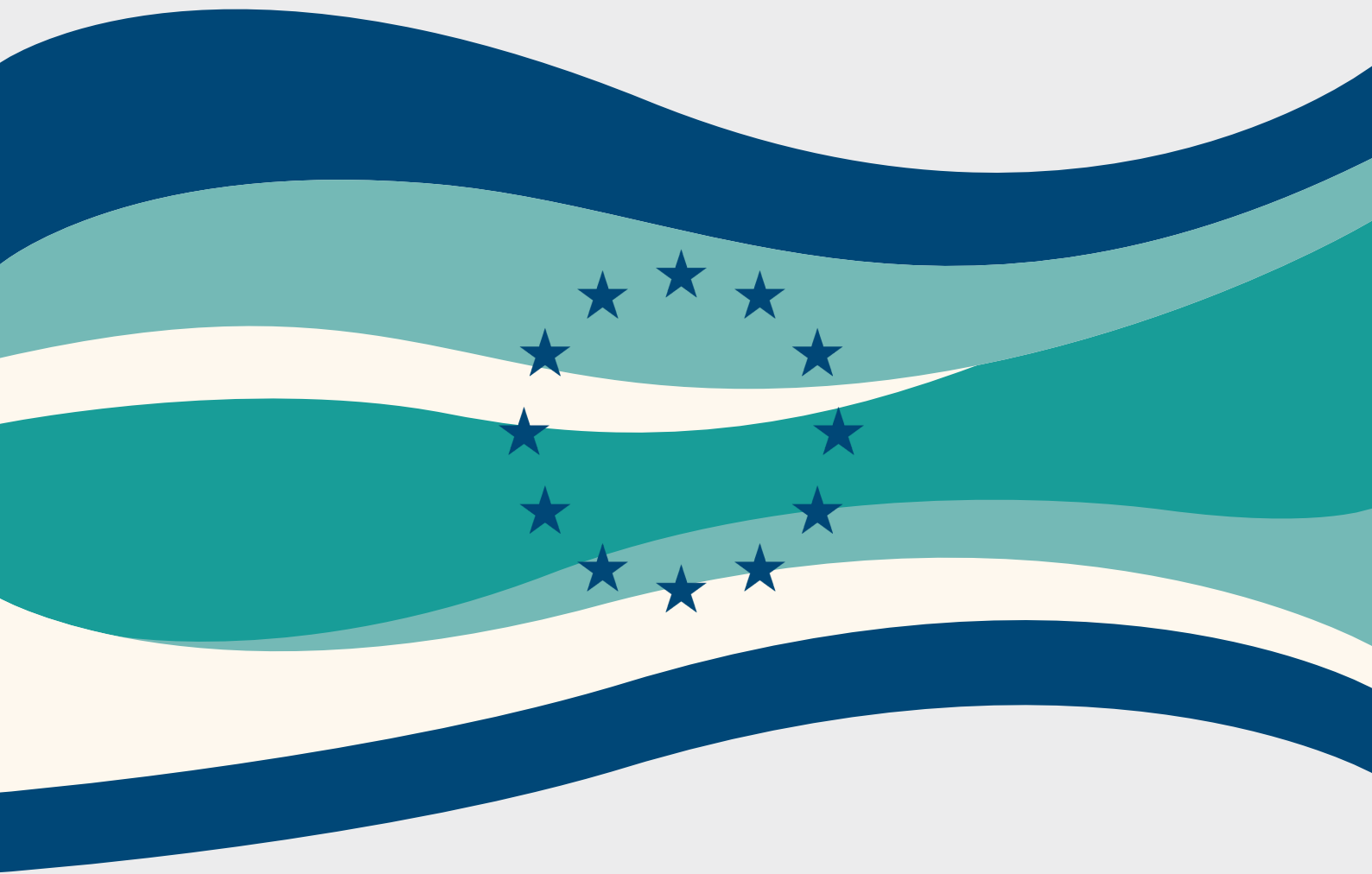


EU, EMERGENCY POWERS AND CIVIC SPACE



Strengthening the EU Rule of Law Review
to monitor governments' measures

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TABLE OF CONTENTS

1 EXECUTIVE SUMMARY

4 INTRODUCTION

5 CIVIC SPACE IN EMERGENCY SITUATIONS: THE STRESS TEST OF THE COVID-19 PANDEMIC

- 5 The importance of civic space in the pandemic context
- 6 How COVID-19 emergency measures have negatively affected civic space

8 THE UNTAPPED POTENTIAL OF THE EU RULE OF LAW REVIEW CYCLE

- 8 Rule of Law and emergency measures
- 9 Rule of Law and civic space
- 10 Monitoring emergency powers through the EU Rule of Law Review Cycle: the European Commission's approach to date
- 11 Gaps and challenges in the current approach

15 KEY RECOMMENDATIONS



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Executive summary

Since the pandemic broke out across the EU, the European Commission committed to a regular monitoring of the application of emergency measures adopted to address the COVID-19 pandemic as regards their impact on rule of law, democracy and fundamental rights. This commitment is reflected somehow within the EU Rule of Law Review Cycle ('Review Cycle').

