

Rules of Law Indices and How They Could be Used in the EU Rule of Law Crisis

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Content

Introduction: Relevance in the EU Rule of Law Crisis

- 1) Why Measure Legal Systems?
 - 2) Methodological steps
 - 2.1 Conceptualisation
 - 2.2 Selecting data
 - 2.3 Statistical analysis
 - 2.4 Presenting, interpreting and comparing results
 - 3) International Indices on the Rule of Law
- Conclusion

Relevance in the EU Rule of Law Crisis

- a need for a mechanism based not only on qualitative , but also on quantitative data concerning the Rule of Law
 - use of statistics compiled for another objective/ other scoreboards?
 - a new scoreboard, on the basis of the existing scoreboards, augmented by other sources of data?

Relevance in the EU Rule of Law Crisis

Problems with “contracting out” the scoreboard to international organisations

- favour a specific structure of government or market economy
- very high correlation between these indices
- opinions of private Think Tanks and NGOs cannot substitute actual constitutional procedures to establish a legal judgement

Results of the complexity of the indices and the methodological challenges

- an entirely automated mechanism is unlikely and undesirable
- difficulties for the judges to perform any meaningful judicial review

Relevance in the EU Rule of Law Crisis – Proposal of the European Commission

“(4) Whenever the Member States implement the Union’s budget, and whatever method of implementation they use, respect for the rule of law is an essential precondition to comply with the principles of sound financial management enshrined in Article 317 of the Treaty on the Functioning of the European Union

(5) Sound financial management can only be ensured by the Member States if public authorities act in accordance with the law, and if breaches thereof are effectively pursued by investigative and prosecution services, and if decisions of public authorities can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.

(6) Judicial bodies should act independently and impartially and investigation and prosecution services should be able to properly execute their function.

They should be endowed with sufficient resources and procedures to act effectively and in full respect of the right to a fair trial. These conditions are required as a minimum guarantee against unlawful and arbitrary decisions by public authorities that could harm the financial interests of the Union.”

Relevance in the EU Rule of Law Crisis – Proposal of the European Commission

“(7) The independence of the judiciary presupposes, in particular, that the body concerned is able to exercise its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

(8) Respect for the rule of law is not only important for citizens of the Union, but also for business initiatives, innovation, investment and the proper functioning of the internal market, which will flourish most where a solid legal and institutional framework is in place.“

Relevance in the EU Rule of Law Crisis – Proposal of the European Commission

“(9) Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, requires the Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union’s budget. The very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law and requires independent courts. Maintaining the independence of the courts is essential, as confirmed by the second subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union. This is true, in particular, for the judicial review of the validity of the measures, contracts or other instruments giving rise to public expenditure or debts, inter alia in the context of public procurement procedures which may also be brought before the courts.

(10) There is hence a clear relationship between respect for the rule of law and an efficient implementation of the Union budget in accordance with the principles of sound financial management.”

Relevance in the EU Rule of Law Crisis – Proposal of the European Commission

Article 5

Procedure

“ 1) Where the Commission finds that it has reasonable grounds to believe that the conditions of Article 3 are fulfilled, it shall send a written notification to that Member State, setting out the grounds on which it based its finding

2) The Commission may take into account all relevant information, including decisions of the Court of Justice of the European Union, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations.

3) The Commission may request any additional information required for its assessment, both before and after having made a finding pursuant to paragraph 1.”

Towards a European Scoreboard of the Rule of Law? – Proposal of the European Commission

Article 2:

“(b)'generalised deficiency as regards the rule of law' means a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law;”

Article 3 – special list of the generalised deficiencies:

“ (a) endangering the independence of judiciary;
(b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;
(c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.”

1. Why Measure Legal Systems?

- 1) One single number can easily sum up complicated questions, so that non-professionals and the press can also use it.
- 2) Indices are often considered as external measures in debates about evaluating reforms or the performance of the government.
- 3) International organisations and NGOs also use indices in order to foster and propagate best practices by comparing numbers on different countries.
- 4) Economists need quantitative data in order to test political-economical correlations, therefore the characteristics of legal systems need to be quantified.

