Articles

Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values

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Peer Reviewing the Rule of Law? A New Mechanism to Safeguard EU Values

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Table of Contents: I. Situating the topic. – II. Dealing with rule transgressions. – II.1. Instrumentalist and normative approaches. – II.2. The potential of peer reviews. – III. What is wrong with the current approaches? – III.1. The Article 7 procedure and the rule of law framework. – III.2. The budget conditionality mechanism. – III.3. The Commission Rule of Law Report. – III.4. The Council's annual Rule of Law Dialogue. – IV. The EU Rule of Law Peer Review. – IV.1. History of the initiative. – IV.2. Which institutional design for the initiative? – IV.3. Can the EU peer review address the problems of the approaches? – V. Ways ahead?

Abstract: The possible remedies that the EU can use against backsliding on the rule of law are limited: While art. 7 TEU has been widely conceived as ineffective, the recently introduced budget conditionality may become bogged down in court cases. Softer instruments like the Commission Rule of Law Report provide observations on rule of law developments, but are in themselves unable to address transgressions. Against this background, the Council has recently introduced a peer review mechanism that may exert peer and public pressure on transgressors. However, the agreed procedures show important deficits such as lacking transparency to the outside world, limited time devoted to the review, and the absence of clear country-specific recommendations that could become the focus of peer and public pressure. The new procedure thus needs reform to achieve results. A comparison with peer reviews among states in other international organizations show the potential that peer reviewing holds.

Keywords: rule of law – peer review – compliance – European Union – article 7 – backsliding.

I. Situating the topic

These are dire times for European integration. Alongside numerous other crises and difficulties, the rule of law as one of the fundamental building blocks of European integration is in jeopardy, especially in Hungary and Poland. A particular aspect of this crisis is that the

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European Papers
Vol. 7, 2022, No 2, pp. 671-695
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/593

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observance of fundamental values of the European Union is stylized in terms of an East-West conflict within the EU. Touting ideas of *illiberal democracy*, a group of states around Hungary and Poland is trying to establish an alternative discourse on the rule of law in the EU.[1] In line with this, art. 7 TEU and the recently established budget conditionality mechanism are portrayed as an attempt by the "old" EU members to impose a liberal *Western* ideology around the rule of law and to silence dissenting opinions. Such assaults on the legitimacy of the art. 7 TEU procedure, combined with its hitherto limited effectiveness,[2] have led the EU member states to search for alternative instruments to monitor and to address deficits in democracy, human rights, and the rule of law. One such instrument, alongside the other new procedures and mechanisms, discussed in the present Special Issue, is the recently introduced peer review on the rule of law conducted by the Council. The procedure enhances and complements the annual "Rule of Law Dialogue" that has existed since 2014 and the Commission's Rule of Law Report introduced in 2020. These instruments differ from art. 7 TEU and the proposed budget conditionality mechanism in that they choose a different, *soft* approach to the rule of law crisis, which builds on dialogue and the exertion of peer and public pressure instead of sanctions. In addition, all member states, and not only those with striking deficits, come under scrutiny of these two procedures. This may avert the criticism of bias and use of double standards. Moreover, as regards the new peer review, the Council is in the driving seat of the new peer reviewing procedure. The procedure might thus be less vulnerable to claims that *Brussels bureaucrats* are getting tough on transgressors.

Against this background, this *Article* discusses the potential of the new rule of law peer review to address rule of law deficits in the EU. The next part (section II) provides a theoretical discussion of compliance mechanisms and the specific contribution that peer reviews may make. Next, this *Article* reviews the existing instruments to address rule of law deficits in the EU, and discusses the potential of a peer review to address existing shortcomings (section III). Subsequently (section IV), the institutional design of the new peer review is discussed, building on previous research that analyses the authority and performance of some existing peer reviews in international organizations.[3] Section V concludes.

[1] R Csehi and E Zgut, '"We Won't let Brussels Dictate us": Eurosceptic Populism in Hungary and Poland' (2020) European Politics and Society 1; Z Kovács, 'PM Orbán: "When They Question the Rule of Law, They Step on Our Honor"' (1 October 2019) About Hungary Blog abouthungary.hu; Hungary Today, 'Hungary and Poland to Set Up Joint Institute for Comparative Law against "Suppression of Opinions by Liberal Ideology"' (31 July 2021) Hungary Today hungarytoday.hu.