ECNL has looked into **how the EU Rule of Law reporting mechanism could better serve the need to assess the impact on civic space and freedoms of emergency measures adopted in responses to crises** such as the Covid-19 pandemic. This policy brief illustrates the main findings of our analysis and formulates a series of targeted recommendations addressed to the Commission, with a view to inform and hopefully prompt improvements for the forthcoming Review Cycles.

In the context of the four thematic areas currently covered by the Review Cycle (1) functioning of the justice system; 2) the anti-corruption framework; 3) media pluralism and 4) other institutional issues related to checks and balances) **there clearly is scope to devote particular attention to the impact of emergency powers on civic space and freedoms**. However, ECNL's critical assessment of the European Commission's 2020 and 2021 Rule of Law Reports shows that the **scope, depth and results of the analysis undertaken by the Commission** so far on the impact of emergency powers on the rule of law have been rather limited and superficial and **do not adequately reflect the breadth and scale of negative consequences affecting in particular civic space and freedoms**.

A comparison between the Commission's Rule of Law Reports on the one hand and the main findings of ECNL's analysis of ICNL-ECNL Civic Freedom Tracker data, the data collection and analysis carried out by other non-governmental organisations as well as by international and regional bodies on the other hand, exposes the gaps of the Commission's horizontal and

country assessments. In particular, the Commission's Rule of Law Reports mostly or fully overlooked the impact of emergency measures and their practical application in a number of important issues related to civic space and freedoms, including **democratic participation, freedom of expression and freedom of information, freedom of movement and freedom of assembly, freedom of association and right to privacy.**

Limits of the approach and methodology undertaken by the Rule of Law Reports include, inter alia:

- a **narrow scope of consultation;**
- a **descriptive rather than an analytical approach;**
- a **limited contextualisation of country developments and**
- a **limited consideration of the work of international and regional bodies as well as civil society actors.**

As a result, the 2020 and 2021 Rule of Law Reports only include partial considerations on both the overall trends and the country specific impact of emergency powers on civic space and freedoms.

ECNL respectfully calls on the European Commission to **review the methodology underpinning the Review Cycle** and embed a structured monitoring and reporting approach on the use and impact of emergency powers, in particular as regards civic space and freedoms, on the basis of the following key recommendations:

1: Expanding scope of monitoring to civic space.

This should be done, ideally, by including civic space as a standalone pillar of the EU Rule of Law Review Cycle, since it is instrumental to unhindered democratic participation and represents a strong system of checks and balances that are, in turn, core elements to a healthy rule of law framework.

2: Shifting from a descriptive to an analytical approach.

The Commission should undertake an analytical assessment of the impact of emergency powers on rule of law, democracy and fundamental rights, including a specific focus on civic space and freedoms. The main findings of such assessment should be reflected in dedicated chapters to be included in both the Commission's horizontal and country reports.

3: Formulating targeted country-specific recommendations.

Considering the Commission's intention to include as of 2022 country specific recommendations also in its Rule of Law Report, this should be used as an opportunity to formulate targeted recommendations providing

guidance to Member States on how to address the negative impact of emergency powers on rule of law, democracy and fundamental rights, including focused recommendations on the respect, promotion and protection of civic space and freedoms. Such recommendations should build on existing guidelines, toolkits and checklists.

4: Enhancing synergies with international and regional

bodies. The Commission should proactively establish a structured and regular cooperation throughout the Review Cycle with international and regional bodies engaged in monitoring and reporting about the use and impact of emergency powers on rule of law, democracy and fundamental rights – in particular UN OHCHR and Special Procedures, Council of Europe and OSCE.

5: Strengthening involvement of and support to civil

society actors. The Commission should ensure a more consistent, transparent and meaningful involvement of civil society actors in the Review Cycle, including the preparations of the Commission's reports, the formulation of recommendations and the follow-up monitoring and discussions with Member States. This could translate into an annual structured dialogue between the Commission and civil society stakeholders, allowing for an evaluation and assessment of the previous year's Rule of Law Review Cycle and for input in preparations of the next year's Cycle. This dialogue could be hosted, e.g., by the Fundamental Rights Agency of the EU (FRA) within the framework of its regular meetings of the Fundamental Rights Platform. Furthermore, the Commission should also prioritise EU funding under the new Citizens, Equality, Rights and Values (CERV) programme to enable civil society actors to engage in a regular monitoring of the impact of emergency powers on rule of law, democracy and fundamental rights, including a specific focus on civic space and freedoms, and to promote national debates on these issues.



Introduction

The emergency situation dictated by the COVID-19 pandemic has put democracies and rule of law under strain worldwide, as international and regional bodies have warned.¹ The EU was no exception.

While the pandemic revealed the centrality of civil society in crisis response, civic space and the exercise of civic freedoms suffered a particular hit as a consequence of governments' response to the health emergency. Restrictive measures exacerbated existing challenges affecting civic space and civil society actors across the EU. The situation got particularly worrying in Member States with longstanding problems with democracy and rule of law, but the impact of COVID-19 and the measures taken to address may have a long-term negative effect on civic space in other EU countries, too.