2. Methodological Steps

The problem is measuring a directly unobservable phenomenon

→ solution lies in several statistical methods

- focus on the measurement of the Rule of Law
- methodological problems are similar to other indices measuring legal systems
- terminology:
 - indicator refers to a single number or feature
 - index refers to composite indicators

2. Methodological Steps

- methodological questions based on legal literature and the OECD Handbook on Constructing Composite Indicators (2008)
- the design of the index must be transparent
- the methodological choices must be grounded

- need of a thorough knowledge of legal doctrine and expertise in working with quantitative data

- → necessity of co-operation of legal experts and data experts via team-based work

2.1 Conceptualisation

Three categories according to their measurement nature:

- 1) Direct observables like the number of seats in a parliament
- 2) Indirect observables, e.g. minutes of corporate board meetings which only convey indirect information on what actually happened
- 3) Constructs or theoretical creations, such as IQ, government performance or rule of law

2.1 Conceptualisation

Definition of the Rule of Law

- usually determined by the common opinion of the professional public
- or a mainstream definition with a small grain of caution
- shortcut by reference to official documents (e.g. by the UN, the Council of Europe, or the European Commission)
- → some indices diverge concerning the exact definition used
- legal indices usually measure the de facto characteristics of a system

2.2 Selecting data - Finding data for the measurement

No direct measurement of the quality of a given legal system

→ Using proxies (approximate data)

- 1) (a) the opinion of experts or (b) opinion of the public (soft data)

- 2) approximate facts (hard data) i.e.
 - the number of registered crimes
 - budget of the courts
 - frequency of the modification of laws
 - frequency of condemnation of a state by an international court of human rights

→ main advantage of experts: costs of wide opinion polls, and hard data are not always available from every country

2.2 Selecting data - Problems with available data

- 1) Sometimes they are corrupted by the authorities
 - 2) The measured value only has an impact on the question in extreme cases
 - 3) It is not at all obvious whether a boost of an objective value has a positive or negative effect on the phenomenon
 - 4) The partial nature of the data (missing values)
- Some indices combine the different sources, making the results more robust. The data sources are also cross-checked

2.3 Statistical analysis

Different types of data

- yes or no (binary data: 1 or 0)
- points on a given scale (ordinal data, for instance from 1 to 7)
- Percentages (metric data)

Dealing with missing data or outliers

- delete the whole row of data
- more than 5%, imputation
- using the mean of the answers of other experts, eventually belonging to the same cluster
- variety of other methods

- Introduce natural logarithm
- taking real outliers into consideration

2.3 Statistical analysis

Weighting

- different importance of characteristics
- weight of indicators can be changed, without deleting them
- must be clear and explicit or implicit

Geometric mean instead of arithmetic

- in order to lower the impact of extreme values
- greater comparability

Sub indices from indicators

- can diminish misunderstandings and biases
- complex and multi-faceted characteristics of institutional functions can be measured
- dimensions from sub-indices
 - higher level of abstraction
- → factor analysis, principal component analysis, Cronbach`s alpha test

2.4 Presenting, interpreting and comparing results

- best presented in charts
- numbers in themselves can only represent correlation
- content needs to be considered further
- visualisation with graphs, maps, clusters
- comparing other indices on the same question