[2] C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity Under Article 7 TEU' (2021) International Political Science Review 501; RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) Journal of European Public Policy 481.

[3] V Carraro, *A Double-Edged Sword: The Effects of Politicization on the Authority of the UN Universal Periodic Review and Treaty Bodies* (PhD thesis 2017) cris.maastrichtuniversity.nl; V Carraro, T Conzelmann and H Jongen, 'Fears of Peers? Explaining Peer and Public Shaming in Global Governance' (2019) Cooperation and Conflict 335; H Jongen, *Combating Corruption the Soft Way: The Authority of Peer Reviews in the Global Fight against Graft* (PhD thesis 2017) cris.maastrichtuniversity.nl.

This *Article* argues that the EU's rule of law peer review holds some limited potential for the preservation of the rule of law. Depending on its future institutional development, the peer review may create bigger political leverage than the Commission's Rule of Law Report. The peer review also holds potential in preventing the political blockades and the that cripple art. 7 TEU and the recently introduced budget conditionality mechanism. However, the agreed procedures of the review show important deficits such as lacking transparency, limited time devoted to the review, and the absence of clear country-specific recommendations. Another problem that transgresses such specific design features is that peer reviews build on the idea of rational and non-ideological exchange on best practices and the presumption of a shared value base. The current political climate of ideological debate about the values of rule of law is likely to undermine the social fabric from which peer reviews are gaining their strength.

II. Dealing with rule transgressions

II.1. Instrumentalist and normative approaches

The problem of how to promote compliance with international rules[4] has created a wealth of scholarly literature. Two principal approaches are juxtaposed, which von Stein usefully labels the "instrumentalist" and the normative approach.[5] The instrumentalist approach starts from the assumption that states are not principally committed to norm compliance. States will weigh the costs and benefits of specific courses of action, and are assumed to transgress rules if it is in their political or financial interest to do so. This does not mean that international rules will be broken all the time, but that there is a permanent danger of transgressions. Accordingly, the key task for the designers of international agreements is to increase the costs of rule violations, so that the "calculus of compliance"[6] changes. Such costs can come in the form of sanctions that an international organization may impose; or in the form of the damage to a state's reputation for being a trustworthy cooperation partner. Threatening sanctions and providing incentives are therefore considered key instruments to make states abide by the rules. Subsidiary design choices concern ways to increase the likelihood of detection of rule transgressions and procedures through which the severity of breaches and the corresponding sanctions can be determined.[7]

[4] Compliance is understood here as "the degree to which state behaviour conforms to what an international agreement prescribes or proscribes", see OR Young, *Compliance and Public Authority: A Theory with International Applications* (Johns Hopkins University Press 1979) 104.

[5] J von Stein, 'The Engines of Compliance' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 477. Also see RO Keohane, 'International Relations and International Law: Two Optics' (1997) HarvIntLJ 487.

[6] A Underdal, 'Explaining Compliance and Defection: Three Models' (1998) European Journal of International Relations 5, at 7.

[7] GW Downs, 'Enforcement and the Evolution of Cooperation' (1998) MichJIntlL 319.

Normative approaches diverge from this model in two ways. First, they assume that states and their societies are generally willing to comply with international rules. This may either be because “constantly recalculating the costs and benefits of compliance is onerous” and “following an established rule is typically more efficient and, therefore, the default option”.[8] At the same time, state leaders and their societies have acceded to international agreements and organizations because they believed this to be in their interest. Therefore, they will also have a propensity to follow the behavioural expectations that come with being party to an agreement, and will see conforming to these rules as appropriate. Moreover, as states are members of an international agreement, they will become co-authors of the behavioural expectations that make up the international agreement or organization. A key argument in this respect is that membership in an international agreement is affecting and transforming the interests and identities of states. Compliance with the rules thus becomes part of a states’ identity and will not be questioned even under adverse circumstances.[9]