Against this background, ECNL has looked into the EU's existing efforts to assess and report on the state of the rule of law across Member States through the EU Rule of Law Review Cycle (hereinafter 'the Review Cycle')², carried out for the first time in 2020. In particular, we have looked into how the Rule of Law reporting mechanism could better serve the need to assess the impact on civic space and freedoms of emergency measures adopted in responses to crises, such as the public health emergency posed by the outbreak of the COVID-19 pandemic.

This exercise is part of ECNL's broader engagement to strengthen EU protection of civic space and complements previous calls on the European Commission to strengthen the Review Cycle with regard to monitoring civic space and freedoms.³ It also builds on the extensive work carried out by ECNL in mapping the adoption and implementation of COVID-19 related measures in the EU and beyond and its impact on civic space and freedoms.⁴ This work is reflected, among others, in the COVID-19 Civic Freedom

¹ See, among others, European Parliament, [The Impact of COVID-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU](#) (2020); Organisation for Security and Co-operation in Europe (OSCE), [OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#) (2020); Council of Europe, [Democracy is in distress, finds the Council of Europe Secretary General's annual report for 2021](#) (2021); UN Office of the High Commissioner for Human Rights (OHCHR), [United Nations Human Rights Report 2020](#) (2021).

² https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en

³ See in particular the recommendations formulated in the Joint contribution to the 2021 Rule of Law consultation, accessible here; <https://ecnl.org/news/joint-response-eu-commission-consultation-rule-law-report-2021>.

⁴ <https://ecnl.org/focus-areas/covid-19-and-civic-freedoms>

Tracker developed jointly with ICNL⁵, in our targeted monitoring of the right to freedom of assembly⁶ and in specific country actions.⁷

Building on all this, ECNL has reviewed the questionnaire used by the European Commission for its annual Rule of Law consultation, in order to assess to which extent it addresses and reviews the impact of emergency powers on civic space issues. We have then compared the assessment included in the Commission's Rule of Law Reports against relevant data extracted from the COVID-19 Civic Freedom Tracker and from selected country submissions. This policy brief illustrates the main findings of such analysis and formulates a series of targeted recommendations addressed to the Commission, with a view to inform and hopefully prompt improvements for the forthcoming Review Cycles.



Civic space in emergency situations: the stress test of the COVID-19 pandemic

The importance of civic space in the pandemic context

The notion of “civic space”, as commonly accepted by the international community based on relevant international human rights standards, refers to the complex web of legal and practical factors that make it possible to work together in associations, to promote and access reliable information, to express opinions, to assemble peacefully and to exercise meaningful participation in decision making. These are essential tools to allow people to contribute and shape the democratic debate and are particularly important in times of crisis, where democratic participation is instrumental to ensure that public authorities' responses benefit people's best interests.

The importance of a healthy and vibrant civic space in the context of the COVID-19 pandemic has been emphasised by several international and regional actors.⁸. At EU level, the Commission itself underlined in its 2020 Rule of Law Report that democratic scrutiny exercised by civil society becomes all the more important when emergency powers lower institutional

⁵ <https://ecnl.org/covid-19-civic-freedom-tracker>

⁶ <https://ecnl.org/focus-areas/protests-and-assemblies#monitoring-assemblies>

⁷ See for example ECNL, [Analysis of the Dutch draft Law on Temporary Covid-19 measures](#) and [Hungary tightens Covid-19 restrictions](#).

⁸ See <https://ecnl.org/covid-19-standards>

checks on decision makers.⁹ Research conducted by the EU Agency for Fundamental Rights (FRA)¹⁰ corroborated such statements, showing the important role that civil society has been playing across the EU in monitoring and shaping authorities' responses to the Covid-19 pandemic, promoting access to basic services for all and responding to urgent needs.¹¹

How COVID-19 emergency measures have negatively affected civic space

The overall global trend, including in the EU, has pointed to increasing challenges negatively affecting civil society work and hindering the exercise of civic freedoms as a result both of the pandemic and of the emergency measures taken to address it. This has exacerbated existing challenges affecting civic space across the EU, which already suffered from unfavourable regulatory frameworks, hurdles in accessing resources, difficulties in providing input into law- and policymaking as well as attacks and harassment of civil society actors, including delegitimising and stigmatising discourse.¹²

Indeed, the analysis of data collected, among others, through ECNL-ICNL COVID-19 Civic Freedom Tracker reveals a troubling impact of emergency measures on civic space and freedoms.¹³ Numerous courts decisions across the EU exposed inconsistencies in the merits and proportionality of the restrictions and questioned the legality of the restrictive measures adopted, including in terms of their legal basis and process of adoption.¹⁴ While some of these measures may be justifiable from a public health perspective, others have proved to be problematic and unnecessarily limit civic space under the guise of battling COVID-19. ECNL-ICNL research has exposed the following worrying trends in Europe:

⁹ European Commission, [2020 Rule of Law Report - The rule of law situation in the European Union](#), cited.

