

## A decade of rule of law toolbox: Assessment and prognosis

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### 1. Introduction

The history of the rule of law in EU law has been one of gradual process of formal Treaty enshrinement culminating in 2009 with the entry into force of the Lisbon Treaty. This Treaty codification phase was followed by a rapid expansion of the EU's rule of law toolbox in response to an unexpected "rule of law crisis" starting with Hungary in 2010 and first publicly acknowledged as such in 2012 by EU officials. These two phases may be viewed as respectively representing the past and the (ending) present of the rule of law in the EU. With systemic threats to and violations of the rule of law not subsiding, notwithstanding the (provisional?) end of backsliding in the case of Poland,<sup>1</sup> this chapter will argue that the next phase in the history of the rule of law in the EU is going to be one of increased retrenchment.

In this emerging phase following the end of what may be labelled the "rule of law toolbox phase", one may tentatively forecast that the EU will no longer seek to adopt new tools – not necessarily a negative development in and of itself – but will also no longer attempt to effectively use the EU's rule of law enforcement tools. The EU's key enforcement duo (the Commission and the Council) will instead embrace a façade of action mode in the form of recurrent production and discussion of non-binding reports and recommendations aimed at all Member States. This, in turn, should make it easier to claim rule of law "progress" and minimise or deny the "authoritarian drifts" which the President of the Court of the Justice (CJEU) unprecedentedly warned against in 2023.<sup>2</sup>

At the same time, the EU's main political institutions can be expected to continue presenting the promotion and protection of the rule of law as a silver thread running through all EU actions and policies both internally and externally. The rising gap between theory/rhetoric and practice/reality is bound to increase and in turn, seriously threaten the authority, legitimacy and functioning of the EU whose interconnected legal order – and the market built on it – is based on the constitutional premiss that all EU Member States are rule of law compliant democracies. As this premiss already no longer holds with Hungary for instance no longer a democracy,<sup>3</sup> the EU's legal order will face increasing contestation and fragmentation either de jure or de facto.

### 2. A transversal and critical assessment of the use, misuse and non-use of the EU's rule of law toolbox

Three transversal trends may be derived from the period which started in 2012-14 when the European Commission first acknowledged the existence of a rule of law crisis and started developing what became later known as the EU's rule of law toolbox. These three trends, which one may expect to continue and gain in intensity, are as follows: (i) To project a façade of action and distract from lack of enforcement, the Commission and the Council will continue to engage in toolbox navel-gazing but instead of focusing on creating new tools after a decade of doing so, toolbox finetuning will be the dominant feature; (ii) The default embrace of the narrowest and in some cases, *contra legem* interpretations of relevant legal provisions and tools will endure both to justify toolbox finetuning and weak or non-enforcement; (iii) Politicisation of the EU's rule of law toolbox will also continue and this will be accompanied by increasing gaslighting to disguise lack of consistency, Panglossian

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<sup>1</sup> A. Wójcik, *Rebuilding the Rule of Law in Poland*. FES (Friedrich-Ebert-Stiftung), February 2025, <https://library.fes.de/pdf-files/bueros/warschau/21873.pdf>

<sup>2</sup> K. Lenaerts, "On Checks and Balances: The Rule of Law Within the EU" (2023) 29(2) *The Columbia Journal of European Law* 25, p. 31.

<sup>3</sup> See B. Lobina and L. Pech, "Illiberal Democracy and EU Law: Is there such a thing as "Illiberal Democracy" and is it compatible with EU membership?" (2024) 45(1) *Tocqueville Review* 35.

assessments and/or reliance on non-legal considerations both in relation to monitoring and enforcement tools.

## 2.1. From toolbox creation navel-gazing to toolbox finetuning navel-gazing

The swift development and densification of the EU's rule of law toolbox following the emergence of a new type of "threats to the legal and democratic fabric in some of our European states"<sup>4</sup> in 2012 may be interpreted in both a positive and a negative way: "it may be positively understood as the sign of a broad consensus regarding the critical importance of the rule of law and an increasing awareness of the existential nature of the threat that rule of law backsliding poses to the EU. Conversely, this evolution may be understood as a failure to fully confront those who have deliberately undermined the rule of law in their countries by instead focusing on a quasi-permanent new instrument creation cycle at the EU level."<sup>5</sup>

The latter tendency emerged as soon as the EU's "rule of law crisis" was widely acknowledged by the main EU institutions in 2012-13. This was not surprising however for those who had been following the aftermath of the allegedly "failed" case of Austria in 1999 and the resulting urban myth that EU rule of law interventions do not work.<sup>6</sup> With most national and European political actors having convinced themselves that proactive (re)actions to systemic threats to the rule of law are bound to backfire, the default setting was inaction disguised under calls for "dialogue". Hungary's increasing descent into authoritarianism was not enough to get the Commission and the Council to move away from this default approach – contrary to the Parliament.<sup>7</sup> To disguise their lukewarm reaction and project a façade of action, they both embraced a primary focus on creating new tools to formalise and structure dialogue-based processes following a (deliberate?) misdiagnosis whereby the EU's rule of law instruments existing in 2012 were allegedly not suitable to deal with the new "crisis" faced by the EU. However, it was and continues to be "outright false to say that the 'EU does not have the necessary enforcement tools' to fix all this. As a matter of fact, it does. It always has. The problem has rather been that the application of these enforcement mechanisms depends at one point or another on political discretion."<sup>8</sup> Be that as it may, it is this misdiagnosis – or convenient excuse – which explains the EU's predominant focus on creating new tools for about a decade since 2012.<sup>9</sup>

