van de democratische rechtstaat in Europa*, No. 104 Juni 2017. This is also notable in linkages/overlap between rule of law and governance indices. Rule of law and good governance are often mentioned together in reports.

36 Elbasani, A. and S. Sabic, 'Rule of law, corruption and democratic accountability in the course of EU enlargement', *Journal of European Public Policy* (May 2017). The accession process has encouraged and (financially) supported judicial and public administration reform and the professionalisation of (autonomous) institutions.

different, unpredictable and contradicting demands were made.³⁷ Conditionality was limited to the formal status of institutions and implementation of rules. EU accession was largely a highly political process in which actual compliance and political realities on the ground have been ignored.³⁸ Case studies show that Central Eastern European member states do perform fairly well in transposing and complying with various EU regulations and do not lag behind in practical implementation compared to other member states.³⁹ However, this signals that capacity building has succeeded in some (acquis) areas, but, looking at the whole rule of law picture, it shows serious gaps.

Since the 2004 enlargement, the EU's instrumentation concerning the rule of law has made major strides in several directions. One of the policy innovations is the creation of the Fundamental Rights Agency in 2007. However, its mandate has been limited to a few fundamental rights themes and is confined to an advisory role that operates largely on the basis of requests from EU institutions and member states. As Table 1 in the Annex shows, the EU instruments that are now in place include many peer pressure processes (open method of coordination) but also some hierarchical supervision, dialogue and admonishment. The EU also provides financial incentives to reform national administrations depending on applications of countries. Furthermore, several (informal) European (EU and non-EU) network-type arrangements have emerged, such as the European Judicial Network (EJN), European Public Administration Network (EUPAN),

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- 37 See e.g. Börzel, T. A., 'Building Sand Castles? How the EU Seeks to Support the Political Integration of its New Members, Accession Candidates and Eastern Neighbours', *MAXCAP Working Paper No. 9* (May 2015) and Kochenov, D., 'The European neighbourhood policy: Pre-Accession Mistakes Repeated', paper prepared for GARNET conference, 'The European Union in International Affairs', Egmont Palace, Brussels, 14-16 April 2008.
- 38 Grabbe, H. 'How does Europeanization affect CEE governance? Conditionality, diffusion and diversity', *Journal of European Public Policy*, vol. 8:6 (December 2001): pp. 1013-14; Schimmelfennig F. & U. Sedelmeier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', *Journal of European Public Policy*, vol. 11:4 (August 2004): pp. 669-687; Krastev, I., 'The strange death of the liberal consensus', *Journal of Democracy*, vol. 18:4 (October 2007), pp. 58-59.
- 39 See Börzel, T.A. and U. Sedelmeier, 'Larger and More Law Abiding? The Impact of Enlargement on Compliance in the European Union', *MAXCAP Working Paper Series No. 19* (April 2016); Zhelyazkova A., C. Kaya and R. Schrama, 'Notified and Substantive Compliance with the EU Law in an Enlarged Europe: Evidence from Four Policy Areas', *MAXCAP Working Paper Series No. 20* (May 2016). The MAXCAP Policy Task Force also states for example that the focus of current pre-accession measures should not be exclusively on professionalising judges and recruitment and training at the expense of paying insufficient attention to democratic accountability. Overall, various state and non-state actors should be better included in accession processes. 'Reinvigorating the Enlargement Process and Strengthening the EU's Integration Capacity: Insights from MAXCAP', Policy Brief No. 2 (November 2015). Tangible rewards and stricter conditionality also does not necessarily imply going beyond formal compliance, see Elbasani, A. and S. Sabic, 'Rule of law, corruption and democratic accountability in the course of EU enlargement'.

European Network of Integrity Practitioners (ENIP) and European Network of Equality Bodies (Equinet); see Table 3 in the Annex.

The European Parliament seeks to bind these existing instruments together in an inter-institutional framework. This proposed 'EU Pact on Democracy, the Rule of Law and Fundamental Rights'⁴⁰ is based on a broad range of indicators that assess the quality of the rule of law. To gather the relevant data, the Pact encompasses existing European networks and aims to extend the mandate of the Fundamental Rights Agency. Mention is made of an endowment for a grant-giving organisation to support local actors promoting European values (see also Annex 11 for an overview of various (individual) suggestions to improve/guarantee the rule of law).

No mention is made of strengthening independent national capacities by embedding these authorities in formalised European networks, nor of the need to elaborate the relevant management role of the FRA or other dedicated agencies. The framework ultimately entails an extended central peer pressure process through reports and debates among officials and politicians in parliaments, Commission and Council.

Taken together, the EU's instruments are mostly informal or include ad hoc interventions. As such, the rule of law policy resembles the failed Lisbon Process and European Semester which were and are being designed to support Economic and Monetary Union in the 2000s and 2010s. Economic convergence largely failed and it is politically extremely difficult to impose fines. As can be seen, the emerging toolbox for rule of law is still in its infancy when it comes to addressing the multilevel management deficit. The conclusion is warranted that the overall ineffectiveness in the area of rule of law in the EU is explained partly by the limited multilevel capacity building and the limited attention paid to it. As was the case first with the internal market and subsequently with the development of the EMU toolbox, rule of law now needs further steps in developing EU and national agencies and the related networks. What now exist are many benchmarking exercises and non-formalised networks with little management capacity.

40 'EU Pact on Democracy, the Rule of Law and Fundamental Rights', see e.g. <https://europa.d66.nl/content/uploads/sites/240/2016/04/EU-Pact-on-Democracy-Rule-of-Law-and-Fundamental-Rights.pdf> and <http://www.europarl.europa.eu/oeil-mobile/summary/1457350?t=e&l=en>

4 Trends in rule of law and rule of capacities: the EU's management deficit

The variety of rule of law indices and reports allows a number of conclusions with regard to the quality of the rule of law in the EU.

Firstly, tables 4-7 and Figures 1-18 in Annex 4-9 show major rule of law deficiencies in areas such as separation of powers, regulatory quality and enforcement, prevention of corruption, criminal and civil justice and media pluralism.

Secondly, summarising the various indices – notwithstanding the fact that the Baltics, Croatia, the Czech Republic, Italy, Poland and Romania have shown some improvements in some areas – Southern and especially Eastern Central Europe are struggling to improve, or have seen a decline, in terms of rule of law. Croatia, Hungary, Bulgaria and Romania are considered ‘semi-consolidated’ democracies by the Nations in Transit Index. Together with countries such as Greece and Italy, these countries also rank low in the Sustainable Governance Indicators, the World Justice Project and World Governance Indicators. Former seemingly relatively successful countries such as Poland and Hungary are rapidly regressing. Backsliding or stagnation is the general rule in these regions, with no consistent or sufficient upward trend visible. On the whole, progress in rule of law has been disappointing and major trust issues exist.

Thirdly, rule of law issues and dynamics differ between countries. The spectacular regression of Hungary and Poland has resulted from a deliberate strategy on the part of ruling parties to dismantle checks on power belonging to a democratic state.⁴¹ This sets them apart from rule of law problems in other countries resulting from idiosyncratic traditions, corrupt judiciaries, unfortunate budget cuts, individual cases of political interference, and obstructions from early winners of the accession transitions (oligarchic networks). At the same time, informal networks and unsound political interventions persist in Southern Europe (see also the results in e.g. Corruption Prevention in Sustainable Governance Indicators and the World Governance Indicators). Individual

41 Pech, Scheppele, Rule of Law Backsliding in the EU: Learning from past and present failures to prevent illiberal regimes from consolidating within the EU (draft, 1 July 2017), pp. 5-6.

issues in Western European countries exist in areas such as media, corruption, party finance⁴² and open government (including whistleblower protection).⁴³

Consequently, rating the quality of a rule of law system requires a focus on a wide range of indicators, institutions and procedures. Annex 2 can only show the tip of the iceberg of some indices or rule of law indicators, including governance. Furthermore, different organisations look at different aspects of rule of law, or more generally, good governance.

In total, these indices also give an indication of the many national institutions involved – and hence of the many EU networks that exist in one way or another. This suggests a major effort is still required to arrive at better management of EU networks.

42 E.g. proactive supervision and dissuasive sanctioning of illegal party funding are still not regular practices across the EU and more efforts are needed to ensure consistent implementation. p. 10 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf

43 European Commission, *Quality of Public Administration – A Toolbox for Practitioners* (April 2015), p. 49.

5 Conclusions and key recommendations to address the EU's administrative deficit in rule of law

Traditionally, the EU has gone through cycles of agreeing to ambitious policy objectives and problematic implementation. After the thorny difficulties in governing the internal market, and the euro, attention has shifted towards the governance of the EU's rule of law ambitions. Assessing the quality of rule of law in a member state requires insights into a vast amount of indicators that are linked to a range of national institutions. What now seems to be a priority is that major effort is being put into the identification and assessment of precisely which institutions have to be monitored in the (heterogeneous) member states.

Evidently, the related difficulties in managing change to meet rule of law ambitions are highly political. This paper nevertheless argues that governance of rule of law in the EU also demands a multilevel administrative approach. Creating trust in each other's rule of law capacities demands that member states have the necessary organisational checks and balances in place in the form of functioning national agency-type bodies. For this purpose, the paper argues that the relevance of better managed networks of agencies has to be explored to complement the EU's rule of law policies.

Apart from haphazard high-political discussions between the Commission and illiberal governments and infringement procedures, at this stage the instruments to strengthen the EU's rule of law are predominantly oriented towards defining indicators and writing reports and recommendations in the hope that a form of general peer pressure is enough. The EU's rule of law policy thus resembles the earlier – and failed – Lisbon Process in the governance of EMU. The current efforts of the European Parliament to integrate the current different approaches in an inter-institutional framework makes the EU's rule of law policy comparable to the European Semester, which, like the Lisbon Process, also suffers from a lack of bite. Moreover, top-down supervision will probably be ineffective if member states themselves lack the relevant independent institutional agencies.

