

Methodological shortcomings in the Commission's Rule of Law Report: consultations « à la carte? »

Introduction

Each year, the Commission prepares the annual Rule of Law Report and its country chapters, presenting positive and negative developments across Member States. It focuses on four specific areas of rule of law: the justice system, the anti-corruption framework, media pluralism and institutional checks and balances.

The Commission considers that the rule of law is “is the backbone of any modern constitutional democracy,”¹ hence the Rule of Law Report has gained a very significant role. It is meant to point at perceived threats to the four abovementioned areas of rule of law in Member States and ensures that the Commission's assessment with regard to Article 7 TEU are met.

While it is stated that “*the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system*”² the way the information is gathered does not take into account Member State's constitutional system and political culture. Beyond the way information is gathered the report drafted raises questions as to necessary objectivity of this exercise, at the risk of turning this important mechanism into a political tool against Member States.

The Report is based on a dialogue engaged with Member State's authorities and “relevant national stakeholders”,³ as well as international professional organizations, such as the Network of the Presidents of the Supreme Courts of the EU, the European Partners against corruption/European contact-point network against corruption, or the European Federation of Journalists, but also international non-governmental organizations such as the Open Society, European Policy Institute, or ILGA-Europe. This paper examines and analyzes the national stakeholders considered as “relevant” in the case of Hungary, with a special interest on the stakeholder's possible biases and political leaning, based on the 2021 Rule of Law Report.

1) Concerns related to the financial independence and transparency of the consulted European wide organizations

The Commission consults with several international nongovernmental organizations (NGOs) regarding the state of rule of law in individual member states, called horizontal consultations. In 2021, the Commission consulted 27 international organizations.⁴

One of these has a commercial interest (EuroCommerce⁵), therefore no to little political diversity. Out of the 26 organizations, 11 are communitarian⁶, and 15 are progressive (see Table 1.) while there is not even one conservative organization.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>

³ https://ec.europa.eu/info/sites/default/files/rolm_methodology_final.pdf

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0714>

⁵ <https://www.eurocommerce.eu/>

⁶ In our analysis we used the typology of Mitchell (2009). According to his typology, “communitarian” political tradition is characterized by an ambivalence toward social ranks and an approval of government force. For details, see the chapter on Methodology

1. Table: Ideological predispositions of the consulted international organizations

Nr.	Consulted Communitarian Organizations	Consulted Progressive Organizations
1	Conference of European Churches	Amnesty International
2	European Centre for Press and Media Freedom	Center for Reproductive Rights
3	European Civic Forum	CIVICUS
4	European Federation of Journalists	Civil Liberties Union for Europe
5	European Partnership for Democracy	Civil Society Europe
6	European Youth Forum	European Center for Not for-Profit Law
7	Human Rights House Foundation	Front Line Defenders
8	International Press Institute	Human Rights Watch
9	Philanthropy Advocacy	ILGA-Europe
10	Reporters without Borders	International Commission of Jurists
11	Transparency International EU	International Federation for Human Rights
12		International Planned Parenthood Federation European Network (IPPF EN)
13		Netherlands Helsinki Committee
14		Open Society European Policy Institute
15		Protection International

However, it is more concerning that more than half (15 organizations) of these organizations receive funding from the European Union. In certain cases, the Commission is one of the top funders. In 2020, the European Commission was among the top 5 funders of CIVICUS, donating 782.406 US dollars.⁷ In 2021, ILGA-Europe has received, nearly 1 million Euros from the European Commission, which made up 29 percent of ILGA-Europe's budget.⁸ In the case of European Centre for Press and Media Freedom,⁹ the European Commission even the founder of this organization and provides funding to it ever since. All these suggest a strong financial dependence of the involved organizations, which can be considered as a factor jeopardizing unbiased analysis.