Second, normative approaches rest on a different ontology of the law, seeing it not as a fixed external set of rules with which states are confronted, but as the product of a joint dialogical process through which rules are established, developed, interpreted, applied, and reinforced. These processes take place in “interpretive communities”,[10] which are established in international organizations and international regimes. These communities are engaged in assessing and interpreting the behaviour of states and the justification for this behaviour in the light of shared norms and understandings. The product of this process is to constrain idiosyncratic and self-serving interpretations of the rules, to reinforce and sometimes develop the existing norms, and to promote habitual compliance. Such *regime dialogues* are an important element in the creation of legitimacy and the stabilization of international agreements.[11]

In this perspective, the use of sanctions against transgressors and the provision of incentives may still be relevant, but is not as crucial as in the instrumentalist account. As states have a general propensity to comply, rule violations are likely to indicate ambiguity of the rules, or a lacking capacity to implement them properly, rather than a wilful and calculated transgression.[12] Other authors in this tradition argue that sanctions run the

[8] J von Stein, 'The Engines of Compliance' cit. 486.

[9] AI Johnston, ‘Treating International Institutions as Social Environments’ (2001) International Studies Quarterly 487; HH Koh, ‘Why Do Nations Obey International Law?’ (1997) YaleLJ 2599.

[10] I Johnstone, ‘The Power of Interpretive Communities’ in M Barnett and R Duvall (eds), *Power in Global Governance* (Cambridge University Press 2005) 185.

[11] AI Johnston, 'Treating International Institutions as Social Environments' cit.; E Weisband, ‘Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime’ (2000) International Studies Quarterly 643; HH Koh, 'Why Do Nations Obey International Law?' cit.

[12] A Chayes and AH Chayes, ‘On Compliance’ (1993) International Organization 175; A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).

risk of creating alienation and division, thus undermining the sense of community which stabilizes international rules. While sanctions may be relevant to erect stop-signs for transgressors and to reassure the community of compliant states, they also come with costs and limited effectiveness.[13]

Normative approaches therefore suggest *softer* strategies; not as an alternative, but as a complement to sanctions. One element is the fortification of regime dialogues, through which obligations are clarified and reinforced, and rules can be developed in the light of new problems or changing circumstances. Regime dialogues can also be important in identifying needs for technical assistance. The need to explain and justify conduct to other participants in the dialogue can also provide incentives for compliance, if states want to look legitimate in the eyes of their peers, or want to belong to a certain reference group of reputable states.[14] This logic is enhanced if domestic publics impose social costs on actors that have been identified as non-compliant. Such costs occur if there is peer or public pressure and shaming by societal groups with reference to social norms;[15] if international organizations tie the delivery of aid or trade preferences to the observance of international standards;[16] or if investors avoid putting their capital into locations that are considered problematic in terms of financial transparency or human rights records.[17]

II.2. The potential of peer reviews

Peer reviews among states are instruments through which regime dialogues are organized. Through peer reviews, information on the behaviour or performance of regime members is periodically collected and evaluated by peer states, with a view towards reinforcing shared norms and triggering domestic policy reform.[18] A key element is the "soft tripartism" of peer reviews, involving the reviewed state, its peers (*i.e.*, representatives of other states),

[13] A Chayes and AH Chayes, 'On Compliance' cit.; A Chayes and AH Chayes, *The New Sovereignty* cit.

[14] T Risse and K Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in T Risse and others (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999) 1, 15.

[15] HR Friman, 'Introduction: Unpacking the Mobilization of Shame' in HR Friman (ed.), *The Politics of Leverage in International Relations: Name, Shame, and Sanction* (Palgrave Macmillan 2015) 1; R Goodman and D Jinks, 'Social Mechanisms to Promote International Human Rights: Complementary or Contradictory?' in T Risse and others (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013) 103; EM Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) International Organization 689.

[16] EM Hafner-Burton, 'The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe' (2009) Perspectives on Politics 33; JH Lebovic and E Voeten, 'The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators' (2009) JPeaceRes 79.