Hence, a managed network approach is needed. A new and complementary, public management approach seems to be in order based on dedicated EU agencies, and networks in which national agencies cooperate. This agency-based approach has

contributed to the success of the internal market and is now being developed in the context of EMU.

This leads to the following recommendations:

- The limitations of benchmarking exercises or providing funds for national reforms have to be recognised. These instruments will continue to be weak if they are not part of wider institution-building efforts that are explicitly aimed at creating independent national agency arrangements and if the independent national institutions are not part and parcel of European agency networks in which the necessary professional values are monitored and defended.
- A commitment is needed to explore in a systematic way the usefulness of an EU agency-based network. This will have consequences for the tasks and resources of the FRA and additional agencies may be needed.
- A strong network (compared to a 'weak' one as defined above) is required to ensure that member states have the relevant independent agencies and that the quality of these agencies is permanently supervised in European networks.
- Agency-type arrangements that can be used as an aspiration for the further development of the governance of rule of law are, among others, the EU's networks of competition authorities, environment agencies and food authorities.
- The Commission, or the FRA, needs to make a first assessment of the independent national agencies or institutions that are urgently needed and/or that need to be reinforced in European networks.

6 Annex

1. EU's instrumentation of rule of law and good governance

Table 1 EU Rule of law Toolbox

Instrument/policy	Description	Limitations/criticism
<i>Enforcement (sanctions)</i>		
Article 258-260 TFEU Infringement procedures.	Binding judgments by the European Court of Justice including financial penalties with regard to specific violations of EU law.	The narrow doctrinal interpretation of infringement procedures ignores trends, patterns and the combined effect of measures on the rule of law. ^a
Article 7 TEU procedure	Political condemnation and the possibility of sanctions, including the suspension of voting rights.	Unanimity has to be established by all member states to consider a breach of European values.
<i>Evaluation and recommendations</i>		
European Commission Rule of Law framework	<i>Ad hoc</i> mechanism to assess rule of law threats and take into account patterns and ongoing developments. Non-binding recommendations are issued while enforcement is based on infringement procedures and the threat of Article 7.	There are some definition issues, the dialogue is confidential, there are no clear deadlines and only the Commission can formally invoke the framework, thereby risking an image of arbitrariness. ^b
Cooperation and Verification Mechanism	Through benchmarking the mechanism supports and reports on effective administrative and judicial systems reforms.	Temporary mechanism and only applicable to Romania and Bulgaria. A more strategic involvement of civil society as a permanent partner of the EU has also been deemed desirable. ^c
European Semester	Country Specific Recommendations (CSRs) include issues relating to justice and public administration.	Non-binding and top-down in relation to central national governments.
Reports by the European Parliament	Annual reports on fundamental rights are issued. Specific resolutions are made in case of specific threats or country situations.	Ultimately decided by party politics (the large political families often do not condemn their own members in government). Since the suspension of the network of independent experts on fundamental rights there is no longer any systematic input concerning the rule of law in member states.
Evaluation of the Area of Freedom, Security and Justice; Schengen	Evaluations, with the involvement of Frontex, are based on how rules of the Schengen acquis are implemented and how the responsible authorities function, including rule of law elements.	Until now evaluations have been conducted by member states (peer reviews) only.

Thematic evaluation within the framework of Justice and Home Affairs	Evaluation of the implementation on national level based on questionnaires and visitations. Evaluations are made public after discussion in the working committee.	Focuses primarily on the implementation on national level of international efforts to combat organised crime.
EU Anti-corruption Report	The report provides a picture of corruption policies in each Member State: measures in place, outstanding issues, policies that are working and areas that could be improved.	The report was only issued in 2014 and has been suspended in 2017 (the EU's own institutions were also supposed to be on the agenda for the suspended report).
Annual EU Council Rule of Law Dialogue	Annual rule of law dialogue on (thematic) rule of law related issues set by the EU's rotating presidency.	Limited to best practices exchange, prone to self-appraisal. Not systematically integrated within existing EU policies.
<i>Monitoring (information provision)</i>		
EU Agency for Fundamental Rights.	Reporting on several thematic fundamental rights issues in the EU, also on request. Sharing best practices and maintaining a network with human rights institutions and civil society.	Limited scope of issues, excluding the broader European values, including the rule of law.
Annual Media Pluralism Monitor	The Monitor assesses the risks to media pluralism based on a set of twenty indicators	The monitor is not linked to any concrete EU policy mechanism.
EU Justice Scoreboard.	Comparative overview of the quality, independence and efficiency of justice systems in the EU.	Mainly quantitative analysis. It does not include a qualitative examination of key factors such as <i>de jure</i> and <i>de facto</i> independence of the judiciary. It focuses on civil matters, not penal, administrative and constitutional matters.
<i>Support and capacity building</i>		
Structural Reform Support Service and Structural Reform Support Programme (SRSP).	Provides targeted reform assistance to the Member States, at their request, to assist them with the design and implementation of institutional, structural and administrative reforms, including reforms that are recommended in CSRs.	Dependent on the application and political will of central (and sometimes regional) governments.
European Structural and Investment Funds.	Thematic objective 11 of the funds is: Enhancing institutional capacity of public authorities and stakeholders and efficient public administration. Member state can apply for funds with proposals.	Dependent on the application and political will of central (sometimes regional) governments.

- a See for example, Pech, L. and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (August 23, 2017). Cambridge Yearbook of European Legal Studies, Forthcoming.
- b Kochenov, D. and L. Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction', *European Constitutional Law Review* 11 (April 2015); pp. 512-540.
- c Dimitrova, A., 'The Effectiveness and Limitations of Political Integration in Central and Eastern European Member States: Lessons from Bulgaria and Romania', *MAXCAP Working Paper Series No. 10* (June 2015).

2. Examples of rule of law indicators

Table 2.1 World Justice Project Indicators

World Justice Project
1. Constraints on Government Powers
1.1 Government powers are effectively limited by the legislature
1.2 Government powers are effectively limited by the judiciary
1.3 Government powers are effectively limited by independent auditing and review
1.4 Government officials are sanctioned for misconduct
1.5 Government powers are subject to non-governmental checks
1.6 Transition of power is subject to the law
2. Absence of corruption
2.1 Government officials in the executive branch do not use public office for private gain
2.2 Government officials in the judicial branch do not use public office for private gain
2.3 Government officials in the police and the military do not use public office for private gain
2.4 Government officials in the legislative branch do not use public office for private gain
3. Open government
3.1 Publicised laws and government data
3.2 Right to information
3.3 Civic participation
3.4 Complaint mechanisms
4. Fundamental rights
4.1 Equal treatment and absence of discrimination
4.2 The right to life and security of the person is effectively guaranteed
4.3 Due process of law and rights of the accused
4.4 Freedom of opinion and expression is effectively guaranteed
4.5 Freedom of belief and religion is effectively guaranteed
4.6 Freedom from arbitrary interference with privacy is effectively guaranteed
4.7 Freedom of assembly and association is effectively guaranteed
4.8 Fundamental labour rights are effectively guaranteed
5. Order and Security
5.1 Crime is effectively controlled
5.2 Civil conflict is effectively limited
5.3 People do not resort to violence to redress personal grievances
6. Regulatory Enforcement
6.1 Government regulations are effectively enforced
6.2 Government regulations are applied and enforced without improper influence
6.3 Administrative proceedings are conducted without unreasonable delay
6.4 Due process is respected in administrative proceedings
6.5 The Government does not expropriate without adequate compensation

7. Civil Justice
7.1 People can access and afford civil justice
7.2 Civil justice is free of discrimination
7.3 Civil justice is free of corruption
7.4 Civil justice is free of improper government influence
7.5 Civil justice is not subject to unreasonable delays
7.6 Civil justice is effectively enforced
7.7 Alternative Dispute Resolution mechanisms are accessible, impartial, and effective
8. Criminal Justice
8.1 Criminal investigation system is effective
8.2 Criminal adjudication system is timely and effective
8.3 Correctional system is effective in reducing criminal behaviour
8.4 Criminal justice system is impartial
8.5 Criminal justice system is free of corruption
8.6 Criminal justice system is free of improper government influence
8.7 Due process of law and rights of the accused

Table 2.2 Sustainable Governance Indicators

Sustainable Governance Indicators	
Quality of Democracy	
<i>Electoral Process</i>	<i>Civil Rights and Political Liberties</i>
Candidacy procedures	Civil Rights
Media Access	Political Liberties
Voting and Registration Rights	Non-discrimination
Party Financing	<i>Rule of Law</i>
Popular-decision Making	Legal certainty
<i>Access to information</i>	Judicial Review
Media Freedom	Appointment of Justices
Media Pluralism	Corruption Prevention
Access to Government Information	
Governance	
Executive Capacity	<i>Adaptability</i>
<i>Strategic capacity</i>	Domestic adaptability
Strategic Planning	International Coordination
Scholarly Advice	<i>Organisational Reform</i>
<i>Interministerial Coordination</i>	Self-monitoring
GO expertise	Institutional Reform
GO Gatekeeping	Executive Accountability
Line Ministers	<i>Citizens' Participatory Competence</i>
Cabinet Committees	Policy Knowledge
Ministerial Bureaucracy	Voicing Opinion to Officials
Informal Coordination	Voter Turnout
<i>Evidence-based Instruments</i>	<i>Legislative Actors' Resources</i>
RIA Application	Parliamentary Resources
Quality of RIA Process	Obtaining Documents

Sustainability Check	Summoning Ministers
<i>Societal Consultation</i>	Summoning Experts
Negotiating Public Support	Task Area Congruence
<i>Policy Communication</i>	Audit Office
Coherent Communication	Ombuds Office
<i>Implementation</i>	<i>Media</i>
Government Efficiency	Media Reporting
Ministerial Compliance	Newspaper Circulation
Monitoring Ministers	Quality Newspapers
Monitoring Agencies, Bureaucracies	<i>Parties and Interests Associations</i>
Task Funding	Intra-party democracy
Constitutional Discretion	Association Competence (Business)
National Standards	Association Competence (Others)