As the present author observed in 2018, "rather than acting decisively using existing tools in a mutually reinforcing and forceful way, there seems to always be a persistent temptation to blame the instruments available to either justify their non-inactivation, or their timid use. I am not sure for instance that even if the proposed mechanism to suspend EU funding on rule of law grounds were to be adopted that the Commission would end up using it forcefully. As the saying goes, a bad workman always blames his tools".<sup>10</sup>

Fast forwarding to 2025, following a protracted legislative gestation resulting in a mechanism made deliberately more difficult to activate than initially foreseen; an illegal de facto suspension of its

<sup>4</sup> State of the Union 2012 Address, Speech/12/596, 12 September 2012.

<sup>5</sup> L. Pech, "The Rule of Law" in P. Craig and G. de Búrca, *The Evolution of EU Law* (2021, 3<sup>rd</sup> edition, OUP) 307, p. 337.

<sup>6</sup> K.L. Scheppele and L. Pech, "Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?", *VerfBlog*, 9 March 2018, <https://verfassungsblog.de/didnt-the-eu-learn-that-these-rule-of-law-interventions-dont-work/>

<sup>7</sup> See European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)). While the Parliament did ask for a concrete and immediate response to the situation in Hungary from the Council, the European Council and the Commission, the Parliament also suggested the adoption of "a new mechanism to ensure compliance by all Member States" with Article 2 values (para. 79). To that extent, the Parliament has also participated to this trend of seeking refuge in the creation of new tools over immediate actions to address and sanction systemic rule of law threats or violations.

<sup>8</sup> A. Jakab and L. Kirchmair, *Saving the European Union from Its Illiberal Member States* (OUP, 2025), p. 8.

<sup>9</sup> R.D. Kelemen, "The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools" (2023) 45 *Journal of European Integration* 223.

<sup>10</sup> See A. Wojcik, "A Bad Workman always blames his tools": An interview with Laurent Pech, *VerfBlog*, 28 May 2018: <https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>.

application; and a *de facto* rewriting of the test to apply it post its adoption, the Conditionality Mechanism has indeed been used once. Only once and even then, the Commission and the Council applied the mechanism in a half-hearted way.<sup>11</sup> In the absence of merely cosmetic changes, the situation has unsurprisingly continued to worsen and more sanctions should have been adopted. Instead, previously frozen funding under other mechanisms has been unfrozen at a time where the Commission's unreasoned failure to apply it to any other country to Hungary has been criticised, including by other EU institutions such as the European Parliament and the European Court of Auditors, but without any political or legal consequences.

All existing evidence points to the EU not moving away from its default setting of engaging in toolbox navel gazing and continuing to blame its toolbox and its alleged gaps or loopholes whenever convenient. We are just looking at a different phase of this trend: Instead of instrument-creation navel gazing, instrument-finetuning navel gazing is likely to be the dominant feature in the years to come.

## **2.2. Narrow or *contra legem* interpretations as part of a broader “rhetoric of inaction”**

The “toolbox is not adequate” misdiagnosis has been accompanied by a “rhetoric of inaction” which has been strategically mobilised to justify inaction and legitimate failures to enforce compliance with EU rule of law requirements.<sup>12</sup> This “rhetoric of inaction” has been a regular feature of political debates ever since President Barroso claimed in 2012 that the tools available to the Commission were allegedly not adequate. Since then, we have seen the Commission and/or the Council regularly calling for more “dialogue” while simultaneously stressing the alleged limitations of the EU’s toolbox to avoid using enforcement/response tools against rogue states.

These alleged limitations follow from the adoption of the narrowest possible interpretation of existing tools. This trend, as noted above, began President Barroso pre-emptively refusing to make a proactive use of the infringement procedure and Article 7 TEU by claiming that the infringement procedure would not allow to tackle national measures targeting the independence of national court as they would be outside the scope of EU law and that Article 7 TEU would furthermore represent a “nuclear option”.<sup>13</sup> The latter was manifestly an exaggeration because there is nothing “nuclear” about formally stating the mere existence of a risk of serious breach and eventually adopting recommendations to prevent this risk from materialising. The former was proven legally incorrect by the European Court of Justice a few years later following a national request for a preliminary ruling originating from a Portuguese court making clear that the Commission’s narrow interpretation of the Treaty provision relating to the principle of effective judicial protection was misguided.<sup>14</sup>

With the Commission pre-emptively “disarming”, a few years were wasted on coming up with a new but flawed pre-Article 7 procedure whose obvious design failure became clear as soon as it was activated in 2016 due to its discursive and soft-law nature. To be fair to the Commission, it had to work with a Council only rhetorically interested in defending the rule of law and a Council Legal Service (CLS) keener on undermining the Commission’s efforts with confidential and weak legal opinions.<sup>15</sup> CLS secret opinions have since regularly offered ample legal cover to the European Council and Council to favour “dialogue” over enforcement and push for a weakening of the Commission’s proposal for a conditionality mechanism; a weaker Article 7(1) TEU procedure and a *contra legem* re-interpretation of Article 7(1) as organising a mere “peer review exercise” where

<sup>11</sup> See K.L. Scheppele and J. Morijn, “Money for nothing?”, Money for nothing? EU institutions’ uneven record of freezing EU funds to enforce EU values” (2025) 32(2) *Journal of European Public Policy* 474.