¹⁰ See FRA, [Protecting civic space in the EU](#) (2021), p. 16 and sources referred.

¹¹ A repository of civil society initiatives across the EU during the pandemic has been created by European Civic Forum within its Civic Space Watch project, [Solidarity amid the COVID-19 crisis](#)

¹² <https://ecn1.org/focus-areas/european-level-policies>; ECNL, [Are we nurturing civil society in Europe – or merely keeping the boat afloat?](#) (2021). See also FRA, [Challenges facing civil society organisations working on human rights in the EU](#), (2018).

¹³ See ECNL, [COVID-19 and civic freedoms in Europe](#) (2021) and ECNL, [One year of COVID-19. Emergency Measures and Civic Freedoms in the Eastern Partnership region](#) (2021). For an assessment of the Tracker's data beyond Europe, see ICNL, [Top Trends: COVID-19 and civic space](#) (2020). Thematic assessments were also conducted as regards security-related measures (ECNL, [Civic space in the era of securitised COVID-19 responses](#) (2021)) as well as restrictions to the freedom of assembly (ECNL, [Protests in a time of pandemic](#) (2021)).

¹⁴ See the examples of Finland, Germany, Romania and Spain illustrated by ECNL, [COVID-19 and civic freedoms in Europe](#) (2021). The Council of Europe Venice Commission also compiled a [living repository](#) of decisions taken by constitutional courts across wider Europe concerning emergency measures.

1) *Disproportionate legislative and regulatory responses*

- Extensive use of emergency regimes in most cases without proper notification of the derogation from international human rights commitments;¹⁵
- Prohibition of free movement to the extent used during wartime;¹⁶
- Introduction of blanket restrictions to public gatherings and assemblies;¹⁷
- Adoption of surveillance measures disproportionately intruding into the right to privacy;¹⁸
- Monopolization and undue restriction of the right to information and expression by state authorities;¹⁹
- Undue restrictions on freedom of association impacting management as well as the provision of services to beneficiaries;²⁰
- Restrictions on reporting on COVID-19 limiting access to and dissemination of information.²¹

2) *Disproportionate implementation of legislative and regulatory measures*

- Crackdown on journalists and government critiques hindering the freedom of expression and media freedom;²²

¹⁵ Within the EU, out of 14 countries declaring an emergency regime under their constitutional provisions or ordinary laws, only Estonia, Latvia and Romania submitted an official notification of the derogation from their obligations under Article 15 of the European Convention on Human Rights – see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021).

¹⁶ Many EU countries introduced strict curfews (among others Belgium, France, Italy, the Netherlands, Spain), travel bans for incoming or outgoing travellers (for example Belgium, Czech Republic, Hungary) as well as travel within different regions/departments of the country itself (for example France, Italy, Slovakia) – see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021).

¹⁷ Blanket restrictions were placed on public and/or private spaces (e.g. Portugal, Malta), indoor and/or outdoor gatherings (e.g. Austria), and elsewhere de-facto blanket bans were imposed, by using vague or very low thresholds of people allowed to gather (e.g. in Cyprus and Ireland) – see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021) and Civil.

¹⁸ This included for example, in Bulgaria, police monitoring of mobile phone traffic metadata and internet contacts to enforce quarantine measures and, in Hungary, derogations from data protection obligations – see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021).

¹⁹ Some countries for example prolonged the statutory periods for responding to access to information requests (e.g. Hungary, Romania) – see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021) and .

²⁰ For example, 6 % of respondents to FRA's 2020 Covid-19 impact consultation said their work suffered from restrictions of physical access to beneficiaries 'every time' or 'often', and 67 % said they were facing challenges in ensuring continuity in the provision of regular services to their beneficiaries 'every time' or 'often' – see FRA, [Protecting civic space in the EU](#) (2021), p. 18.

²¹ For example, Hungary introduced a very criticised new criminal provision on fearmongering which reportedly has a chilling effect on journalists reporting about the emergency and the legality and proportionality of the measures taken to address it - see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021) and Civil Liberties Union for Europe and Greenpeace European Unit, [Locking down critical voices – How governments' responses to the Covid-19 pandemic are unduly restricting civic space and freedoms across the EU](#) (2020).

²² In a number of EU countries, for example, journalists, activists and civil society organisations reported to be the object of obstructions, smears and threats when they questioned or criticised governments' actions – see Reporters Without Borders,

- Use of new technologies for extensive surveillance of Individuals hampering their right to privacy;²³
- Arbitrary use of sanctions and police force when facilitating peaceful assemblies;²⁴
- Imposition of inherent security-based measures purported by coercive powers, based on a rhetoric of war and setting up a hostile atmosphere affecting democratic debate and participation.²⁵

Against this background, international bodies²⁶ as well as civil society actors, including ECNL and ICNL²⁷, have developed guidelines, toolkits and checklists providing them guidance to assess how emergency measures taken in response to the COVID-19 pandemic affect rule of law, democracy and human rights, including civic space and freedoms and take action to remedy disproportionate impacts, in line with international and regional human rights standards.²⁸



The untapped potential of the EU Rule of Law Review Cycle

Rule of law and emergency measures

Since the pandemic broke out across the EU, the European Commission committed to a regular monitoring of the application of emergency measures adopted to address the COVID-19 pandemic as regards their

[#Tracker_19](#), and Civil Liberties Union for Europe and Greenpeace European Unit, [Locking down critical voices – How governments' responses to the Covid-19 pandemic are unduly restricting civic space and freedoms across the EU](#) (2020).