3. Development of networks

Table 3 European networks

Networks within the EU
Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union
European Anti-Fraud Office (OLAF) and the OLAF Anti-Fraud Communicators Network OACFN
European Judicial Network (EJN)
European Data Protection Supervisor (EDPS)
European Judges and Prosecutors Association
European Network of Councils for the Judiciary (ENCJ)
European Network of Equality Bodies (Equinet)
European Network of Integrity Practitioners (ENIP)
European Ombudsman – European Network of Ombudsmen
European Police Office (EUROPOL)
European Public Administration Network
European Regulators Group for Audiovisual Media Services (ERGA)
European Union Agency for Law Enforcement Training (CEPOL)
Frontex
Network of Presidents of the Supreme Judicial Courts of the European Union
The European Union’s Judicial Cooperation Unit (EUROJUST)
European networks
Anti-Fraud Coordination Service (AFCOS Group)
Consultative Council of European Judges (CCJE)
Consultative Committee of European Prosecutors (CCPE)
European Commission for the Efficiency of Justice (CEPEJ)
European Contact-point network Against Corruption (EACN)
European Network of National Human Rights Institutions (ENNHRI)
European Partners Against Corruption (EPAC)
European Platform of Regulatory Authorities (EPRA)
Group of States Against Corruption (GRECO)
RegWatchEurope

4. World Justice Project overview of scores

Based on the World Justice Project, the EU faces problems particularly in Criminal Justice, Regulatory Enforcement (although improving), Civil Justice and Open Government (although improving). Issues of checks and balances on government (Constraints on Government Powers), Absence of Corruption and Civil Justice remain in several member states, with Hungary and Poland experiencing a rapid decline. Overall weak countries are in addition Bulgaria, Croatia, Greece, Italy, Romania, Slovenia, and Spain.

Table 5.1 below presents an overview of the most relevant World Justice Project scores: i.e. scores which have either grown towards or above a score of 70 from 2012 to 2016 (green) or declined (further) below a score of 70 (red). Red numbers between brackets indicate a strong decline since 2012 while maintaining a score of 70 or higher. Green numbers between brackets imply strong growth from a score of 70 in 2012 to above 70 in 2016.

Tables of the individual indicators follow (Tables 4.2-4.9).

Table 4.1 World Justice Project: scores of 70 or below (scale 1-100)

	Constraints Government Powers	Absence of Corruption	Open Government	Fundamental Rights	Order and Security	Regulatory Enforcement	Civil Justice	Criminal Justice	Total scores below 70
Bulgaria	49	41	58	64	-	51	57	41	7
Hungary	46	51	52	62	-	51	52	54	7
Croatia	60	57	59	69	-	50	53	54	7
Greece	64	55	57	65	-	56	57	51	7
Italy	70	60	63	-	(72)	57	57	64	6
Romania	69	55	67	-	-	57	65	58	6
Slovenia	61	60	66	-	-	62	64	66	6
Spain	70	69	68	(77)	-	67	65	63	6
Poland	68	-	72	(74)	-	62	66	59	5
Portugal	-	72	67	-	-	60	66	67	4
Czech Republic	(76)	68	69	-	-	68	-	-	3
France	-	(74)	-	(75)	-	72	71	65	1
Belgium	-	-	73	-	-	-	76	-	0
Estonia	-	-	-	-	-	-	-	70	1
Austria	-	-	(75)	-	-	-	-	-	0
Total scores below 70	9	9	10	4	0	11	10	12	

In tables 4.2-4.9 a **green** coloured country implies a score that has either grown towards or above a score of 70 from 2012 to 2016. A **red** coloured country implies a score declining (further) below a score of 70 or a sudden rapid decline towards a score of 70.

Table 4.2 Constraints on Government Powers (scale 1-100)

Country	2012	2016	Difference
Denmark	93	93	0
Netherlands	86	89	3
Sweden	92	88	-4
Finland	89	87	-2
Austria	82	86	4
Germany	82	85	3
United Kingdom	79	85	6
Belgium	78	83	5
Estonia	79	80	1
Portugal	79	80	1
France	80	77	-3
Czech Republic	71	76	5
Italy	67	70	3
Spain	75	70	-5
Romania	58	69	11
Poland	78	68	-10
Greece	64	64	0
Slovenia	64	61	-3
Croatia	61	60	-1
Bulgaria	51	49	-2
Hungary	63	46	-17

Table 4.3 Absence of Corruption (scale 1-100)

Country	2012	2016	Difference
Denmark	95	96	1
Finland	93	92	-1
Sweden	92	91	-1
Netherlands	93	88	-5
Austria	77	84	7
Germany	82	84	2
United Kingdom	80	82	2
Belgium	78	78	0
Estonia	77	78	1
France	80	74	-6
Poland	72	73	1
Portugal	68	72	4
Spain	80	69	-11
Czech Republic	62	68	6
Slovenia	62	60	-2
Italy	62	60	-2
Croatia	55	57	3
Romania	50	55	5
Greece	56	55	-1
Hungary	72	51	-21
Bulgaria	46	41	-5

Table 4.4 Open Government (scale 1-100)

Country	2012	2016	Difference
Denmark	82	86	4
Finland	84	85	1
Netherlands	90	85	-5
Sweden	93	84	-9
United Kingdom	78	84	6
Estonia	71	81	10
Germany	73	79	6
France	75	77	3
Austria	80	75	-5
Belgium	67	73	6
Poland	59	72	13
Czech Republic	49	69	20
Spain	61	68	7
Romania	51	67	16
Portugal	62	67	5
Slovenia	63	66	3
Italy	49	63	14
Croatia	53	59	6
Bulgaria	53	58	5
Greece	51	57	6
Hungary	52	52	-

Table 4.5 Fundamental Rights (scale 1-100)

Country	2012	2016	Difference
Denmark	91	92	1
Finland	90	92	2
Austria	82	88	6
Sweden	93	88	-5
Netherlands	84	86	2
Germany	80	85	5
Belgium	81	84	3
Czech Republic	79	81	2
United Kingdom	78	81	3
Estonia	79	80	1
Portugal	75	79	4
Slovenia	78	77	-1
Spain	86	77	-9
France	79	75	-4
Poland	85	74	-11
Romania	73	73	-
Italy	72	73	1
Croatia	67	69	2
Greece	72	65	-7
Bulgaria	68	64	-4
Hungary	72	62	-10

Table 4.6 Order and Security (scale 1-100)

Country	2012	2016	Difference
Finland	92	93	1
Sweden	89	92	3
Denmark	91	92	-1
Austria	89	90	-1
Czech Republic	81	89	8
Germany	86	87	1
Belgium	84	84	-
Hungary	83	86	3
United Kingdom	84	85	1
Estonia	82	85	3
Poland	81	85	4
Netherlands	86	85	-1
Belgium	84	84	-
Romania	80	84	4
Slovenia	80	83	3
Croatia	77	82	5
Spain	79	79	-
Portugal	74	76	2
Greece	73	75	2
Bulgaria	74	74	-
Italy	76	72	-4

Table 4.7 Regulatory Enforcement (scale 1-100)

Country	2012	2016	Difference
Netherlands	83	88	5
Sweden	89	85	-4
Germany	73	85	12
Denmark	85	85	-
Finland	82	83	1
Austria	84	80	-4
United Kingdom	79	79	-
Estonia	73	78	5
Belgium	70	77	7
France	76	72	-4
Czech Republic	59	68	9
Spain	67	67	-
Poland	61	62	1
Slovenia	59	62	3
Portugal	57	60	3
Italy	56	57	1
Romania	54	57	3
Greece	54	56	2
Bulgaria	50	51	1
Hungary	60	51	-9
Croatia	48	50	2

Table 4.8 Civil Justice (scale 1-100)

Country	2012	2016	Difference
Netherlands	80	88	8
Germany	80	86	6
Denmark	79	84	5
Sweden	78	81	3
Austria	74	80	6
Finland	79	80	1
Estonia	71	77	6
Belgium	68	76	8
United Kingdom	72	75	3
Czech Republic	65	73	8
France	68	71	3
Portugal	62	66	4
Poland	63	66	3
Spain	65	65	-
Romania	59	65	6
Slovenia	60	64	4
Greece	61	57	-4
Bulgaria	57	57	-
Italy	56	57	1
Croatia	51	53	2
Hungary	55	52	-3

Table 4.9 Criminal Justice (scale 1-100)

Country	2012	2016	Difference
Finland	87	85	-3
Austria	75	83	8
Denmark	87	82	-5
Netherlands	80	80	-
Sweden	82	79	-3
Germany	76	77	1
United Kingdom	75	76	1
Belgium	72	76	4
Czech Republic	70	73	3
Estonia	75	70	-5
Poland	73	69	-4
Portugal	62	67	5
Slovenia	59	66	7
France	69	65	-4
Italy	67	64	-3
Spain	69	63	-6
Romania	60	58	-2
Hungary	64	54	-10
Croatia	53	54	1
Greece	50	51	1
Bulgaria	39	41	2

5. Sustainable Governance Indicators overview

Based on the Sustainable Governance Indicators regarding the Quality of Democracy, improvements in popular decision making remain desirable across the whole of the EU. Legal uncertainty, corruption, discrimination and media are a cause of concern in many member states. Hungary, Romania, Croatia, Bulgaria and Malta in particular have bad scores overall and to a lesser extent Greece, Slovakia, France, the Czech Republic and the United Kingdom do as well. It is noteworthy that Poland is considered one of the positive examples between 2009/2014 and 2016 (recent developments have most likely changed this) and Romania is not considered to be improving, contrary to the World Justice Project.