<sup>12</sup> See C. Emmons and T. Pavone, “The rhetoric of inaction: failing to fail forward in the EU’s rule of law crisis” (2021) *Journal of European Public Policy* 1611.

<sup>13</sup> See D. Kochenov and L. Pech, “Better late than never: On the European Commission’s Rule of Law Framework and its first activation” (2016) 54(5) *Journal of Common Market Studies* 1062.

<sup>14</sup> See M. Ovádek and L. Pech, “Associação Sindical dos Juizes Portugueses and Judicial Independence” in P. Craig and R. Schütze, *Landmark Cases in EU Law. Constitutional Cases* (Hart, 2025), 253.

<sup>15</sup> P. Oliver and J. Stefanelli, “Strengthening the Rule of Law in the EU: The Council’s Inaction” (2016) 54(5) *Journal of Common Market Studies* 1075.

“concerns” can be discussed in confidence and misleading claims promoted without accountability, in addition to dissuading the Commission from using in a combined manner Article 7 TEU and infringement actions on account of a persistent misguided view that Article 7 must be viewed as the *lex specialis* for Article 2 TEU breaches.

To these multiple examples of abusively narrow and arguably *contra legem* interpretation of different components of the EU’s rule of law toolbox, one should add connected instances showing willingness to breach EU primary law for reasons of political expediency. This was for instance done by the European Council in its conclusions of December 2020 when the EU heads of state and government agreed to de facto amend the Conditionality Regulation in addition to agreeing to its de facto suspension until after the Court of Justice confirms its legality which it did in February 2022. Since then, the Commission has continued on this path by adopting “the narrowest interpretation” of the Regulation “by effectively excluding a serious *risk* affecting the financial management of the Union and its financial interests as a condition under which the conditionality mechanism should be activated”.<sup>16</sup>

### 2.3. Gaslighting and reality-denial assessments

Finding examples of the Commission or the Council seeking to disguise non-enforcement and, in some instances, their complicity, by engaging in gaslighting and/or reality-denial assessments is no difficult task as there are so many.

To focus on the sole Guardian of the Treaties, the gap between rhetoric and (in)action is particularly wide and indeed widening notwithstanding the current President of the Commission boldly asserting in September 2022 that the “Commission’s duty and most noble role”<sup>17</sup> is to protect the rule of law. This assertion was made ten years after the then President of the Commission, Mr. Barroso, warned against mounting “threats to the legal and democratic fabric in some of our European states”<sup>18</sup> and at a time where the von der Leyen Commission was the only one in the history of the EU:

- to have been sued by the European Parliament in October 2021 for failing to apply the Conditionality Regulation<sup>19</sup> and sued by several association of judges in August 2022 for disregarding the rule of law case law of the CJEU in respect of the situation in Poland for political reasons;<sup>20</sup>
- to have seen a national parliament formally instruction the government to launch a rule of law-related infringement action in respect of Poland’s “muzzle law” as the Commission was failing to do so<sup>21</sup> and an EU Advocate General questioning the Commission’s infringement record (or lack thereof) in respect of Romania considering the Commission’s own assessment of the situation;<sup>22</sup>
- to have claimed that no follow up enforcement action was required as regards a CJEU rule of law related order and judgment as they had allegedly been complied with only to see the ECtHR subsequently disagreeing with this assessment;<sup>23</sup>

<sup>16</sup> European Parliament Resolution of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary (2022/2647(RSP)), P9\_TA(2022)0204, para. 14.

<sup>17</sup> 2022 State of the Union Address by President von der Leyen, SPEECH/22/5493, 14 September 2022.

<sup>18</sup> State of the Union 2012 Address, Speech/12/596, 12 September 2012.

<sup>19</sup> Action for failure to act lodged on 29 October 2021, *Parliament v Commission* (Case C-657/21 later withdrawn in May 2022)

<sup>20</sup> Action for annulment lodged on 28 August 2022, *Medel et al v Council* (see Joined Cases T-530/22 to T-533/22, *Medel et al* dismissed by the General Court on legal standing grounds on 4 June 2024, now on appeal before the Court of Justice: Case C-555/24 P)

<sup>21</sup> A. Krzysztoszek, “Dutch government urged to sue Poland in top EU court over rule of law debacle”, *Euractiv.pl*, 2 December 2020, [https://www.euractiv.com/short\\_news/dutch-government-urged-to-sue-poland-in-top-eu-court-over-rule-of-law-debacle/](https://www.euractiv.com/short_news/dutch-government-urged-to-sue-poland-in-top-eu-court-over-rule-of-law-debacle/)

<sup>22</sup> Opinion of AG Collins delivered on 26 January 2023 in Case C-817/21, *Inspectia Judiciară*, EU:C:2023:55.