²³ As reflected in the debate on contact tracing apps and smart quarantines, for example, in the Czech Republic and France - see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021). A recent report by the Civil Liberties Union for Europe points to problematic aspects in the continued use of tracing apps across the EU - see Liberties, [Do EU governments continue to operate contact tracing apps illegitimately?](#) (2021).

²⁴ As reported, for example, in France and Slovenia - see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021) and ECNL, [Protests in a time of pandemic](#) (2021).

²⁵ Including by deploying large numbers of police and military forces to monitor and enforce curfew and quarantine measures (such as in Hungary, Romania), imposing criminal liability on individuals breaching COVID-19 restrictions (such as in Romania) or jailing individuals for petty crimes due to the fact

that they occurred during a state of emergency (for example in the Czech Republic) - see ECNL, [COVID-19 and civic freedoms in Europe](#) (2021) and ECNL, [Civic space in the era of securitised COVID-19 responses](#) (2021).

²⁶ UN Special Procedures, [Checklist - Freedoms of peaceful assembly and of association during public health emergencies](#); UN OHCHR, [Civic Space and COVID-19: Guidance](#); Council of Europe, [Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, A toolkit for member states](#).

²⁷ ICNL, [Checklist COVID-19 and Human Rights - Assessing Compliance of Legal Measures with International Standards](#); ICNL, [International Legal Framework Governing Public Health Emergencies](#); ECNL, [Public participation in crisis response](#).

²⁸ ECNL made available a compilation of such standards and guidelines on this [dedicated page](#).

impact on rule of law, democracy and fundamental rights.²⁹ This commitment is reflected somehow within the EU Rule of Law Review Cycle ('Review Cycle').

The Review Cycle is a structured monitoring and reporting process and offers a key opportunity to conduct a thorough and regular assessment of the implementation and impact of emergency measures across the EU, in order to identify problematic issues as well as good practices. The relevance of this process also lies in its potential to stimulate discussions at EU and national levels – as well as with other regional and international stakeholders – and help to ensure balanced responses to crisis situations in the EU and beyond. This is even more the case since the European Commission announced that the Rule of Law Reports will, as of 2022, include country specific recommendations addressed to Member States.³⁰

Emergency measures and their application have a direct relevance to all the four thematic areas the Review Cycle is currently required to cover, i.e., 1) the functioning of the justice system; 2) the anti-corruption framework; 3) media pluralism and 4) other institutional issues related to checks and balances.

Rule of law and civic space

Even in the context of the four thematic areas currently covered by the Review Cycle, **there clearly is scope to devote particular attention to the impact of emergency powers on civic space and freedoms.** Indeed, the enabling framework for civil society, as well as practices of consultations in the law-making process, have been part of the scope of the Commission's assessment since the Review Cycle was first launched in 2020.³¹

In building the methodology for the preparation of its first Rule of Law Report, the Commission explicitly acknowledges that **an active civil society is an integral part of the EU notion of rule of law and democracy**, and that "attempts to diminish pluralism and weaken essential watchdogs such as civil society (...) are warning signs for threats to the rule of law."³²

²⁹ European Commission, [Statement by President von der Leyen on emergency measures in Member States](#) (2020).

³⁰ European Commission, [State of the Union 2021](#).

³¹ See European Commission, [European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report](#) (2020).

³² See European Commission, [Strengthening the rule of law within the Union. A blueprint for action](#), COM(2019) 343 final, p. 2. See also European Commission, [Communication on the European democracy action plan](#), COM(2020)790 final, p. 3, where the Commission mentioned civil society as a precondition for healthy democracies; and the [Strategy to strengthen the application of the Charter of Fundamental Rights in the EU](#), COM(2020)711 final, p. 10, where the Commission refers to civil society actors as key partners in promoting a culture of values

An in-depth assessment of the state of civic space and freedoms in the EU – including against the background of the public health emergency – also serves the demand from EU citizens: according to an EU survey, as many as 85% of Europeans recognise the importance of civil society, alongside with media, in keeping those in power accountable, and see a particularly urgent need for improvement in terms of civil society being able to operate freely and make criticisms without risk of intimidation.³³

The existence of a legal and policy environment allowing a healthy and diverse civil society to thrive is the basis for the implementation of the principles of democratic pluralism and commitment to the rule of law.

Monitoring emergency powers through the Review Cycle: the European Commission's approach to date

The COVID-19 pandemic broke out in the EU right at the time when the annual Rule of Law Review Cycle was being launched for the first time in 2020. The European Commission had launched its targeted Rule of Law consultation with Member States and other stakeholders in January 2019 for preparation of the 2020 Rule of Law Report, so it could not possibly have devoted specific attention to emergency measures by then. As a result, considerations on the impact of COVID-19 and the measures taken to address it on the rule of law were based on information proactively submitted by Member States and stakeholders and, presumably, on information available from evaluations conducted by regional and international bodies in the areas under the scope of the Review Cycle.