Below is an overview of the scores of all EU member states for the Quality of Democracy. A score in **red** or **green** implies a decline or growth from 2009/2014 to 2016. A red background gives a quick insight into the scores that are below 7 as of 2016.

Table 5.1 Sustainable Governance Indicators overview: Quality of Democracy

	Candidacy Procedure	Media Access	Voting Rights	Party Finance	Popular Decision	Media Freedom	Media Pluralism	Access Gov Info	Civil Rights	Political Liberties	Non-discrimination	Legal Certainty	Judicial Review	Appointing Justices	Corruption Prevention	Total scores below 7
Hungary	9>6	6>3	8>3	3	6	5>3	7>4	8>4	8>5	9>6	6>4	8>3	9>5	7>2	5>3	15
Romania		5	6	5	4	4>3	4	7>6	5		5	4	5>6	5	5	13
Croatia		5		5	4>6	5	5	6>7	5		5	5	5		4>5	10
Bulgaria		6		6>5	6>7	4	5		5		6	5	5	5	4	10
Malta		5		2>3	3	6	6	4			5	6		2	4>5	10
Greece		5>9		2>5	2	7>6	5>6	6>9	7>6		6	5>7			4>5	7
Slovakia				6			7>6				6>5	7>6	7>6	6	5	7
France					4		6>5				7>6	7>6		5	5	6
Czech Rep.		8>6		7>6	5	9>7			7>6		6				5	6
UK				6	2>3	9>6			7>6			5			4	6
Cyprus				3	2			3				5		4		5
Spain				5	4>3	8>6		5>6							6	5
Italy				8>5			5>7		7>6				6>8		4>5	3
Austria					5		5				7>6					3
Luxembourg		5>8			4>6			8>6				6				3
Netherlands				2>4	3>4	10>7		10>7	9>7			9>7	10>7		9>7	2
Portugal					2	9>6	9>7								6>7	2

	Candidacy Procedure	Media Access	Voting Rights	Party Finance	Popular Decision	Media Freedom	Media Pluralism	Access Gov Info	Civil Rights	Political Liberties	Non-discrimination	Legal Certainty	Judicial Review	Appointing Justices	Corruption Prevention	Total scores below 7
Belgium					3			7>6	9>7							2
Estonia					2>3									2		2
Ireland					5							8>6		9>7		2
Slovenia							6>5								5>6	2
Finland				6>9	5>6									3>5		2
Denmark					4											1
Lithuania															4>5	1
Germany					6											1
Sweden				7>6												1
Poland						4>8			5>8		5>8	5>9			4>7	0
Total scores below 7	1	6	2	14	20	9	10	7	8	1	10	11	5	9	14	

Table 5.2 Sustainable Governance Indicators overview: Governance

The index involves many indicators that are difficult to present in one overview. No overview has been given with separate figures due to the excessive amount. An overview of the data can be found in the attached Excel sheet on the original publication page.

6. World Governance Indicators overview

Based on the World Governance Indicators, improvements in a couple of areas can be seen in the Baltics, the Czech Republic, Poland and Romania. Bulgaria, Romania and Croatia are struggling overall in various fields, while Hungary has seen a sharp decline in almost all areas. While having better scores, southern member states are also struggling. Italy and Greece in particular are experiencing sharp declines, followed by Spain and Portugal. Below is an overview in figures, presenting the individual indicators in two groups: EU-13, member states which joined the EU from 2004 onwards, and the EU-15 (EU member states prior 2004).

The scores range from approximately -2.5 (weak) to 2.5 (strong) governance performance.

Figure 1 Control of Corruption (EU-13)

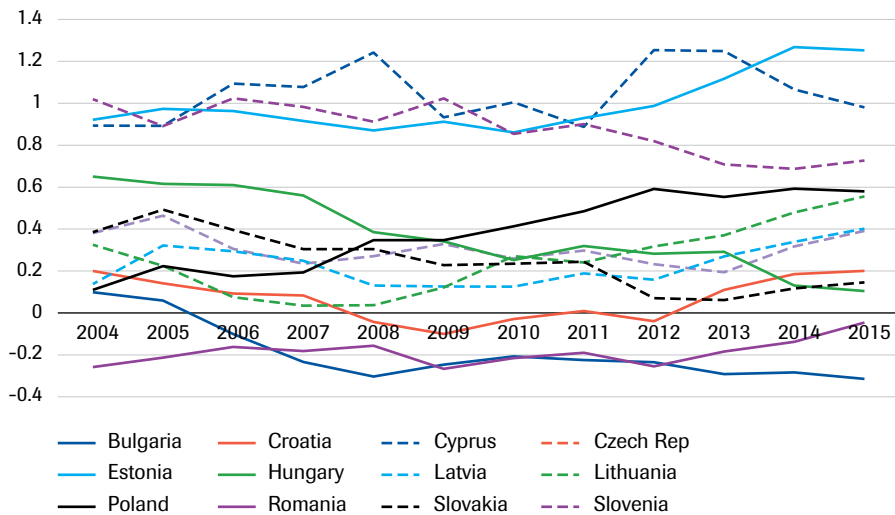


Figure 2 Control of Corruption (EU-15)

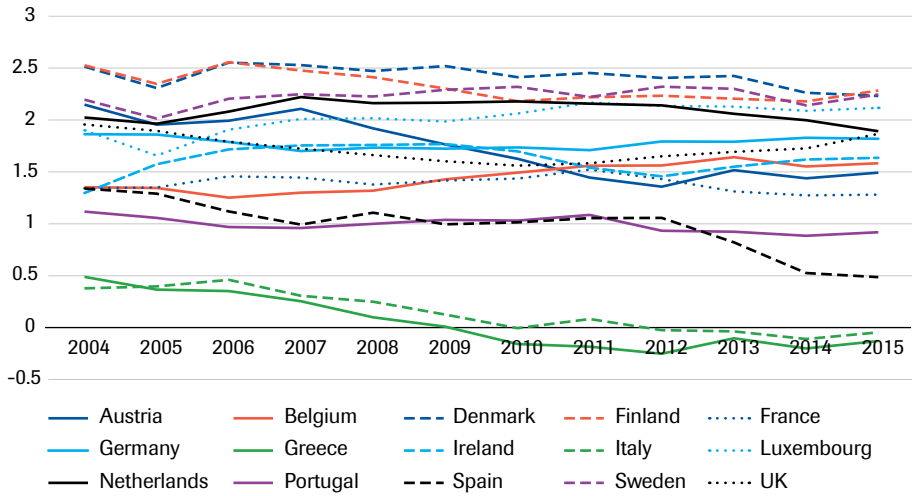


Figure 3 Government Effectiveness (EU-13)

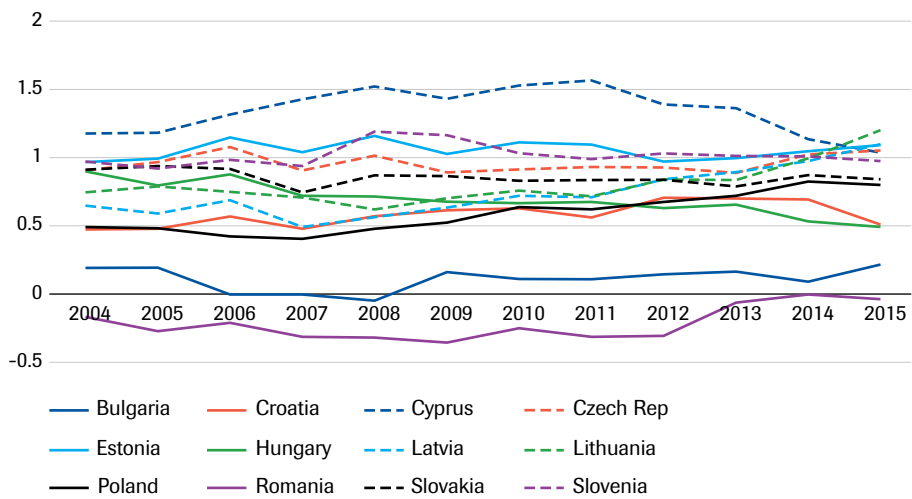


Figure 4 Government Effectiveness (EU-15)

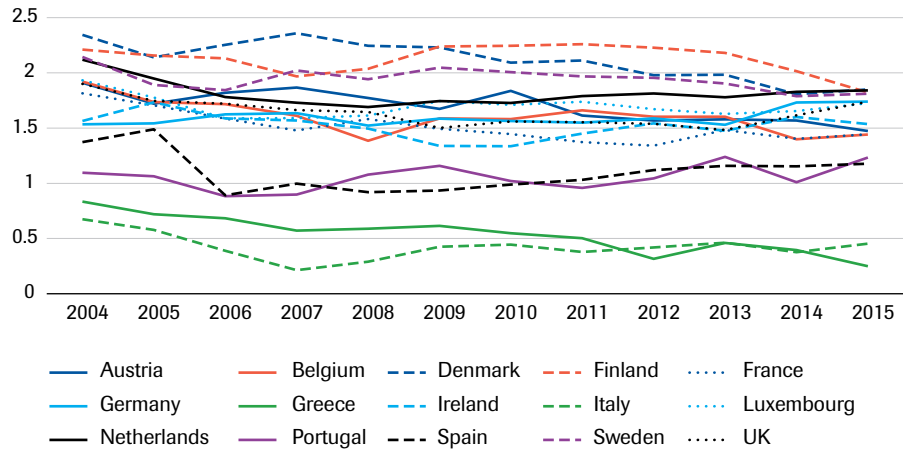


Figure 5 Political Stability and Absence of Violence (EU-13)