3. International Indices of the Rule of Law

	FIW	BTI	WGI	WJP RLI	EU Justice Scoreboard
Goals (Measured values?) ³⁶	Global comparative evaluation of <i>political rights and civil liberties</i>	Evaluates and measures the steps of developing and transition countries (<i>Entwicklungs- und Transformationsländer</i>) toward democracy and market economy	Aggregate and individual governance indicators	Measurement of the de facto rule of law, (based on the people's experience, not on the legal rules)	Measuring quality, efficiency and independence of justice in the Member States of the EU
How long and how frequently?	Yearly since 1972 195 countries today (+15 disputed or special territories).	Since 2006 two-yearly (a pilot study in 2003) today 129 developing and transition countries (i.e., every non-member country of the OECD in 1989, provided that the population is over 2 million)	Since 1996, and yearly since 2002, on 215 economies at the present time.	Yearly since 2011 (in 2012/13, a unified biannual report), in 102 countries	Yearly since 2013 in all the Member States of the EU)
Conceptualisation	<p>Political rights: (1) Electoral process (2) Political pluralism and participation, (3) Functioning of Government.</p> <p>Civil Liberties: (1) Freedom of Expression and Belief (2) Associational and Organisational Rights (3) <i>Rule of law</i> [in common sense with somehow arbitrary elements], (4) Personal Autonomy and Individual Rights</p> <p>There are four questions on the rule of law: (1) Is there an</p>	<p>The final index (Status Index) is composed of a democracy and market economy part</p> <p>The Democracy Index is based on an explicit and philosophically elaborate democracy-concept: (1) Stateness (2) Political participation (3) <i>Rule of law</i> (4) Stability of democratic institutions (5) Political and Social Integration</p> <p>The four constituents of the rule of law are partially overlapping, according to the traditional legal doctrine: (1) Separation of powers, (2) Independent judiciary (3) Prosecution of office abuse, (4) Civil rights</p>	<p>for six dimensions of governance: (1) Voice and Accountability (2) Political Stability and Absence of Violence (3) Government Effectiveness (4) Regulatory Quality (5) <i>Rule of law</i> (6) Control of Corruption</p> <p>"Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence."⁵⁷</p> <p>Conceptualisation is questionable,⁵⁸ it is based rather on formal than substantive criteria.</p> <p>Measuring rule of law on the basis of 23 sources (including the partial</p>	<p>Based mainly on UN-documents, the definition of the rule of law is a system relying on the following four principles: "(1) The government and its officials and agents as well as individuals and private entities are accountable under the law. (2) The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights. (3) The process by which the laws are enacted, administered, and enforced is</p>	<p>I. Efficiency of justice systems 1.Length of proceedings 2.Clearance rate 3.Pending cases 4.Efficiency in specific areas II. Quality of justice systems 1.Accessibility 2.Resources 3.Assessment tools 4.Quality standards III. Independence 1.Perceived judicial independence 2.Structural independence 3. Work of the judicial networks on judicial independence</p>

3. International Indices of the Rule of Law

	<p>independent judiciary? (2) Does the rule of law prevail in civil and criminal matters? Are police under direct civilian control? (3) Is there protection from political terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system? Is there freedom from war and insurgencies? (4) Do laws, policies, and practices guarantee equal treatment of various segments of the population?</p>		<p>indices – and not the main indices - of BTI, FIW, WJP.) using 86 data units (44 of them are representative, 42 are not” Representative indicators are indicators that cover a set of countries in which the distribution of governance is likely to be similar to that in the world as a whole.[...] In contrast non-representative indicators cover either specific regions (for example the BEEPS survey of transition economies or the LatinoBarometer survey of Latin American countries), or particular income levels (for example the World Bank CPIA ratings that cover only developing countries).”⁵⁹</p>	<p>accessible, fair, and efficient. (4) Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”⁶⁰</p> <p>According to the principles above, they measure 9 factors and 47 sub-factors: (1) Constraints on Government Powers (2) Absence of Corruption (3) Open Government (4) Fundamental Rights (5) Order and Security (6) Regulatory Enforcement (7) Civil Justice (8) Criminal Justice (9) Informal Justice (i.e. traditional, tribal, and religious courts)⁶¹</p>	
<p>Selecting data</p>	<p>Expert opinions evaluating with points ranging from 1 to 7, a general <i>codebook</i> with the definition of</p>	<p>Mainly based on expert opinion, with a standardised codebook. Points ranging from 1 to 10 (with separate instructions for every single question). Not only numbers but a</p>	<p>Based on several hundred indicators from 32 different sources.</p>	<p>So-called General Population Polls: 1000 respondents from the three largest cities of the country, selected by</p>	<p>Most of the data is acquired from the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ), other sources are contact persons on national</p>