However, the methodology underscoring the 2021 Review Cycle remained unchanged, with no specific references or considerations on the impact of COVID-19 and the emergency measures taken when defining the scope of the monitoring or the standards and sources for the assessment.³⁴ In fact, the Commission rather limited itself, in the consultation questionnaire, to:

- encourage Member States and stakeholders to report on significant developments related to emergency regimes and measures adopted in the context of the COVID-19 pandemic in the four thematic areas covered by the assessment, as a general indication; and
- include specific questions on the impact of COVID-19 and measures taken to address it as regards:
 - the resilience of justice systems;

³³ [Special Eurobarometer 489 – rule of law](#).

³⁴ European Commission, [European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report](#) (2021).

- targeted anti-corruption measures;
- checks and balances, including judicial and constitutional review of emergency regimes and measures, oversight by Parliament of emergency regimes and measures and measures taken to ensure the continued activity of parliaments.

Gaps and challenges in the current approach

ECNL's critical assessment of the European Commission's 2020 and 2021 Rule of Law Reports³⁵ shows that the scope, depth and results of the analysis undertaken by the Commission so far on the impact of emergency powers on the rule of law have been rather limited and superficial and have failed to adequately reflect the breadth and scale of negative consequences affecting in particular civic space and freedoms.

Lack of a structured monitoring and reporting approach

On the one side, the attention devoted to emergency powers, their use and impact is a positive sign and so is the acknowledgement by the Commission of new obstacles facing civil society as a consequence of the COVID-19 pandemic. On the other side, the lack of a structured monitoring and reporting approach on these issues has prevented the Commission from conducting a comprehensive and consistent assessment. The following shortcomings appear particularly problematic:

- **Narrow scope of consultation:** the narrow scope of the Commission's consultation prevented a fully informed and comprehensive assessment of the impact of emergency powers and measures on rule of law, democracy and human rights, including civic space and freedoms. This derives, on the one hand, from the failure to break down the different factors affecting the enabling framework for civil society in the Commission's questionnaire (such as the regulatory framework for civil society organisations, rules governing the exercise of civic freedoms, the extent to which civil society actors enjoy a safe space to operate, and the financing of civil society organisations); and, on the other hand, from the very limited number of questions specifically referring to the impact of COVID-19, which did not include any pertaining to civic space.
- **Lack of in-depth analysis:** the choice of a descriptive rather than an analytical approach and the limited contextualisation of country developments, in particular relating to emergency powers, failed to grasp and reflect violations of a systemic and deliberate nature occurring in

³⁵ European Commission, [2020 Rule of Law Report - The rule of law situation in the European Union](#), COM(2020) 580 final and [2021 Rule of Law Report - The rule of law situation in the European Union](#), COM(2021)700.

some Member States as well as the risks of a long-term impact on the rule of law, democracy and human rights, which can derive from a disproportionate and undue use of emergency powers: e.g., , the 2021 country report on Hungary³⁶ does not give account of retrogressive bills unrelated to the COVID-19 emergency that were still submitted and discussed by means of accelerated procedures, in the absence of proper public consultations under the emergency state induced by the pandemic (impacting in particular on the rights of LGBTIQ+ persons³⁷), or of the deepening of corruption suspicions in the country against the background of the further weakening of the anti-corruption framework³⁸.

- **Limited consideration of the work of international and regional bodies as well as civil society actors:** the limited consideration of, and limited cooperation with, international and regional bodies that engaged in emergency powers monitoring – including UN Special Procedures and OHCHR, OSCE and the Council of Europe – and the limited, scattered involvement of civil society actors when preparing the reports, including conducting country visits, are an obstacle to the credibility and impact of the Commission’s reports.

Reflecting a partial picture

As a result, the 2020 and 2021 Rule of Law Reports only include partial considerations on both the overall trends and the country specific impact of emergency powers on civic space and freedoms. In particular, the 2020 Report only includes generic considerations in the horizontal communication³⁹, and fragmented considerations in a limited number of country reports, focussing mainly on limitations on public consultations and access to information. Similarly, in the 2021 Report, there are only generic references to restrictions on the freedom of movement and assembly, reduced funding and a limited involvement of civil society in the design and implementation of COVID-19 measures.⁴⁰

A comparison between the Commission’s Rule of Law Reports on the one hand and the main findings of ECNL’s analysis of the Civic Freedom Tracker data,⁴¹ the data collected and analysis carried out by other non-

³⁶ European Commission, [2021 Rule of Law Report – Country Chapter Hungary](#).

³⁷ See ILGA Europe, [2021 Rule of Law Report – Targeted Stakeholder consultation](#).