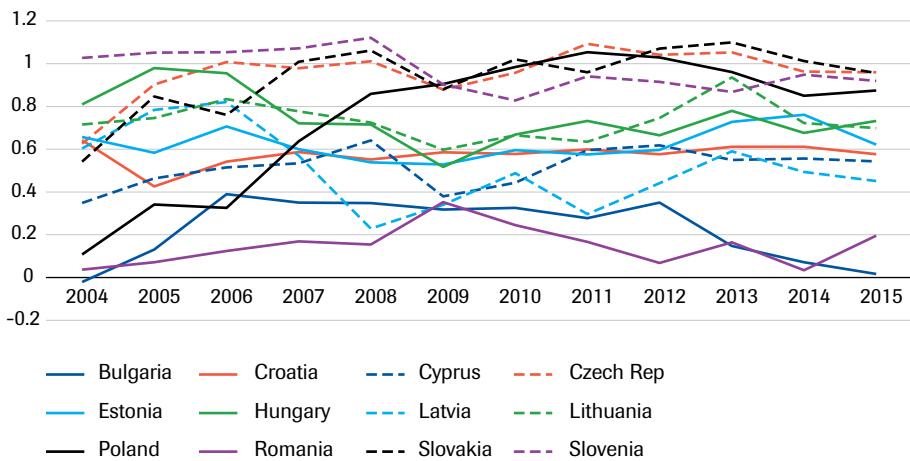


Figure 6 Political Stability and Absence of Violence (EU-15)

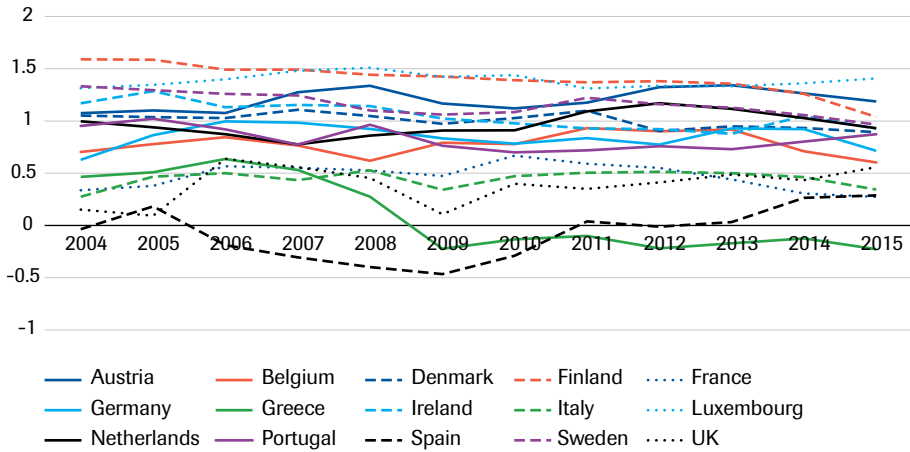


Figure 7 Regulatory Quality (EU-13)

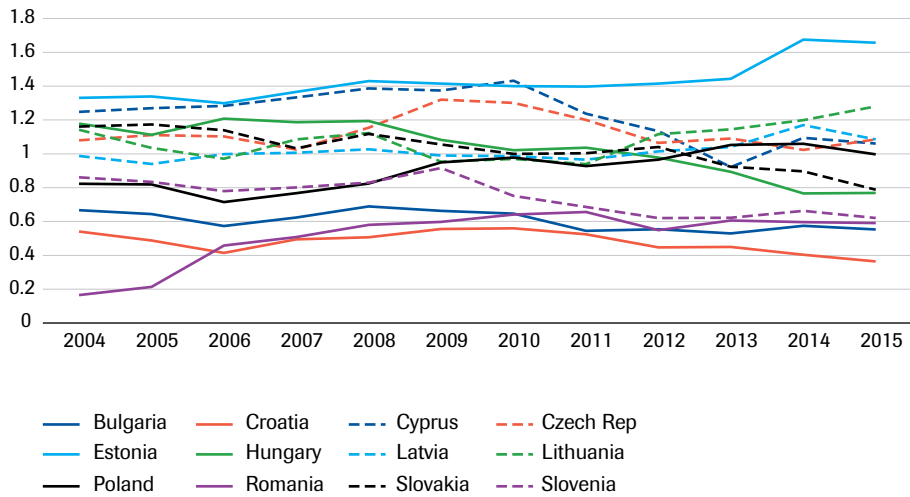


Figure 8 Regulatory Quality (EU-15)

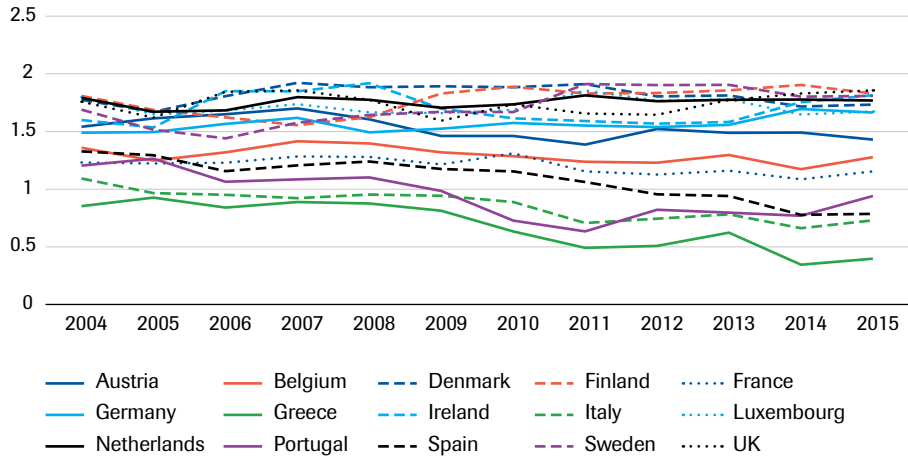


Figure 9 Rule of Law (EU-13)

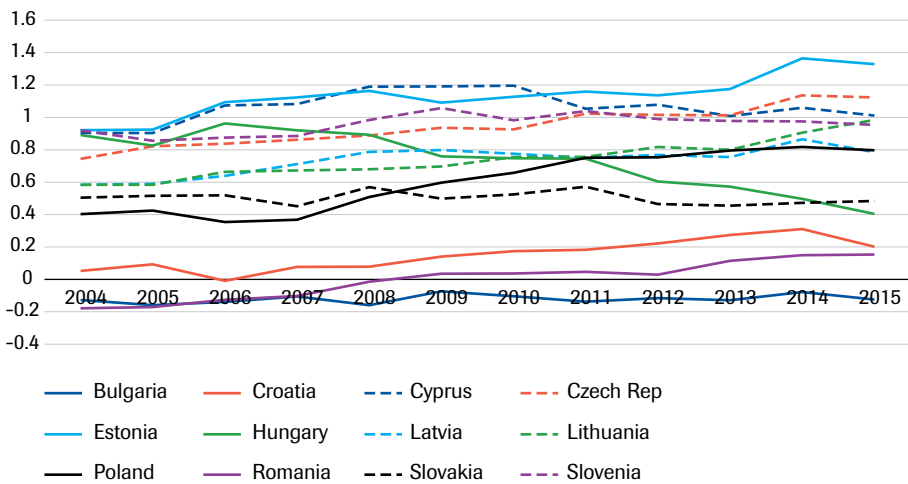


Figure 10 Rule of Law (EU-15)

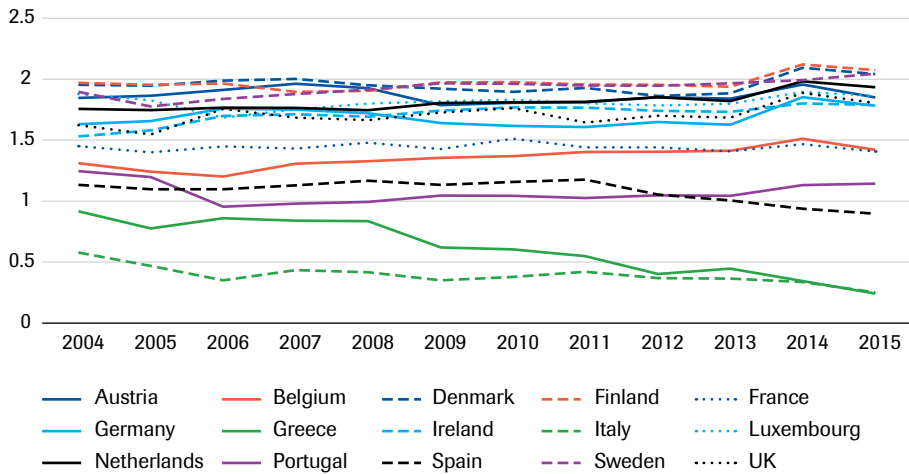


Figure 11 Voice and Accountability (EU-13)