<sup>23</sup> See Judgment of 15 March 2022 in *Grzęda v. Poland* [GC], 43572/18, CE:ECHR:2022:0315JUD004357218, para. 23 regarding the ECJ order in Case C-791/19 R: “Despite the CJEU’s interim decision, the Disciplinary Chamber has continued to operate and has decided, for example, to lift immunity from prosecution in cases against judges” (emphasis added). See also Judgment of 24 October 2023, *Pajak and Others v. Poland*,

- to have failed to dismiss the Hungarian Commissioner notwithstanding his attempts to doctor Commission reports so as to downplay authoritarian developments and deliberately “circumvent and undermine the centrality of democratic and rule of law reforms in EU accession countries”.<sup>24</sup>

Since 2022, the von der Leyen Commission has been sued by a Romanian association of prosecutors for closing the CVM similarly under false pretences<sup>25</sup> before being used by the European Parliament for having agreed to release up to €10.2bn again under false pretences.<sup>26</sup> Regarding the latter, a finding of maladministration was furthermore made against the von der Leyen Commission in relation to its refusal to disclose documents related to its exchanges with the Hungarian government on judicial independence prior to the controversial unlocking of €10.2bn previously mentioned.<sup>27</sup>

These repeated instances of undue politicisation if not dereliction of duties have not prevented the Commission from continuing to make reality-disconnected claims and engaging in unjustified self-praise. The example of the Commission’s own account of “the story of the von der Leyen Commission” is particularly striking as it boldly claimed in March 2024 that this Commission “took unprecedented action to uphold the rule of law in all Member States”.<sup>28</sup> If you replace “action” with “façade of action” and add “toothless report” at the end of the sentence, however, the statement becomes immediately more accurate.

Just to give a single example of shameless gaslighting, the von der Leyen Commission has justified the closure of the special Cooperation and Verification Mechanism put in place at the time of Bulgaria and Romania’s accession on account of their “remarkable progress” on the rule of law front.<sup>29</sup> This claim, however, contradicts all available evidence, including evidence to be found in its own (already watered down) rule of law reports,<sup>30</sup> a point also noted by the European Court of Auditors.<sup>31</sup>

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25226/18 et al, CE:ECHR:2023:1024JUD002522618, para. 261 regarding the ECJ judgment in Case C-192/18: “Elle relève que, malgré l’adoption de l’arrêt précité de la CJUE [...], la situation des requérantes en l’espèce n’a pas changé et les discriminations dénoncées devant elle demeurent entières pour ce qui les concerne” (emphasis added).

<sup>24</sup> European Parliament resolution of 28 February 2024 on the implementation of the CFSP – annual report 2023 (2023/2117(INI), para. 67.

<sup>25</sup> Action for annulment brought on 28 November 2023, *Asociația Inițiativa pentru Justiție v Commission* (see Case T-1126/23 dismissed by the General Court on legal standing grounds on 3 February 2025, now on appeal before the Court of Justice: Case C-284/25 P).

<sup>26</sup> Action for annulment brought on 25 March 2024, *Parliament v Commission* (Case C-225/24 now pending).

<sup>27</sup> Case 849/2024/PPV, case opened on 17 May 2024 and closed on 13 February 2025.

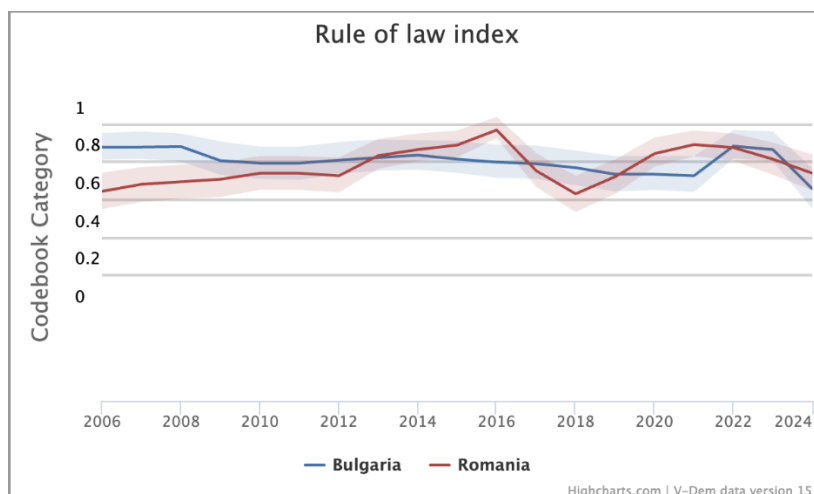
<sup>28</sup> European Commission, *The story of the von der Leyen Commission*, 6 March 2024: [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/story-von-der-leyen-commission\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/story-von-der-leyen-commission_en)

<sup>29</sup> European Commission, *Achievements of the von der Leyen Commission. Strengthening European democracy and upholding the rule of law*, November 2024, p. 5, [https://ec.europa.eu/commission/presscorner/detail/en/fs\\_24\\_1396](https://ec.europa.eu/commission/presscorner/detail/en/fs_24_1396)

<sup>30</sup> See A. Marini, “The Fight for the Rule of Law Moves against its Main Guardian: the Commission”, *EUinside*, 14 March 2024: <https://euinside.eu/en/analyses/the-fight-for-the-rule-of-law-moves-against-main-guardian-the-commission>

<sup>31</sup> European Court of Auditors, *The rule of law in the EU – An improved framework to protect the EU’s financial interests, but risks remain*, special report 03/2024, para. 57.