³⁸ See the findings of a report of the Corruption Research Center Budapest (CRCB), available at <http://www.crcb.eu/?p=2464>

³⁹ Considerations in the Commission’s horizontal communication are in particular limited to a general mention of “new obstacles” faced by media and civil society “in certain Member States” and to drawing attention to the “potential risks arising from restrictions on freedom of expression and on access to information”, in particular due to use of measures designed to tackle the ‘infodemic’ as a pretext to undermine fundamental rights and freedoms or their abuse for political purposes – see European Commission, [2020 Rule of Law Report - The rule of law situation in the European Union](#), COM(2020) 580 final.

⁴⁰ European Commission, [2021 Rule of Law Report – The rule of law situation in the European Union](#), COM(2021)700.

⁴¹ <https://www.icnl.org/covid19tracker/>

governmental organisations⁴² as well as by international and regional bodies⁴³, including the newly released FRA report on civic space⁴⁴, on the other hand, exposes the gaps of the Commission's horizontal and country assessments. In particular, the Commission's Rule of Law Reports mostly or fully overlooked the impact of emergency measures and their practical application in a number of important issues related to civic space and freedoms:

- **Democratic participation:** a clear concern has emerged across the EU about limitations of meaningful discussions and public consultations in the framework of fast-track legislative procedures used during the pandemic, including in countries with strong democratic traditions like France, Germany, the Netherlands, Spain and Sweden. Research also alerted on the use of such accelerated procedures for purposes other than the emergency response, as it happened, for example, in Hungary (regarding the rights of LGBTIQ+ people, as mentioned above), Poland (regarding a bill on abortion) and Slovenia (regarding participation in environmental impact assessments). Yet, the Commission's reports gave very little attention to these issues.
- **Limitations on freedom of movement and freedom of assembly:** with limited exceptions, disproportionate restrictions on freedom of movement and of assembly became a trend across the EU. These ranged from blanket or otherwise far-reaching restrictions to public gatherings in countries such as Austria, Bulgaria, Cyprus, Germany, Hungary, Ireland, Italy, Malta, the Netherlands and Portugal, to the disproportionate use of criminalisation, law enforcement powers and sanctions to enforce imposed restrictions in several countries including Belgium, Czech Republic, France, Hungary, Greece, Italy, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, Romania. Most governments chose not to formally derogate from obligations under the European Convention on Human Rights when adopting their bans on free movements and assemblies. The Commission's reports failed to adequately give account of such restrictions and their impact.

⁴² Among the numerous reports by non-governmental organisations illustrating these trends at EU level, see CIVICUS, Civicus Monitor, [Civic freedoms and the COVID-19 pandemic. A snapshot of restrictions and attacks](#) (2020); Civil Liberties Union for Europe and Greenpeace European Unit, [Locking down critical voices – How governments' responses to the Covid-19 pandemic are unduly restricting civic space and freedoms across the EU](#) (2020), cited; European Civic Forum, [Civic Space Watch report 2020](#); IDEA, [The Global State of Democracy in Focus: Taking Stock of Global Democratic Trends Before and During the COVID-19 Pandemic](#) (2020); Civil Liberties Union for Europe, [EU 2020: Demanding on Democracy](#) (2021).

⁴³ See in particular European Parliament, [The Impact of COVID-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU](#) (2020); OSCE, [OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#) (2020); UN Special Rapporteur on the rights to freedom of peaceful assembly and freedom of association, [Ten years protecting civic space worldwide](#) (2020); UN: [COVID-19 and Human Rights We are all in this together](#) (2020); Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, [Disease pandemics and the freedom of opinion and expression](#) (2020); Council of Europe, [Democracy is in distress, finds the Council of Europe Secretary General's annual report for 2021](#) (2021); UN Office of the High Commissioner for Human Rights (OHCHR), [United Nations Human Rights Report 2020](#) (2021).

⁴⁴ FRA, [Protecting civic space in the EU](#), cited.

- **Impact on freedom of association:** lockdown and containment measures have reportedly also prevented many associations across the EU from continuing regular operations. This has impacted, among others, search and rescue operations by civil society actors in Italy and Malta. At the same time, civil society organisations were hit particularly hard by the economic impact of the crisis, with very little efforts on the side of the authorities to involve civil society actors in reflections on recovery strategies and provide them with emergency support. The Commission's reports only addressed these issues very superficially.
- **Undue restrictions on freedom of expression and freedom of information:** the fight against disinformation and fearmongering was at the origin of restrictions disproportionately limiting freedom of expression and information. This occurred, in some cases unintendedly and in others deliberately, in many countries across the EU, including Austria, Bulgaria, the Czech Republic, Hungary, Italy, the Netherlands, Romania, Slovenia and Spain. Journalists, activists and whistleblowers were also the subject of smear campaigns and threats in a number of Member States, such as Italy and Slovenia. These worrying trends are not adequately reflected and assessed in the Commission's reports.
- **Measures affecting privacy:** governments across the EU adopted legislative measures allowing public authorities to intrude into individuals' privacy with little oversight and no clear redress mechanisms. These include the setting up and use of tracing apps, which gave rise to concerns in countries such as Czech Republic, France, Ireland and the Netherlands, surveillance-type measures for example in Bulgaria, Croatia, France, Romania and Slovenia as well as data breaches reported for example in Romania and Slovakia and general data protection derogations as it was the case in Hungary. Although such measures have a clear link to the rule of law framework, they were not included in the scope of the Commission's assessment.