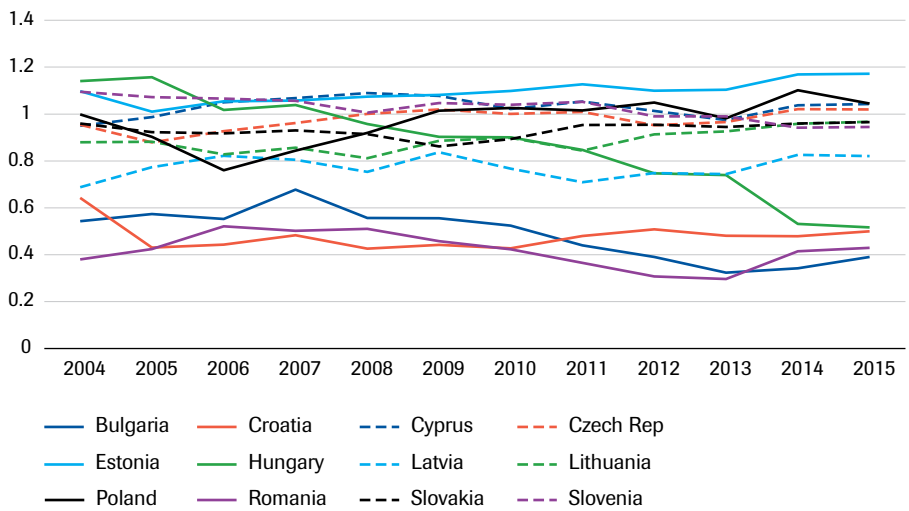
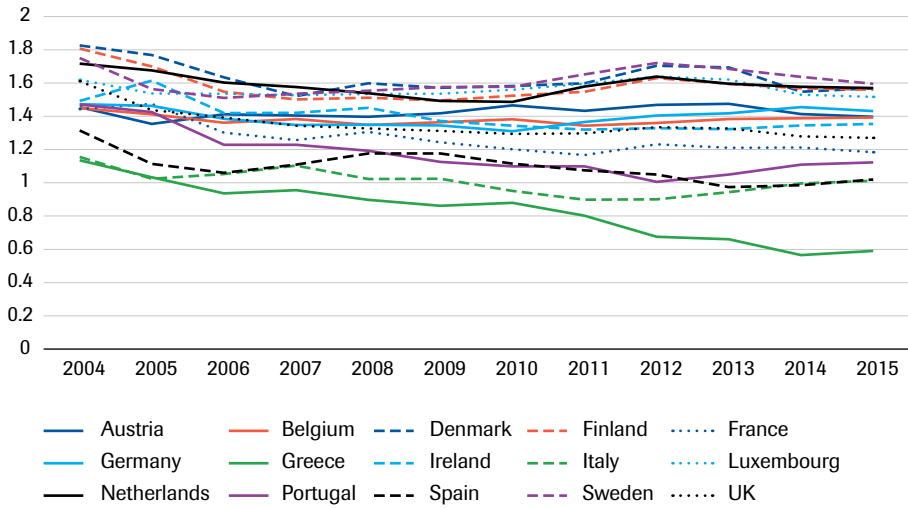


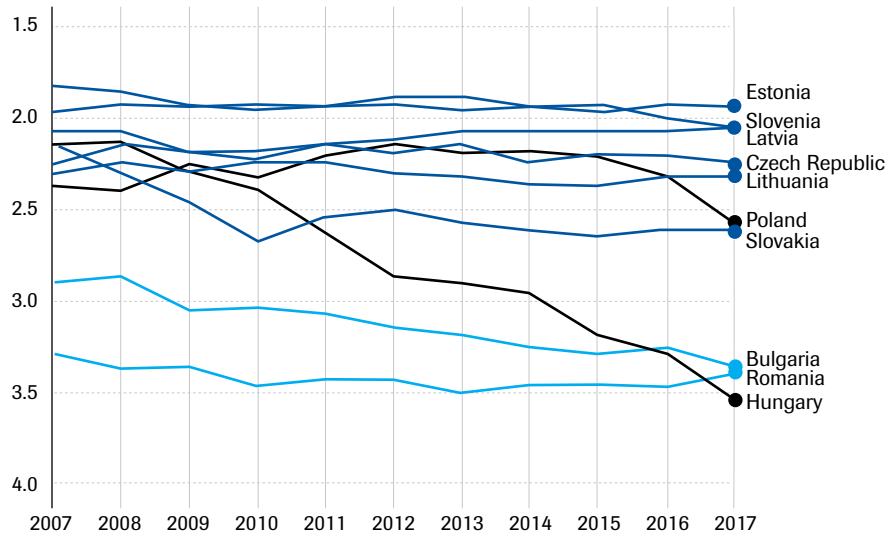
Figure 12 Voice and Accountability (EU-15)



7. Freedom House: Nations in Transit overview⁴⁴

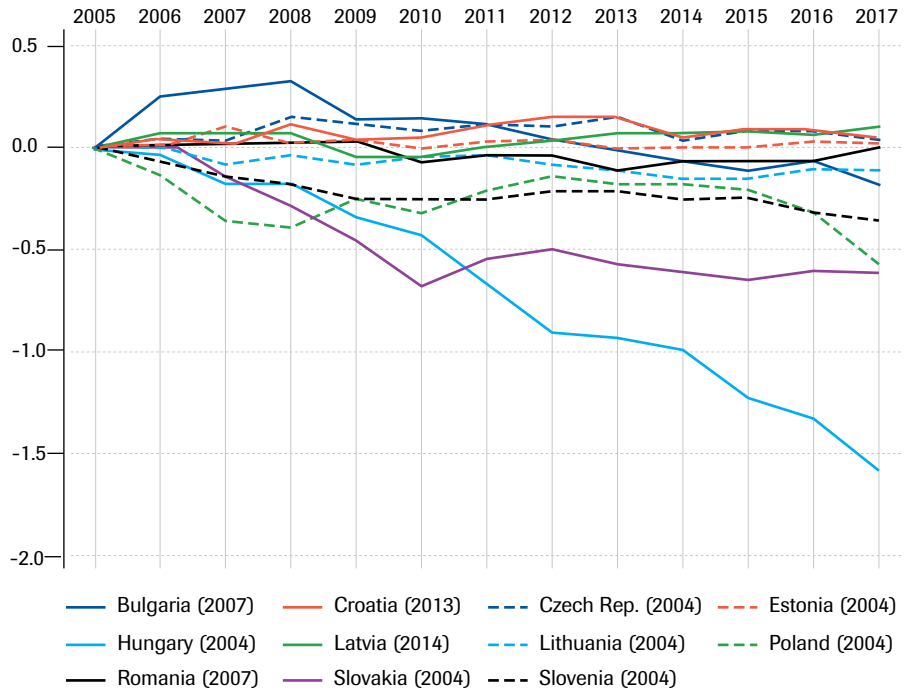
Aggregate democracy scores are based on five main indicators: Independent Media, National Democratic Governance, Local Democratic Governance, Judicial Framework and Independence, Corruption.

Figure 13



44 Freedom House, Nations in Transit, <https://freedomhouse.org/report-types/nations-transit>

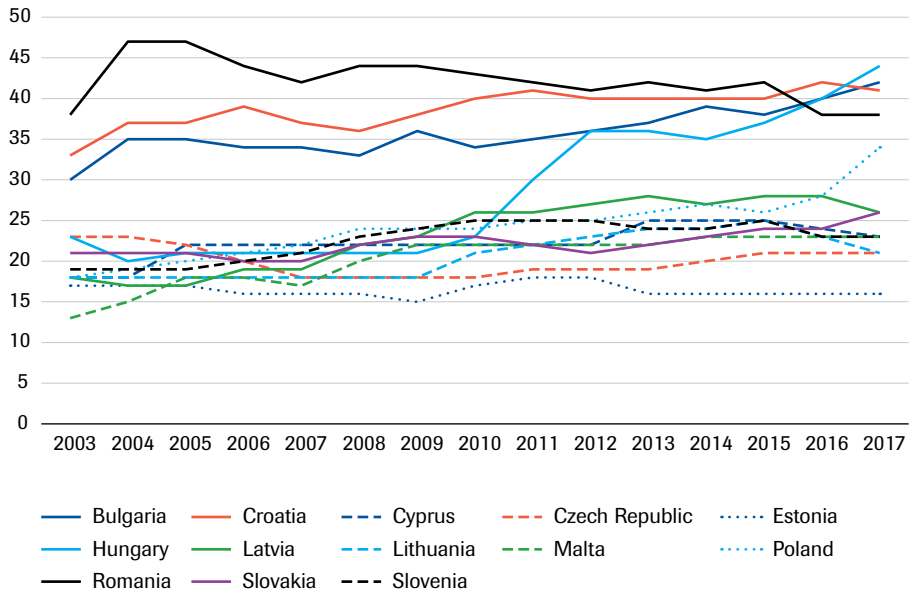
Figure 14



8. Freedom House: Freedom of the Press⁴⁵

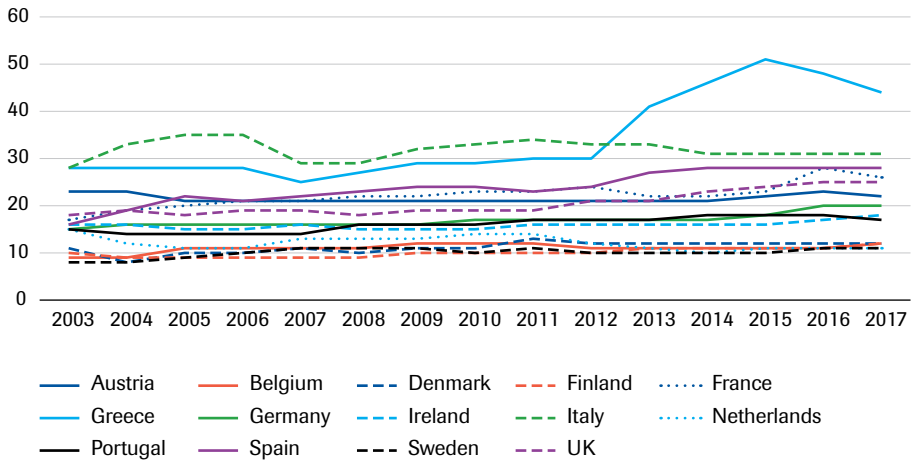
A total score of 0 to 30 results in a press freedom status of Free; 31 to 60 results in a status of Partly Free; and 61 to 100 indicates a status of Not Free. Scores are based on multiple questions related to the legal, political and economic environment.