[17] CM Barry, CK Clay and ME Flynn, 'Avoiding the Spotlight: Human Rights Shaming and Foreign Direct Investment' (2013) International Studies Quarterly 532; JC Sharman, 'The Bark *is* the Bite: International Organizations and Blacklisting' (2009) Review of International Political Economy 573.

[18] F Pagani, 'Peer Review as a Tool for Co-operation and Change: An Analysis of an OECD Working Method' (2002) African Security Review 15.

and the staff of the international organization hosting the peer review.[19] The Organization for Economic Cooperation and Development (OECD), the United Nations (UN), the World Trade Organization (WTO), the Council of Europe (CoE), and many other international organisations employ peer reviews among their members.[20] Within the EU, the European Semester and the several variants of the Open Method of Coordination are examples of peer reviews.[21] At the time of writing, discussions are underway to initiate a new global peer review for enhancing international financial accountability and transparency.[22]

Peer reviews may generate effects through two distinct mechanisms. First, as reviewed states explain and justify their policies during the reviews, "peer accountability"[23] is established. If a reviewed state is put into the spotlight for underperformance or for transgressing rules, this may trigger peer pressure on the reviewed state to heed the recommendations received.[24] A possible strength of peer reviews is that states may feel a greater obligation to comply with recommendations made by their peers, compared to a situation in which such recommendations come from an external expert body, or from the bureaucracy of an international organization.[25] If there is a sufficient degree of

[19] G Dimitropoulos, 'Compliance Through Collegiality: Peer Review in International Law' (2016) Loyola of Los Angeles International and Comparative Law Review 275, 292.

[20] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

[21] E Barcevičius, T Weishaupt and J Zeitlin (eds), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination* (Palgrave Macmillan 2014); A Crespy, 'The EU's Socioeconomic Governance 10 Years after the Crisis: Muddling through and the Revolt against Austerity' (2020) JComMarSt 143; S Deroose, D Hodson and J Kuhlmann, 'The Broad Economic Policy Guidelines: Before and After the Re-launch of the Lisbon Strategy' (2008) JComMarSt 827; J Zeitlin and B Vanhercke, 'Socializing the European Semester: EU Social and Economic Policy Co-ordination in Crisis and Beyond' (2018) Journal of European Public Policy 149.

[22] V Carraro and H Jongen, 'Peer Review in Financial Integrity Matters' (FACTI Panel Background Paper 8/2020).

[23] RW Grant and RO Keohane, 'Accountability and Abuses of Power in World Politics' (2005) AmPolSciRev 29.

[24] "[T]he process confronts the offending state with the stark choice between conforming to the rule as defined and applied in that particular case, or openly and explicitly flouting its obligation. The discomfort of such a position proves sufficient in most circumstances to get the transgressor to bring its behaviour in line with its obligations"; A Chayes, AH Chayes and RB Mitchell, 'Managing Compliance: A Comparative Perspective' in EB Weiss and HK Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 1998) 39, 62.

[25] See V Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?' (2017) Human Rights Quarterly 943-970; KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations: The Case of the Universal Periodic Review of Human Rights' (2018) British Journal of Political Science 513, 528. Examples of expert reviews are the Treaty Body monitoring procedures that exist for most UN human rights treaties, or the PISA reviews of national education policies conducted by the OECD.

transparency of the procedure, non-governmental organizations (NGOs), the media, and parliaments may amplify pressure on recalcitrant states.[26]

Second, the process of peer reviewing is important as it provides an organizational format to the "interpretive communities" discussed above.[27] This process is relevant on two levels. First, the "parameters of acceptable argumentation"[28] are established through this process of continuous deliberation and review, as well as a shared understanding of behavioural expectations and appropriate policies. This process serves to both prevent self-serving interpretations of the rules and reinforce shared understandings of the applicable rules. Second, the process also has an effect at the domestic level. Peer reviews involve officials from different departments of the domestic executive, through both the compilation of own country reports and the preparation for the review of other countries. The literature has identified this situation of preparation for the review session and the follow up to it as an important conduit for the questioning of domestic policies. This is especially so if there is the prospect of a subsequent session during the next review cycle in which responses of the reviewed state to the peer recommendations are expected.[29] It is not just the moment of review that matters, but also the run-up and the follow-up to it through which an "ongoing dialogic process" is established.[30] Critical assessments resulting from a peer review may thus act as an unsettling force for established policies and inject new knowledge into the domestic debate; a process that Sabel and Zeitlin call "democratic destabilization".[31]