## “Remarkable [Rule of Law] Progress” in the real world for Bulgaria and Romania (2006-2024)<sup>32</sup>



The closure of the CVM brings again to the fore the question of the undue politicisation of the Commission’s technical and legal assessments not only in this context but across the toolbox. In the case of Bulgaria and Romania, not only are the reports produced under the ARoLR continuing to bear little reality to the situation on the ground when it comes to the most serious rule of law issues<sup>33</sup> – which led an associate of Romanian judges to boycott this process<sup>34</sup> – it is striking to see the absence of any infringement action launched by the Commission in respect of any of the CVM issues since 2007. Similarly, it is difficult to understand the absence of any consideration given to the potential application of the Conditionality Regime, another issue highlighted by the European Court of Auditors.<sup>35</sup>

Considering the increasing evidence of undue politicisation of the EU’s rule of law toolbox, “a question might need to be raised whether such powers [rule of law, fundamental rights assessments] should be either entrusted to a body within the Commission that is fully insulated from other political considerations or be transferred to a separate institution only entrusted with enforcement and monitoring functions.”<sup>36</sup> As none of these two potential outcomes are realistic in the current political constellation, this article will instead seek to outline what one may expect when it comes to the future of the rule of law considering the interconnected trends previously outlined and more recent emerging trends noticeable both from within and outside the EU.

### 3. The next phase in the history of the rule of law in the EU

The history of the rule of law in the EU began with a gradual but extensive process of constitutional entrenchment. Are we going to go full circle and enter a phase of retrenchment? While formal retrenchment will not happen if only because of the legitimating force attached to the concept of the

<sup>32</sup> Indicator used: Rule of Law Index with variable graph produced via [https://v-dem.net/data\\_analysis/VariableGraph/](https://v-dem.net/data_analysis/VariableGraph/)

<sup>33</sup> R. Vassileva, “Bulgaria’s Constitutional Drama and the EU Commission’s Rose-Colored Glasses”, *VerfBlog*, 30 July 2024, <https://verfassungsblog.de/bulgarias-constitutional-drama-and-the-eu-commissions-rose-colored-glasses/> (“the EU Commission continues to make seemingly politically motivated decisions and to display dual standards, thus fueling rather than curtailing the rule of law crisis in Bulgaria”).

<sup>34</sup> Romanian Judges’ Forum Association, *The Rule of Law Report 2024 does not objectively reflect the situation of judiciary in Romania*, 24 July 2024, <https://www.forumuljudicatorilor.ro/index.php/archives/6829>

<sup>35</sup> European Court of Auditors, *The rule of law in the EU – An improved framework to protect the EU’s financial interests, but risks remain*, special report 03/2024, para. 58.

<sup>36</sup> M. Giera, “EU’s democratic oversight under scrutiny as Parliament files landmark suit against Commission over Hungary”, *Euractiv*, 15 March 2024, <https://www.euractiv.com/section/politics/news/eus-democratic-oversight-under-scrutiny-as-parliament-files-landmark-suit-against-commission-over-hungary/>

rule of law which remains lauded even by those seeking to hollow it systematically,<sup>37</sup> increasing de facto retrenchment is likely. This prognosis may seem counterintuitive as the EU's "toolbox phase" did see some unexpectedly meaningful enforcement actions primarily in the form of EU funding not being disbursed on rule of law grounds in respect of both Hungary and Poland in 2022-23. However, this episode of meaningful enforcement did not last and ended with the unlocking of EU funds under false pretences with the Commission and the Council furthermore simultaneously undermining the rule of law in other contexts. With increasing representation in the European Parliament of political forces promoting a rule by law approach and/or engaged in autocratisation processes in the name of the "will of the people", there is decreasing impetus left within the EU's institutional framework to promptly respond to backsliding at Member State level with meaningful enforcement action. This will also mean fewer opportunities for the CJEU to step in as the Court can only do so if it receives infringement actions of the right scope at the right time and if national judges are not prevented (de jure or de facto) from submitting questions to it (the Court's enabling of EU institutions' disregard of EU rule of law requirements via an absurdly narrow understanding of legal standing rules will not be addressed<sup>38</sup>).

This is why it is suggested that we are entering a new phase in which the EU will no longer seek to project a sense of purpose by adopting new tools and undertaking minimal enforcement action when confronted with the most defiant instances of systemic rule of law violations. Instead, one may expect to see the Commission and the Council further engaging in never-ending toolbox finetuning coupled with never-ending reporting exclusively relying on existing but ineffective *permanent* dialogue-based monitoring procedures covering *all* Member States resulting in the *recurrent* adoption of *non-binding* recommendations. This will be accompanied by upbeat assertions of a general nature and country-specific assessments claiming compliance or progress, even where there is little or none on the ground, and denying or minimising systemic violations when necessary, so as to avoid having to follow up with enforcement action.

This prognosis builds upon the interconnected and mutually reinforcing (negative) trends previously identified and which are currently being reinforced by two new trends: (i) increasing reckless disregard for the rule of law in EU countries not (yet) subject to backsliding and (ii) increasing lawlessness on the international plane in a broader context where autocratisation is spreading worldwide.