Figure 15 Press Freedom EU-13



45 Freedom House, Freedom of the Press, <https://freedomhouse.org/report-types/freedom-press>

Figure 16 Freedom of the Press EU-15



9. Transparency International corruption overview

Below is an **overview of public opinion** concerning corruption in specific sectors, based on the Global Corruption Barometer. *The higher the score, the more perceived corruption.*

Legend:

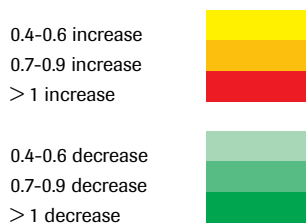


Table 6 Global Corruption Barometer 2004-2013

To what extent do you perceive the following sectors in this country/territory to be affected by corruption?		Political parties	Parliament/Legislature	Legal system/Judiciary	Police	Business/private sector	Media	Medical services	Education system	Military	NGOs	Religious bodies
Austria	2004	3,3	2,8	2,6	2,8	2,9	2,8	2,4	2,3	2,5	2,4	2,5
Austria	2010/11	3,2	2,7	2,5	2,6	3,3	2,8	x	2,3	2,5	2,3	2,7
Bulgaria	2004	4,3	4,2	4,3	3,8	3,7	3,0	3,8	3,3	2,7	2,9	2,6
Bulgaria	2013	4,2	4,0	4,4	3,9	3,8	3,5	4,2	3,4	2,9	3,2	3,5
Croatia	2004	3,6	3,6	3,8	3,3	3,5	3,1	3,6	3,0	2,7	2,4	2,6
Croatia	2013	4,0	3,8	4,0	3,5	3,5	3,4	3,8	3,5	2,6	2,8	2,8
CzechRepublic	2004	3,9	3,5	3,5	3,8	3,1	2,9	3,0	2,6	2,8	2,6	2,2
CzechRepublic	2013	4,1	3,8	3,5	3,6	3,4	2,9	3,3	3,0	3,4	2,5	2,4
Denmark	2004	2,6	2,2	1,9	1,9	2,3	2,6	2,0	1,7	1,9	2,1	1,9
Denmark	2013	2,9	2,4	1,7	2,0	3,0	2,4	2,2	2,0	2,3	2,4	3,1
Estonia	2004	3,5	3,1	3,1	2,9	3,1	2,8	2,7	2,4	2,0	2,8	1,7
Estonia	2013	3,7	3,1	2,8	2,6	3,3	2,6	2,8	2,3	2,0	2,4	2,1
Finland	2004	3,0	2,6	2,0	1,7	2,7	2,9	1,9	1,6	1,6	2,0	2,3
Finland	2013	3,4	2,9	2,0	1,8	3,3	3,1	2,4	2,1	1,9	2,4	2,3
France	2004	4,1	3,4	3,3	3,1	3,5	3,5	2,2	2,0	2,3	2,5	2,2
France	2013	4,0	3,5	3,0	3,3	3,7	3,6	2,8	2,3	2,5	2,8	2,8
Germany	2004	3,9	3,2	2,8	2,5	3,3	3,1	2,7	2,5	2,5	2,7	2,5
Germany	2013	3,8	3,4	2,6	2,7	3,7	3,6	3,4	2,7	2,9	3,0	3,1

Greece	2004	3,8	3,0	3,1	3,2	3,0	3,5	4,0	2,8	2,2	2,4	2,7
Greece	2013	4,6	4,3	3,9	3,6	3,8	4,4	4,1	3,3	2,9	3,1	3,4
Ireland	2004	3,9	3,2	3,3	3,1	3,1	2,8	2,8	2,2	2,1	2,2	2,8
Ireland	2010/11	4,4	4,0	2,7	3,0	3,4	3,0	x	2,5	2,3	2,5	3,9
Italy	2004	4,2	3,7	3,2	2,5	3,5	3,3	3,4	2,5	2,4	2,4	2,2
Italy	2013	4,5	4,1	3,4	2,9	3,6	3,4	3,6	3,0	2,8	2,8	3,2
Latvia	2004	4,2	4,0	4,1	4,0	3,7	3,1	3,6	3,0	2,5	2,4	2,0
Latvia	2013	4,0	3,7	3,5	3,5	3,4	3,0	3,4	3,4	2,3	2,4	2,1
Lithuania	2004	4,2	4,2	4,2	4,1	3,5	3,2	3,8	3,0	2,4	2,8	2,3
Lithuania	2013	4,2	4,3	4,3	3,9	3,6	3,3	4,1	3,2	2,4	2,6	2,5
Luxembourg	2004	2,9	2,4	2,5	2,4	2,7	2,6	2,1	2,0	1,9	2,1	2,4
Luxembourg	2013	3,6	3,1	2,7	2,9	3,4	3,2	2,6	2,6	2,7	2,6	3,3
Netherlands	2004	2,8	2,6	2,6	2,7	3,0	3,0	2,2	2,1	2,4	2,4	2,3
Netherlands	2010/11	3,0	2,7	2,6	2,6	3,1	2,9	x	2,3	2,5	2,5	2,9
Poland	2004	4,2	4,1	4,0	3,9	3,8	3,4	4,1	3,5	3,1	3,3	3,1
Poland	2010/11	3,6	3,4	3,3	3,2	3,5	2,8	x	2,6	2,4	2,6	2,7
Portugal	2004	3,9	3,4	3,5	3,4	3,4	3,2	3,3	3,0	2,7	3,1	2,8
Portugal	2013	4,1	3,9	3,9	3,2	3,5	3,2	3,0	3,1	3,9	3,2	3,0
Romania	2004	4,2	4,0	4,1	3,8	3,7	2,6	3,9	3,3	2,4	2,7	2,2
Romania	2013	4,2	4,0	3,7	3,5	3,5	3,1	3,7	2,9	2,5	2,7	2,5
Spain	2004	3,8	3,2	3,4	2,9	3,5	3,6	2,6	2,7	2,7	2,5	3,0
Spain	2013	4,4	3,9	3,5	3,1	3,3	3,2	2,3	2,1	2,6	2,4	3,1
UK	2004	3,4	3,2	3,0	2,8	3,0	3,3	2,4	2,4	2,5	2,6	2,6
UK	2013	3,9	3,6	2,7	3,0	3,5	3,9	2,6	2,6	2,5	2,6	3,0

Below are two figures (EU-13 and EU-15) on corruption, based on the Corruption Perceptions Index: aggregate data is based on the **opinions of various experts** and institutions.⁴⁶ *A high score means less corruption.*

46 See Transparency International, https://www.transparency.org/news/feature/corruption_perceptions_index_2016

Figure 17 Anti-corruption score (EU-13)

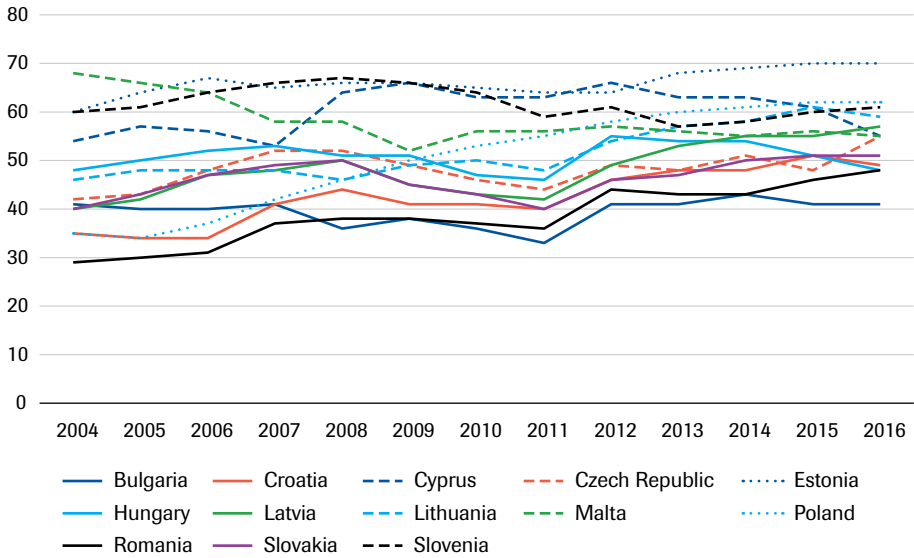
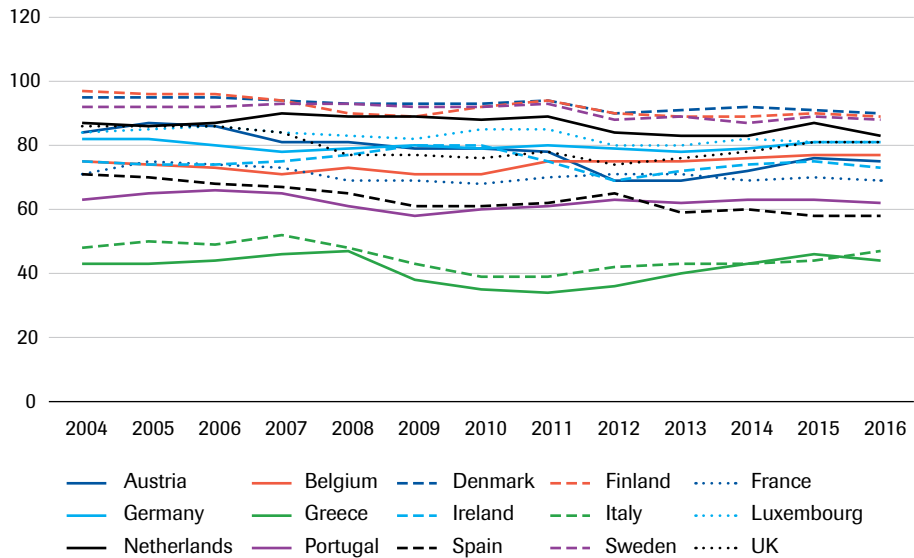
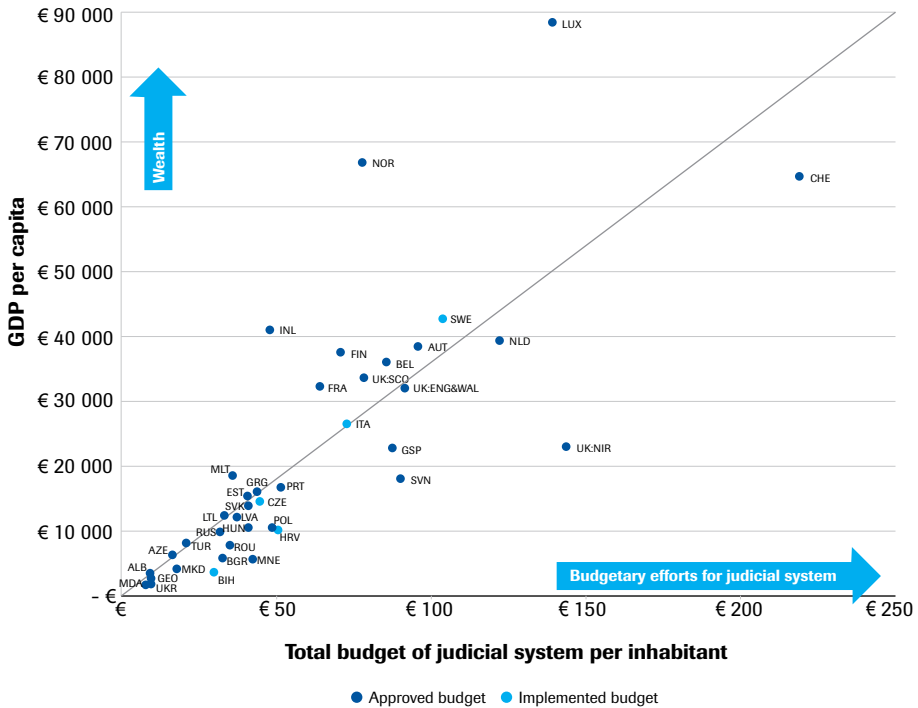