⁷ https://www.civicus.org/documents/reports-and-publications/annual-reports/civicus-annual-report-2020-singles_en.pdf

⁸ <https://www.ilga-europe.org/report/overview-of-ilga-europes-finances-in-2021/>

⁹European Centre for Press and Media Freedom, Finances. Available at:

<https://www.ecpmf.eu/about/finances/>

It is even more worrisome that seven of these organizations (see Table 2.) do not present any information about their donors or main partners.

2. Table: List of organizations consulted with no information on financial sources

No information provided on financial sources
Civil Society Europe
EuroCommerce
European Center for Not-for-Profit Law
European Federation of Journalists
European Partnership for Democracy
International Planned Parenthood Federation European Network (IPPF EN)
Philanthropy Advocacy

This raises the question of the transparency of the organizations which are consulted regarding the rule of law in several countries. It is ironic that the Commission uses terms such as independence, institutional framework to prevent corruption, transparency as their evaluation criteria, yet a quarter of the civil society organizations reporting on these issues do not meet the very same criteria.

2) Concerns related to the selection of organizations consulted at national level

We have also examined a few Member States' national organizations deemed as "relevant" by the Commission and consulted. We have found several inconsistencies and methodological weaknesses. When examining the number and the type of these organizations, little to no consistency is found among Member States, yet most of these organizations' ideological leaning are surprisingly similar.

Firstly, the number of the organizations involved in the process varies greatly: while in the case of Spain 40 stakeholders were identified, in the case of France there were only 19 organizations involved in the consultations. Interestingly, in Hungary 31 and in Poland 30 organizations were consulted, while in France only 19 "relevant national stakeholders" were identified (see Annex 1). This variance cannot be explained by the difference in the population of various countries,¹⁰ the size of public sector as measured by share of public sector employment per total employment¹¹, the government spending to GDP by country¹², the strength of civil society in

¹⁰ Eurostat: EU population in 2020: almost 448 million, News release, 10 July 2020. Available at: <https://ec.europa.eu/eurostat/documents/2995521/11081093/3-10072020-AP-EN.pdf/d2f799bf-4412-05cc-a357-7b49b93615f1#:~:text=Among%20the%20EU%20Member%20States,38.0%20million%20or%208.5%20>

¹¹ The World Bank: Public sector employment as a share of total employment. Available at: https://govdata360.worldbank.org/indicators/haa733075?country=ESP&indicator=42305&countries=FR,RA,HUN,ROU,POL,BEL,SWE&viz=line_chart&years=2000,2017

¹² Trading Economics: Government Spending to GDP by Country. Available at: <https://tradingeconomics.com/country-list/government-spending-to-gdp?continent=europe>

these countries (also referred to it by some scholars as third sector)¹³ or any other objective measurement type.

Second, the type of organizations involved in the process do not reflect the differences between institutional arrangements existing in the countries'. Spain has a complex setting of political institutions which could justify consulting with 10 governmental organizations and 6 independent agencies, the same might be true for France, where only 6 governmental organizations were consulted. In the case of Hungary, 4 governmental organizations and 5 independent agencies were interviewed, while in Poland only 2 governmental organizations and 1 independent agency's input was considered. It seems, that in certain cases the Commission gives much more leverage to governmental organizations, while in other cases it degrades their value by consulting with many more opposition partners.

Furthermore, the number of non-governmental organizations involved in the process shows an unbalanced selection. According to Salamon and Sokolowski¹⁴ by the size of the country's populations, Scandinavia has the largest third sector. This is followed by Northern Europe, Southern Europe and lastly, Eastern Europe. This means that in relation to the country's population, much more Scandinavian individuals are active members of NGOs, when compared to active members of Hungarian or Polish NGOs. The active membership of NGOs ensures that the organizations truly represent the collective view of their members and legitimizes their advocacy activities. The lack of active membership, low civic engagement of the population, and weak civil society have been notorious problems in the former Eastern Blocks countries.¹⁵ Despite this well documented political culture, the Commission chose to give the most political leverage to NGOs in Spain, by consulting a total of 8 organizations. This was followed by Hungary, with 5 NGOs, while from Sweden only 3 NGOs were consulted. It is worrisome that the Commission disregards the political culture of various Member States and attributes legitimacy to organizations having little to no active membership. Additionally, it is not clear on what criteria the NGOs were selected to be consulted.