### **3.1 Increasing reckless disregard for the rule of law in EU consolidated democracies**

Evidence of increasing disregard for the rule of law is visible in EU countries regarded as consolidated democracies and whose governments tend to adopt a strong pro-rule of law stance in the Council. This disregard for the rule of law may be described as reckless so as to distinguish from systemic disregard. While non-systemic in nature, reckless disregard is not only unhealthy if not dangerous in terms of the country's rule of law culture and democratic fabric, it also provides convenient cover for those pursuing autocratic agendas. This trend furthermore reinforces the existing trends highlighted above as the Commission has shown an extreme reluctance to act without strong support in the Council and strong support is unlikely to materialise in a situation where the core pro-rule of law countries show a reckless disregard for the rule of law in a broader context of accommodation of populist political actors and their anti-rule of law rhetoric.<sup>39</sup>

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<sup>37</sup> See L. Pech, "The rule of law as a well-established and well-defined principle of EU Law" (2022) 14 *Hague Journal on the Rule of Law* 107.

<sup>38</sup> For a recent critical account, see CEU Democracy Institute Rule of Law Clinic, *Rule of Law beyond the EU Member States. Assessing the Union's Performance*, October 2025, <https://ruleoflawclinic.com/>

<sup>39</sup> See recently e.g. Lord Reed, *Trust in the Courts in an age of populism*, The Peter Taylor Memorial Address 2025, Inner Temple, 12 June 2025, p.3, <https://supremecourt.uk/speech/speech-lord-reed-13062025> ("In a number of countries, voters have turned to leaders who argue that executive powers cannot be constrained by unelected judges – or, for that matter, elected judges, as in some countries – and who are hostile to courts that uphold constitutional principles, protect the rights of minorities, and safeguard the separation of powers")

To give but a few examples, one may first mention the French government's violation of an interim order of the ECtHR for the very first time in an extradition context.<sup>40</sup> Prior to this, the French government emulated Hungary and Poland's authoritarian governments by seeking to rely on specious constitutional identity arguments to convince France's top administrative court of disregarding the CJEU's case law in the area of date retention.<sup>41</sup> Most recently, political actors, at least those seeking to take liberties with the law or found guilty for a variety of crimes, are embracing populist attacks against the judiciary and unprecedented attacks on the very concept of the rule of law.<sup>42</sup>

Deliberate violations of the law and associated court rulings have also been entertained in Germany with the German Federal Interior Minister turning asylum seekers away in open violation of European Law and a judgment of the Berlin Administrative Court.<sup>43</sup> In the face of this "attack on the judiciary's authority as an institution for restraining power",<sup>44</sup> a German association of judges was forced to recall the most basic principles which govern any constitutional state governed by the rule of law.<sup>45</sup> This recalls the most serious warnings from French senior judges in relation to the repeated attacks made against the basic legal principles governing France and Europe since the end of World War II.<sup>46</sup> As Professor Dominique Rousseau put it, "we are at a historic moment where there is tension between two forms of government: the rule of law, where being elected by the people is not enough; and the brutal government, as we see with Trump, where election is supposed to give all rights".<sup>47</sup>

Examples of executive (illegal) disobedience can be easily multiplied. The risk of seeing the EU becoming a lawless zone has been noted inter alia by the European Parliament which recently condemned "the sometimes open and unashamed non-compliance of several Member States with EU law in various fields, such as the right to effective judicial protection, anti-corruption laws, asylum, the implementation of sanctions, and human rights law."<sup>48</sup> The Parliament correctly noted in this context that increasing non-compliance with EU law includes increasing non-compliance with CJEU judgments following a more ancient and "persistent problem" of non-compliance or "incomplete implementation of ECtHR judgments."<sup>49</sup> In short, we are seeing unprecedented, increasing and unashamed non-compliance with court rulings gaining ground in the EU. It is no wonder that the CJEU and successive presidents of the ECtHR have felt the need to publicly ring the alarm largely to no avail however.<sup>50</sup>

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<sup>40</sup> J. Pascual, "La France procède à l'expulsion en passant outre une décision de la CEDH pour la première fois", *Le Monde*, 1 December 2023, [https://www.lemonde.fr/societe/article/2023/12/01/la-france-procede-a-l-expulsion-en-passant-outre-une-decision-de-la-cedh-pour-la-premiere-fois\\_6203343\\_3224.html](https://www.lemonde.fr/societe/article/2023/12/01/la-france-procede-a-l-expulsion-en-passant-outre-une-decision-de-la-cedh-pour-la-premiere-fois_6203343_3224.html)

<sup>41</sup> "Le gouvernement français refuse d'appliquer les arrêts de la CJEU sur la conservation des données", *Contexte*, 3 March 2021, [https://www.contexte.com/fr/article/tech/le-gouvernement-francais-refuse-dappliquer-les-arrets-de-la-cjue-sur-la-conservation-des-donnees\\_128041](https://www.contexte.com/fr/article/tech/le-gouvernement-francais-refuse-dappliquer-les-arrets-de-la-cjue-sur-la-conservation-des-donnees_128041)

<sup>42</sup> N. Hervieu, "Contre l'État de droit, une offensive politique aussi frontale qu'inédite en France", *La Croix*, 21 October 2024, <https://www.la-croix.com/a-vif/contre-l-etat-de-droit-une-offensive-politique-aussi-frontale-quinedite-en-france-20241021>

<sup>43</sup> A-M. Brandau and M. Steinbeis, "When It Happens: Halfway Through the Judicial Resilience Project", *VerfBlog*, 25 July 2025, <https://verfassungsblog.de/when-it-happens/>

<sup>44</sup> Ibid.