Figure 18 Anti-corruption score (EU-15)



10. Budgetary efforts for judicial system

Figure 19 Budgets allocated to the judicial system



The figure above shows that there is a positive correlation between the level of wealth of the States or entities and the resources allocated to the judicial systems. This positive correlation is represented by a trend line. The states situated below the trend line make a relatively high budgetary effort for their judicial systems given their wealth. The more a state or entity is at the bottom right of the graph, the more its budgetary effort may be considered significant in view of its wealth. States or entities above the trend line are on the contrary states whose budgetary effort seems more moderate compared to their wealth.

Source: CEPEJ, 'European judicial systems Efficiency and quality of justice', *CEPEJ STUDIES No. 23 Edition 2016* (Data 2014).

11. Additional suggestions on Rule of Law policy

I. Fine-tune and expand rule of law standards, including review

- Expand on Article 2 TEU values to solve definition issues. While the Council of Europe, Venice Commission and jurisprudence of the EU Court of Justice play an important role and the European Commission has communicated standards, the EU lacks its own set of proper rule of law definitions. Also, the EU Charter of Fundamental Rights is only applicable with regards to the implementation of (specific, secondary) EU law.
- Fine-tune the Commission's Rule of Law Framework: solve definitional issues, provide clear and consistent procedures. Allow co-ownership (to be formally proposed by other EU institutions).⁴⁷ Alternatively, make (a reformed) Fundamental Rights Agency or independent agency responsible (see also next point). The European Commission has recently acquired increased (democratic) legitimacy (*Spitzenkandidaten*) but is also more political, risking credibility in judging sensitive rule of law issues.
- Expand the mandate of the Fundamental Rights Agency. Develop a profile in relation to Article 2 TEU values under the issue of 'access to justice' e.g. constitutional justice.⁴⁸ Establish a European Fundamental Rights Information System.⁴⁹
- Improve the Justice Scoreboard. Include a more qualitative examination of key factors as *de jure* and *de facto* independence of the judiciary to detect internal linkages. Focus on penal, administrative and constitutional matters as well.
- Review the Audio-visual media services directive. EU law treats media like any other business, not recognising its special role in supporting democracy.
- Support the proposal of the European Parliament in October 2016, named a Union Pact for Democracy, the Rule of Law and Fundamental Rights (DRF).⁵⁰
- These suggestions require in most cases unanimity or even treaty change. Options for enhanced cooperation by a core group could be explored, one that entails a carrot to join (reputational benefit that e.g. facilitates business investments, or concrete benefits by connecting it to the attainment of funds and the participation in programs).

47 See Kochenov, D. and L. Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction', *European Constitutional Law Review* 11 (April 2015); pp. 512-540.

48 See Democracy Reporting International, 'Towards a New Deal for Democracy in Europe', Briefing Paper 49, June 2014.

49 See Fundamental Rights Agency, 'Fundamental rights in the future of the European Union's Justice and Home Affairs', 31 December 2013.

50 See e.g. *Draft Report. The establishment of an EU mechanism on democracy, the rule of law and fundamental rights* (2015/2254(INL)) Rapporteur Sophia in 't Veld. <https://europa.d66.nl/content/uploads/sites/240/2016/04/EU-Pact-on-Democracy-Rule-of-Law-and-Fundamental-Rights.pdf>

II. Better enforcement/ sanctions⁵¹

- Make better use of Infringement procedures such as presenting a bundling of infringement procedures under Article 258 TFEU (to demonstrate that the sum is more than just the sum of its parts) to allow the Court to judge on Article 2 TEU values and show that there is a systemic breach of the rule of law (either under a packaged claim under article 4(3) TEU or with a bundling of ordinary *acquis* violations infringement procedures together with violations of the Charter of Fundamental Rights.⁵²
- By applying a more forceful interpretation of the EU Treaty the Commission could explore the Court's willingness to protect fundamental values. The Commission latest infringement action which referred Poland to the Court of Justice regarding the Polish Law on the Ordinary Courts Organisation seems to show this for the first time: namely an infringement in the context of a violation of Article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights (instead of specific defined *acquis* violations which does not address general rule of law concerns).
- Member States could opt for using 'direct action' against another Member State who violates the rule of law by invoking Article 259 TFEU.⁵³ The Court could then decide if it should lead to adjusting/suspending the principle of mutual trust. A parallel in reasoning might perhaps be sought with a case during the migration crisis of 2015, when refugees under the Dublin regulations were not allowed to be send back to Greece as the Greek (judicial) asylum system was deemed to be dysfunctional. Member States, as ultimate guardians of European values via Article 7 TEU , might also have a better legal chance than the Commission.
- Enforcement through suspending EU funds. While suspending already committed EU funding would breach the rule of law, a number of options may be explored: attaching the suspension of funds to a judgment under Article 260 TFEU, the Commission could declare that the absence of independent judicial scrutiny and the sacking of experts means it can no longer certify that EU funds are being properly spent. In addition, justify additional safeguards regarding the next EU budgetary

51 See Pech, L. and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' and Democracy Reporting International, 'Towards a New Deal for Democracy in Europe' and Pech, L. and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU'.

52 As proposed by Kim Lane Scheppele, see e.g. *Enforcing the Basic Principles of EU Law through Systemic Infringement Procedure* (August 2015) https://law.yale.edu/system/files/enforcing_the_basic_principles_of_eu_law.pdf

53 See Kochenov, D., Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool, *The Hague Journal of the Rule of Law*, Vol. 7, 2015, pp. 153-174.

period in order to allow EU funding to be frozen when a country stops complying with the rule of law⁵⁴.

- Before sanctions are possible under Article 7 TEU, a breach of EU values must be declared by unanimity first (Article 7(2) TEU). Nevertheless, even the adoption of Article 7(1), stipulating a clear risk of a serious breach and requiring a 4/5 majority, might lead the Court to set aside the principle of mutual trust and/or stop recognizing affected national courts/governance as valid institutions within the meaning of EU Law. In addition, launching Article 7 simultaneously against more than one member state could prevent the veto-protection of rogue states by each other (this currently seems the case in relation to Poland and Hungary).⁵⁵
- Strengthen accountability via non-EU bodies including civil society, such as investment in the capacities of NGO's to make governance accountable. E.g. NGO's with expertise have in Hungary under circumstances of weak opposition and investigative journalism hold the Hungarian government accountable in some cases with procedures at the European Court of Human Rights in Strasbourg.

III. Improved capacity building and/or incentives

- Use EU money differently by i.a. rerouting EU money through infra-national authorities (sidestep the central government), re-assessing public procurement rules and processes to prevent supporting oligarchic patronage, granting positive budget incentives to well performing rule of law member states (on the basis of enhanced monitoring, see e.g. above) and directly or indirectly financially supporting civil society.
- Ensure the structural inclusion of reform-minded civil society organizations in post-accession tools aimed at monitoring rule of law enforcement. Make established NGOs a regular partner in the discussion between the Commission and governments.⁵⁶

54 See e.g. Šelih J., I. Bond and C. Dolan, Can EU funds promote the rule of law in Europe?, *Centre for European Reform Policy Brief*, 21 November 2017, <http://www.cer.eu/publications/archive/policy-brief/2017/can-eu-funds-promote-rule-law-europe>

55 See Kochenov, D., L. Pech and K. L. Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?', *EU Law Analysis*, 23 December 2017, <http://eulawanalysis.blogspot.nl/2017/12/the-european-commissions-activation-of.html?m=1>

56 See e.g. Elbasani, A. and S. Sabic, 'Rule of law, corruption and democratic accountability in the course of EU enlargement,' and Dimitrova, A., 'The Effectiveness and Limitations of Political Integration in Central and Eastern European Member States: Lessons from Bulgaria and Romania.'

- Greater long-term investment in (subsidiarity-based) European networks and independent national capacity building processes, including i.a. a shared digital database on EU-case law by national judges across the EU, (further) investment in European training sessions and networking, cultivation and socialisation of norms etc (see e.g. also this policy brief).
- Multi-speed Europe: Member States may only partake in new EU-policies when rule of law issues have been improved (as for example already politically instigated by some member states in the case of Schengen accession of Romania and Bulgaria).