It is also remarkable that in the case of Hungary and Poland, the Commission consulted more NGOs than governmental organization. Moreover, all the Hungarian NGOs interviewed have a progressive political stance, while in the case of Poland, two out of the three consulted NGOs are progressive, one being communitarian, see below Table 3.

¹³ Salamon, M.L. & Sokolowski, W (2016) The Size and Scope of the European Third Sector, TSI Working Paper No. 12, Seventh Framework Programme (grant agreement 613034), European Union. Brussels: Third Sector Impact. https://centerforborgerdialog.dk/wp-content/uploads/2017/10/TSI-Working-Paper-12_Size-and-Scope.pdf

¹⁴ Salamon, M.L. & Sokolowski, W (2016) The Size and Scope of the European Third Sector, TSI Working Paper No. 12, Seventh Framework Programme (grant agreement 613034), European Union. Brussels: Third Sector Impact. Pp.: 15. Available at: https://centerforborgerdialog.dk/wp-content/uploads/2017/10/TSI-Working-Paper-12_Size-and-Scope.pdf

¹⁵ Howard, Marc Morjé, The weakness of civil society in post-communist Europe. Cambridge University Press, 2003.

3. Table: Political leaning of the consulted Hungarian and Polish NGOs

Consulted Hungarian NGOs		Consulted Polish NGOs	
Name	Political leaning	Name	Political leaning
Amnesty International Hungary.	progressive	Amnesty International	progressive
Hungarian Civil Liberties Union	progressive	Batory Foundation	communitarian
Hungarian Helsinki Committee	progressive	Helsinki Fundacja Praw Człowieka (Helsinki Foundation of Human Rights)	progressive
K-Monitor	progressive		
Transparency International Hungary	progressive		

The progressive and the communitarian values represented by the consulted NGOs are sparingly reflected in the general population, and, as such, are not persistent in cultural and political traditions. The data of World Values Survey¹⁶ assesses cross-cultural variations in the world based on two major dimensions: survival values versus self-expression values, respectively traditional values versus secular-rational values. The general population of Hungary holds values based on which self-expression has a relatively low importance and is very close to being a traditional culture.¹⁷ Similarly, Poland has an even more traditional culture, while self-expression is hardly more important than for the Hungarians. Hence, the consulted progressive and communitarian organizations' inputs reflect individual opinions of professionals working at NGOs with little to no democratic legitimacy. Furthermore, several of these organizations receive funding from the European Union, showing again a strong dependency on the Commission.

Thirdly, think tanks were considered important stakeholders only in the case of Hungary, Poland, and, to some degree, Romania. In no other cases examined in this study think tanks were deemed to be relevant actors. The cases of Hungary and Poland are particularly unbalanced since the Commission, unlike for other Member States (see Annex 1), consulted more think tanks than governmental organizations–

We can conclude that the consultation process shows clear methodological inconsistencies when selecting and interviewing stakeholders in various Member States. The number and the type of organizations differ greatly when compared across countries, and the consulted non-governmental organizations heavily emphasize progressive values. However, these values are

¹⁶ World values Survey: The Inglehart–Welzel Cultural Map - World Values Survey 7 (2020). Available at: <https://www.worldvaluessurvey.org/photos/EV000190.JPG>

¹⁷ Based on Inglehart-Welzel definitions, traditional values prioritize religion, deference to authority, belonging to a nation, and strong traditional family values: divorce, abortion are generally rejected.

not reflected by the majority of the population and the organizations have notoriously low local support.

All these strongly contradict the statement written in the methodology of the consultation process where it is stated that the Commission will assess all Member States “whilst remaining proportionate to the situation and developments in full respect of the principle of equality of Member States.”¹⁸ The unbalanced selection of stakeholders, the arbitrarily attributed advantage to these interviewees, inevitably lead to a distorted image and an incorrect assessment of the issues at stake.