3. International Indices of the Rule of Law

	<p>the grades only, not that of the individual questions.</p> <p>The list of experts is not public, the selection is not transparent.</p> <p>Measuring 27 questions in 8 groups</p>	<p>descriptive text (two reports on a country: a foreign and a domestic report, the latter of which also comments on the former); the list of experts is public, but non-transparent</p> <p>hard data too (on inflation and education).</p> <p>17 criteria with 49 questions.</p>		<p>probability sampling. + Qualified Respondents' Questionnaires: on average, 25 legal professionals from each country (the scores from the two types of Questionnaire – when available – were weighted 50%-50%)</p> <p>Selecting experts: two methods: (1) random sampling from a list of experts like law professors, attorneys, NGO professionals etc. (2) WJP network of practitioners and academics</p>	<p>justice systems (2), the European Network of Councils for the Judiciary (ENCJ), the Network of the Presidents of the Supreme Judicial Courts of the EU, Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (ACA), the European Competition Network, the Council of Bars and Law Societies of Europe (CCBE), the Communications Committee, the European Observatory on infringements of intellectual property rights, the Consumer Protection Cooperation Network, Eurostat, the European Judicial Training Network (EJTN), the World Bank and the World Economic Forum.</p>
Methods of aggregation	arithmetic mean	arithmetic mean	<p>Aggregation in three steps: (1) Each question is assigned to one of the six indicators (2) Responses are rescaled between 0 and 1, 1 meaning the best outcome (3) Constructing a weighted average using an Unobserved Components Model</p>	<p>Aggregation in five steps (1) Translating the questionnaire into numbers (2) Raw country scores aggregated from the individuals (experts or general public) (3) Normalising the raw data. (4) Aggregating normalised data into factors and sub-factors using simple average (5) Final ranking of the countries.</p>	No final overall composite index, part-indices and indicators only
Degree of transparency	Low but progressing (not every datum is	High (all data used is available on the website, with the related part of the	Very elaborate calculations, but inherits the non-transparency of the	high	High: relatively simple indices

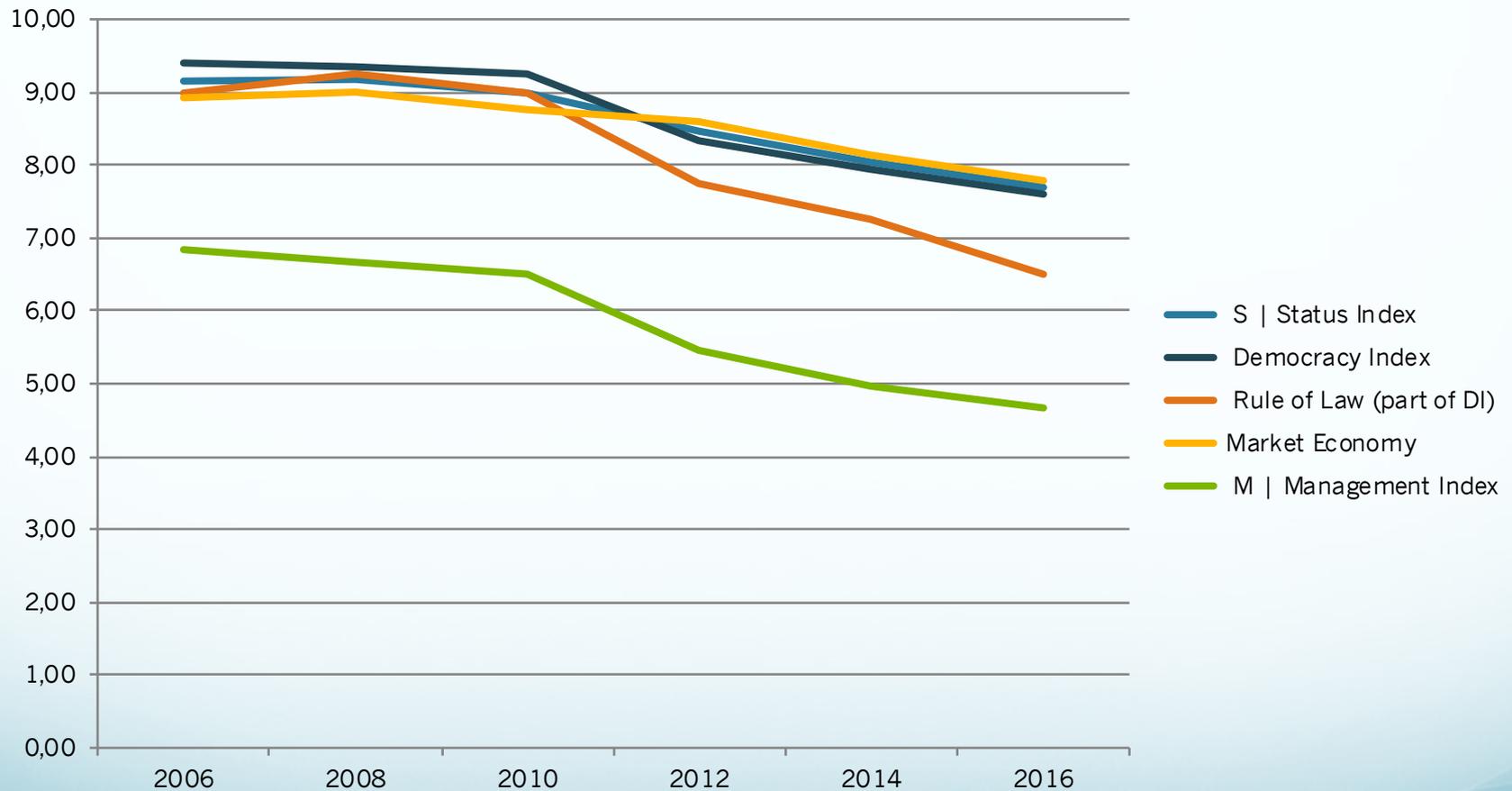
3. International Indices of the Rule of Law