<sup>45</sup> Neue Richter\*innenvereinigung, "Richterverband erschüttert über fehlende Rechtstreue des neuen Innenministers", 5 June 2025, <https://www.neuerichter.de/richterverband-erschuettert-ueber-fehlende-rechtstreue-des-neuen-innenministers/>

<sup>46</sup> L. Bronner, "Il ne faudrait pas découvrir la valeur de l'Etat de droit une fois perdu » : l'alerte de hauts magistrats français", *Le Monde*, 7 March 2025: [https://www.lemonde.fr/politique/article/2025/03/07/il-ne-faudrait-pas-decouvrir-la-valeur-de-l-etat-de-droit-une-fois-perdu-l-alerte-de-hauts-magistrats-francais\\_6576867\\_823448.html](https://www.lemonde.fr/politique/article/2025/03/07/il-ne-faudrait-pas-decouvrir-la-valeur-de-l-etat-de-droit-une-fois-perdu-l-alerte-de-hauts-magistrats-francais_6576867_823448.html)

<sup>47</sup> Ibid (personal translation).

<sup>48</sup> European Parliament resolution of 28 February 2024 report on the Commission's 2023 Rule of Law report (2023/2113(INI)), para. 76.

<sup>49</sup> Ibid., para. 79.

<sup>50</sup> See e.g. K. Lenaerts, "On Checks and Balances", op. cit., p. 31 and p. 33; ECtHR, "70 years since the European Convention on Human Rights entered into force on 3rd September 1953", Statement of the President of the Court, Siofra O'Leary, ECHR 238 (2023), 2 September 2023.

### 3.2. Lawlessness at domestic and international levels as a mutually reinforcing process

Lawlessness is however not merely on the rise in the EU. At a domestic level, the USA under Trump may well be presented as exhibit A at this stage. Not unlike what happened in countries previously subject to an autocratisation process, the American (captured) Supreme Court<sup>51</sup> is playing a key role in enabling the country's descent into executive lawlessness,<sup>52</sup> leading to unprecedented but warranted condemnation by several federal but also state judges, including individual judges from within the US Supreme Court of the US Supreme Court's endorsement of the Trump administration's lawlessness.<sup>53</sup> This is happening in a context of obvious increasing non-compliance with court orders, open questioning of judicial review as a matter of principle,<sup>54</sup> and an unprecedented level of violent threats made against US judges which – perhaps unsurprisingly – Chief Justice Roberts has also noticeably failed to address because the attacks originate from the senior echelons of the Trump administration, including Trump himself.<sup>55</sup>

Increasing lawlessness domestically is accompanied by increasing lawlessness internationally, a mutually reinforcing process which domestic actors pursuing autocratisation agendas in democratic countries have unsurprisingly sought to amplify. To give a single example from an unfortunately long list, one may refer to the “the political attacks, sanctions and other coercive measures introduced or envisaged against the ICC itself and against its staff”<sup>56</sup> coming from the current Trump administration,<sup>57</sup> and which constitutes “a serious attack on the international justice system” according to the European Parliament.<sup>58</sup>

In the face of these unprecedented attacks on the rules-based international order, which includes attacks on international treaties, courts and judges, multiple governments in EU consolidated democracies have shown a similar reckless disregard for the *international* rule of law.<sup>59</sup> This is similarly accompanied by a questioning of international law and European law,<sup>60</sup> which recalls the questioning of the very concept of the rule of law by some political actors.

Rhetoric undermining the international rule of law and selective compliance with international law are deeply unwise. Indeed, when “governments in the Global North selectively disrespect international law, they jeopardize the rule of law and democracy in their own countries – at the very point where they are most endangered by the threat of authoritarianism.”<sup>61</sup> To put it differently, “those who ignore international legal obligations will not shy away from dismantling domestic

<sup>51</sup> See L. Litman, “The Law of Lawlessness: A Recap of Supreme Court's Last Term”, *VerfBlog*, 4 July 2025, <https://verfassungsblog.de/the-law-of-lawlessness/>

<sup>52</sup> “To the extent there is law in what the Republican justices are doing, it is a body of law that is for lawlessness and that invites more of it”, *ibid.*

<sup>53</sup> See e.g. Dissenting opinion of Justice Jackson in *Trump v. CASA, Inc.*, 606 U. S. \_\_\_\_ (2025), p. 21 and concurring opinion of Hawaii Supreme Court Justice Todd Eddins in *Hilo Bay Marina, LLC vs State of Hawaii*, SCAP-23-0000310, 12 September 2025.

<sup>54</sup> American Bar Association, *ABA condemns remarks questioning legitimacy of courts and judicial review*, 11 February 2025, <https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-statement-re-remarks-questioning-judicial-review/>

<sup>55</sup> L. Hurley, “In rare interviews, federal judges criticize Supreme Court's handling of Trump cases”, *NBC News*, 4 September 2025: <https://www.nbcnews.com/politics/supreme-court/supreme-court-trump-cases-federal-judges-criticize-rcna221775>

<sup>56</sup> European Parliament resolution of 2 April 2025 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2024 (2024/2081(INI)), para. 29.

<sup>57</sup> See e.g. J. Galbraith, “U.S. Sanctions on the International Criminal Court: The Details and The Pattern”, *VerfBlog*, 6 June 2025, <https://verfassungsblog.de/u-s-sanctions-on-the-international-criminal-court/>

<sup>58</sup> European Parliament resolution of 2 April 2025, op. cit., para. 30.