3) Final Conclusions

The consultation procedure raises serious concerns regarding its methodology and, more specifically, its impartiality. An unproportionate weight is given to the subjective opinion of some actors who do not represent most of the Hungarian population. On the contrary, actors whose values are more in line with those of the majority, and with the values enshrined in the Fundamental Law of Hungary, are underrepresented. As enshrined in Article 4. of TEU, the European Union has the obligation to “respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” It seems as if the European Union was not respecting the rule of law in regarding to its own obligations towards Hungary, its fundamental political and constitutional structures, national identity and self-government.

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Methodology

When selecting country cases, we have used the typology of Kuhlmann and Wollmann (2019)¹⁹ considering the different political and institutional features of existing national administrative structures and administration traditions. Because of the withdrawal of the United Kingdom from the European Union, we have deemed that the Anglo-Saxon country group would be less relevant for the purposes of this analysis, therefore no country from that group was included in our study. Language barriers did limit our possibilities of choice, therefore in the second part of the analysis we have not included Greece and Bulgaria. The interviewed organizations, as listed in the country chapters of the Rule of Law Report 2021, were categorized according to their regard for the use of force (legal and institutional form) and their recognition of rank (status quo) as elaborated by Mitchell (2009).²⁰ The author classifies current American political views based on their regard for the use of government force and the recognition of rank. He distinguishes the political left by its rejection of social rank and hierarchy, while the political right is characterized by its acceptance of the use of government forces. The various political

¹⁸ European Commission: European Rule of Law Mechanism: Methodology of the preparation of the Annual Rule of Law Report. 20 July 2021. Available at: https://ec.europa.eu/info/files/2021-rule-law-report-methodology_en

¹⁹Kuhlmann, Sabine, and Hellmut Wollmann. *Introduction to comparative public administration: Administrative systems and reforms in Europe*. Edward Elgar Publishing, 2019.

²⁰ Mitchell, Brian Patrick. *Eight ways to run the country: A new and revealing look at left and right*. Greenwood Publishing Group, 2007.

traditions are placed along a chart using as the vertical axis a scale to represent the attitudes towards the use of government force, and on the horizontal axis, a scale for tendencies to recognizing ranks. In this classification, anarchy would not necessarily mean the absence of government, rather a rejection of ranks, such as patriarchy. Based on these criteria, he identifies eight different political perspectives, as follows: communitarian (ambivalent toward ranks, and approving government force), progressive (against ranks and supporting government force), radical (against ranks and ambivalent toward government force), individualist (against ranks and government force), paleolibertarian (ambivalence toward ranks, against government force), paleoconservative: (support for ranks but against government force), theoconservative: (support for ranks but ambivalent towards government force), and neoconservative (support for ranks and for government force).

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1. Annex: The number and type of organization consulted by the European Commission in its 2021 Rule of Law Report.

Countries	Number of organizations	Nongovernmental organizations	Think thanks	Government organizations	Others	Journalists' representatives	Jurists' representatives
Spain	40	8 NGOs balanced between progressive and communitarian, 3 share no information about donors, 2 are funded by the EU	None	10	6	2	12
Hungary	31	5 NGOs , all are progressive, 2 receive funding from the EU	6 TTs , 2 are progressive.	4	5	4	2
Poland	30	3 NGOs , 2 out of them are progressive, 2 receive funding from the EU.	9 TTs , 3 are progressive, 2 communitarian, 3 neoconservative, and 1 theoconservative	2	1	5	3
Sweden	23	3 NGOs , 2 are progressive.	None	10	4	2	2
Romania	23	1 NGO , it's communitarian	2 TTs , communitarian and progressive as well, both financed by the EU	4	3	2	5
Belgium	22	3 NGOs , 2 are progressive, 1 communitarian, its top funder is the EU	None	8	2	3	2
France	19	1 NGO , communitarian, its founder is the EU	None	4	6	3	4