	available on the website, the sub-indices of the rule of law are also inaccessible)	country-report).	sources.		
Strength	(1) Data available since 1972 (2) Well-known trademark	(1) Transparency (2) The controlling function of the second report (3) Better conceptualisation compared to the FIW (4) As a last step an expert committee corrects the data regionally and globally to enable better international comparison	(1) Elaborate mathematical model (2) Robust (the change of a single indicator does not severely impact the whole).	Also focusing on the perception of the rule of law in vulnerable groups (such as in low-income groups) The selection of experts is transparent	Mainly basic, easily quantifiable data
Shortcomings and critiques	(1) Geometric mean would be better here than arithmetic mean (2) lack of transparency (coding below the sub-categories remains non-transparent), (3) the differences between the grades of the 1-7 are unclear (4) lack of consistency in time: changing questions (5) the borders between the dimensions are unclear (6) Selection of experts is not transparent	(1) Geometric mean would be better here than arithmetic mean (2) Not transparent selection criteria of the experts. (3) The Status Index implies that political and economic development are strongly correlated, which is not necessarily true (see China).	(1) Inheriting the shortcomings of the original sources, (2) Favours market-economies, because of the numerous market-indicators. (3) Difficult comparison in time and between countries as the sources are constantly changing. (4) Weak conceptualisation; (5) No text, only numbers.	(1) No text, numbers only (except one paragraph interpreting the results in the last version) (2) The Constraints on Government Powers sub-index is centred on presidential systems.	No final aggregate index, changing methodology. From our point of view, the main goal of the indices is to measure quality, efficiency and the independence of justice in the Member States of the EU, and not the rule of law in general.
General evaluation of the index	<i>Old methodology and lack of transparency.</i>	<i>Developed methodology, transparent and global index with a part focusing on the rule of law</i>	<i>The method minimises the subjective elements (except for the selection of indicators), the main focus is not the rule of law</i>	<i>Very elaborate methodology, focusing on the aspects of the rule of law</i>	<i>The EU Justice Scoreboard is different to the other indices enlisted here, as it is closer to classical judiciary statistics.</i>