<sup>59</sup> See e.g. German Speaking International Law Scholars, “Open Letter: Respect for International Law”, *VerfBlog*, 20 March 2025, <https://verfassungsblog.de/declaration-respect-for-international-law/>

<sup>60</sup> H.P. Aust and H. Krieger, “Once Populist, Now Mainstream? How It Has Become Fashionable Among German Politicians to Belittle International Law and European Law”, *VerfBlog*, 13 February 2025, <https://verfassungsblog.de/once-populist-now-mainstream/>

<sup>61</sup> M. Goldmann, “The Boomerang Effect: How Disrespect for International Law threatens democracy”, *EJIL: Talk!*, 23 July 2025, <https://www.ejiltalk.org/the-boomerang-effect-how-disrespect-for-international-law-threatens-democracy/>

constitutional law. Those who do not respect international Law and European law will sooner or later no longer abide by the constitution.”<sup>62</sup>

### **3.3. A mutually reinforcing bound to further weaken EU’s (non)response to backsliding**

Lawlessness at domestic and international levels is not only mutually reinforcing but bound to further reinforce rule of law erosion within the EU and the *tendances lourdes* previously outlined in respect of the use, misuse or non-use of the EU’s rule of law toolbox.

For instance, the EU’s default setting of inaction hidden by expressions of “concern” and the monitoring of relevant developments when faced with *internal* systemic threats to or violations of the rule of law is matched by a similar default setting when faced with *external* threats or violations of a comparable nature. To continue with the example of the ICC, the European Commission and the European Council/Council have failed to react to the European Parliament’s *repeated* calls to urgently activate the EU’s Blocking Statute,<sup>63</sup> and have furthermore left unsanctioned Orbán’s withdrawal from the ICC.<sup>64</sup> This failure to stand for EU values, EU legal obligations and EU soft law commitments has been facilitated by the reckless disregard of the (international) rule of law by formally pro-rule of law governments such as the current French and German governments. Yet these are the same governments which have expressed *inter alia* an unwillingness to comply with ICC requests,<sup>65</sup> while Italy has straightforwardly refused to comply with an ICC arrest warrant.<sup>66</sup>

The EU itself has unfortunately amplified the lawlessness trends identified above not only by showing a willing to use compliance with the rule of law as a bargaining chip *internally*, but also by acting *externally* in defiance of basic rule of law norms resulting in the development of what has been labelled “EU Lawlessness Law”.<sup>67</sup> One may mention the example of the EU-Tunisia “memorandum of understanding” which was agreed by “Team Europe”, a body which has no legal basis in the Treaties and has made the EU complicit in abuses against refugees, asylum-seekers and migrants.<sup>68</sup>

To make a bad situation worse, the CJEU has indirectly facilitated this disregard of EU rule of law requirements by refusing to adjust its unreasonably narrow interpretation of legal standing rules it adopted in 1963. This means that the Commission and the European Council/Council when acting externally, but also bodies such as Frontex, can escape judicial review even in respect of the most obvious instances of illegality.<sup>69</sup> One may only hope that the CJEU will follow the recent Opinion of Advocate General Emiliou<sup>70</sup> and close this accountability gap and require in respect of itself what the Court has – rightly – required from national courts. It is however clear at this stage that the rule of law needs to be defended from national governments, both inside and outside the EU, as well as from the EU institutions themselves.

<sup>62</sup> Aust and Krieger, “Once Populist, Now Mainstream?”, *op. cit.*

<sup>63</sup> See e.g. European Parliament resolution of 2 April 2025, *op. cit.*, para. 30.

<sup>64</sup> P. van Elsuwege, “How Hungary’s Withdrawal from the International Criminal Court Affects the Credibility of the European Union”, *VerfBlog*, 9 April 2025, <https://verfassungsblog.de/how-hungarys-withdrawal-from-the-international-criminal-court-affects-the-credibility-of-the-european-union/>

<sup>65</sup> Aust and Krieger, “Once Populist, Now Mainstream?”, *op. cit.*

<sup>66</sup> See e.g. D. Colombi, “The Italy v ICC row exposes deep-rooted hypocrisy in EU migration policy”, *CEPS*, 25 February 2025, <https://www.ceps.eu/the-italy-v-icc-row-exposes-deep-rooted-hypocrisy-in-eu-migration-policy/>

<sup>67</sup> S. Ganty and D. Kochenov, “EU Lawlessness Law” (2025) 30(1) *Columbia Journal of European Law* 78.

<sup>68</sup> See e.g. International Commission of Jurists, *The Price of Complicity: Tunisia-EU Partnership Agreement Fuels Serious Abuses Against Refugees, Asylum-Seekers and Migrants*, 18 December 2024, <https://www.icj.org/the-price-of-complicity-tunisia-eu-partnership-agreement-fuels-serious-abuses-against-refugees-asylum-seekers-and-migrants/>

<sup>69</sup> See most recently CEU Democracy Institute Rule of Law Clinic, *Rule of Law beyond the EU Member States. Assessing the Union’s Performance*, October 2025, <https://ruleoflawclinic.com/>

<sup>70</sup> Opinion of 12 June 2025 in Case C-731/23 P, *Nicoventures Trading Ltd*, EU:C:2025:435.