Key recommendations

Data from a recent FRA survey show that civil society actors in the EU (93% of the survey respondents) are concerned that the negative impact of COVID-19 and related emergency measures on civic space will persist at least in the short to medium term.⁴⁵ This points to an urgent need to continue monitoring the use and impact of emergency measures, in particular on civic space and freedoms, in the years to come.

The Review Cycle has the potential to be used as a powerful monitoring tool to that effect, but, as the analysis illustrated in this paper shows, improvements are needed to make sure that it is used at its best. Adding to statements jointly made with other civil society partners across the EU⁴⁶, ECNL respectfully calls on the European Commission to review the methodology underpinning the Review Cycle and embed a structured monitoring and reporting approach on the use and impact of emergency powers, in particular as regards civic space and freedoms, on the basis of the following key recommendations:

Expanding scope of monitoring to civic space

1.

The Commission should expand and better articulate the scope of the monitoring as regards civic space and freedoms. This should be done, ideally, by including civic space as a standalone pillar of the EU Rule of Law Review Cycle, since it is instrumental to unhindered democratic participation and represents a strong system of checks and balances that are, in turn, core elements to a healthy rule of law framework. As a result, the consultation questionnaire should include a set of dedicated questions based on indicators mirroring international standards on freedom of association, freedom of assembly, freedom of opinion, expression and information.⁴⁷ The Commission should also consider including specific questions on the impact of emergency powers and measures adopted to address COVID-19 on civic space and freedoms, in particular regarding areas of concern identified by existing research. The expanded scope should be mirrored in the Commission's consultation questionnaire as well as in the structure of the Commission's horizontal and country reports.

Shifting from a descriptive to an analytical approach

2.

The Commission should undertake an analytical assessment of the impact of emergency powers on rule of law, democracy and fundamental rights, including a specific focus on civic space and freedoms. The assessment should duly take into account the implications of such impact in the light of the overall EU and the specific country context in which it occurs. The main findings of such assessment should be reflected in dedicated chapters to be included in both the Commission's horizontal and country reports.

⁴⁵ FRA, [Consultation with civil society organisations on the impact of COVID-19 measures on civil society](#) (2020).

⁴⁶ See in particular the [Contribution to the 2021 Rule of Law Report - targeted stakeholders consultation](#), coordinated by Civil Society Europe and [Civil society recommendations: how the Commission can improve the credibility, inclusiveness and impact of the Rule of Law Report](#), coordinated by the European Partnership for Democracy.

⁴⁷ This could be inspired by the methodology underscoring the EU-funded project CSO-Meter: <https://csometer.info/>

Formulating targeted country-specific recommendations

3.

To date, the Commission addressed to Member States only very general recommendations regarding their adoption of emergency measures in the context of the European Semester, recalling that exceptional measures adopted in response to the COVID-19 pandemic should be necessary, proportionate, limited in time and subject to scrutiny.⁴⁸ Considering the Commission's intention to include as of 2022 country specific recommendations also in its Rule of Law Report, this should be used as an opportunity to formulate targeted recommendations providing guidance to Member States on how to address the negative impact of emergency powers on rule of law, democracy and fundamental rights, including focussed recommendations on the respect, promotion and protection of civic space and freedoms. Such recommendations should build on existing guidelines, toolkits and checklists.

Enhancing synergies with international and regional bodies

4.

The Commission should proactively establish a structured and regular cooperation throughout the Review Cycle with international and regional bodies engaged in monitoring and reporting about the use and impact of emergency powers on rule of law, democracy and fundamental rights – in particular UN OHCHR and Special Procedures, Council of Europe and OSCE. Such cooperation should aim at enhancing synergies between respective recommendations and follow-up actions and be reflected in the consistent integration of international and regional bodies' findings into the Commission's horizontal and country reports.

Strengthening involvement of and support to civil society actors

5.

The Commission should ensure a more consistent, transparent and meaningful involvement of civil society actors in the Review Cycle, including the preparations of the Commission's reports, the formulation of recommendations and the follow-up monitoring and discussions with Member States. This could translate into an annual structured dialogue between the Commission and civil society stakeholders, allowing for an evaluation and assessment of the previous year's Rule of Law Review Cycle and for input in preparations of the next year's Cycle. This dialogue could be hosted, e.g., by the Fundamental Rights Agency of the EU (FRA) within the framework of its regular meetings of the Fundamental Rights Platform. Furthermore, the Commission should also prioritise EU funding under the new Citizens, Equality, Rights and Values (CERV) programme to enable civil society actors to engage in a regular monitoring of the impact of emergency powers on rule of law, democracy and fundamental rights, including a specific focus on civic space and freedoms, and to promote national debates on these issues.

⁴⁸ Council of the EU, Country Specific Recommendations of August 2020, OJ of 26 August 20, C 282.

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