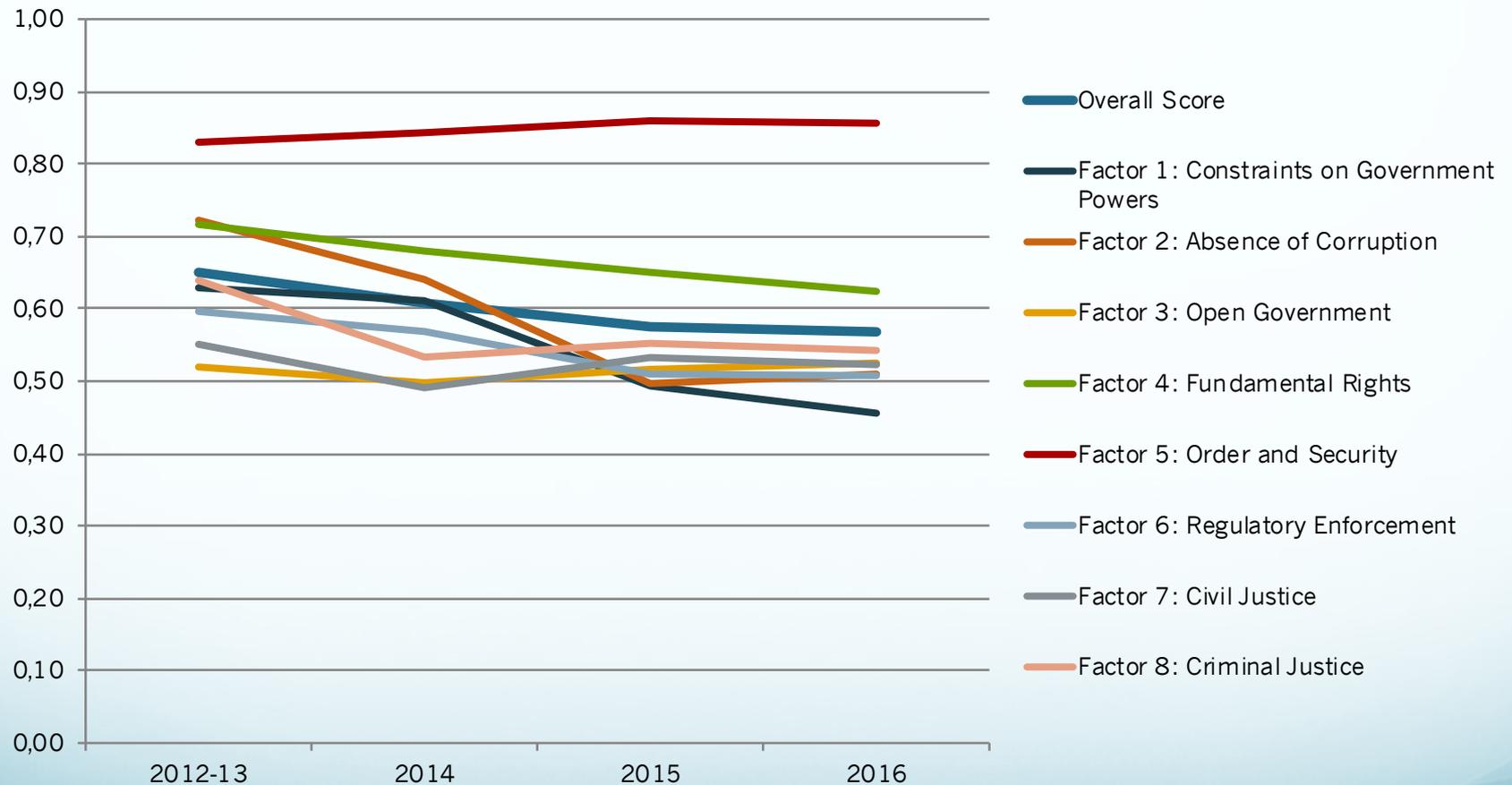
Conclusion

- should the European Union establish some sanction mechanism based on a partly quantitative analysis of the rule of law in its Member States?
- first determine the methodology and the EU authorities responsible for the construction of the index
- a new index should be tested during numerous periods in order to obtain a credible tool
- measures for transgression can be complicated
 - → underperformance can have numerous origins
- where the problem is the non-efficiency of constitutional law (normativity of law), traditional (doctrinal) legal methods struggle

The Bertelsmann Transformation Index, data for Hungary, 2006–18



Data of the World Justice Project's RoL Index for Hungary, 2012/13–18



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<https://ssrn.com/abstract=3032501>