In summary, pressure by the peers that their recommendations are heeded, the public pressure that may result from a critical assessment during a review, the ongoing dialogical processes by which rules are clarified and states are reassured about their validity, and the questioning of established domestic policies are the mechanisms through which peer reviews may create effects on domestic policy. Importantly, these effects all work without the imposition of formal sanctions, so that peer reviews can be considered an important example of the *normative* approach discussed above. However, the extent to which peer reviews are successful in utilizing these mechanisms to affect domestic policy is an empirical question. Important factors in this respect are the institutional design of the review procedure as well as the degree of value conflicts that exist in a concrete policy field.[32]

[26] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; F Pagani and U Wellen, 'The OECD Peer Review Mechanism: Concept and Function' in K Tanaka (ed.), *Shaping Policy Reform and Peer Review in Southeast Asia: Integrating Economies amid Diversity* (OECD 2008) 261; R Terman and E Voeten, 'The Relational Politics of Shame: Evidence from the Universal Periodic Review' (2018) The Review of International Organizations 1.

[27] I Johnstone, 'The Power of Interpretive Communities' cit.

[28] *Ibid*. 186.

[29] KM Milewicz and RE Goodin, 'Deliberative Capacity Building Through International Organizations' cit.

[30] *Ibid*. 519.

[31] CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) ELJ 271.

[32] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

Looking at the latter issue, the rule of law is arguably a difficult case for peer reviews. The current leaderships of Poland and especially Hungary have made it clear that they perfectly well understand the principles of the rule of law as pronounced by the EU, but that they prefer to follow an alternative model of *illiberal democracy* instead. In this sense, the two countries are putting themselves outside of the "interpretive community" discussed above. Some observers have therefore discussed soft approaches as meaningless paper tigers and have argued that tough sanctions are the only sensible measure against rule of law dissenter states.[33] While there is some plausibility to this argument, it nonetheless falls short in three respects: first, the existing EU toolbox, including the instruments working through financial and political sanctions, is likewise crippled by severe problems. This issue will be covered in section III, with brief reviews of the art. 7 TEU and the budget conditionality procedures. Second, the new peer review on the rule of law will not stand alone, but be used as a complement to existing procedures. It may thus augment the sanctioning procedures, but also the existing softer mechanisms (such as the Commission Rule of Law Report), which will likewise be discussed in section III. In that sense, the question is less whether the new peer review on its own will generate results, but how it will be embedded into the existing toolbox of the EU to address rule of law problems in its member states.[34] Third, as highlighted by the three Rule of Law Reports that the Commission has published in 2020, 2021, and 2022, the focus of the debate should not only be on Hungary and Poland, but also on the other member states, which likewise show deficits in their rule of law culture.[35] Because of these three reasons, soft measures, such as newly established peer review on the rule of law, should not be dismissed out of hand.

III. What is wrong with the current approaches?

Concerns over the rule of law in Hungary and Poland exist for more than a decade now. Already in January 2012, the Commission sent three Letters of Formal Notice (as a first step in a possible infringement procedure) to Hungary, which expressed concerns over the

[33] RD Kelemen, 'You Can't Fight Autocracy With Toothless Reports' (6 October 2020) EU Law Live eulawlive.com; KL Scheppele and L Pech, 'Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?' (9 March 2018) Verfassungsblog verfassungsblog.de.

[34] Also see the remarks on the complementarity of the various instruments made by M Bonelli Bonelli, M Claes, B De Witte and K Podstawa, 'Usual and Unusual Suspects in Protecting EU Values: An Introduction' (2022) European Papers www.europeanpapers.eu 641.

[35] Communication COM/2020/580 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions of 30 September 2020: 2020 Rule of Law Report on the rule of law situation in the European Union; Communication COM(2021) 700 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 July 2021: 2021 Rule of Law Report on the rule of law situation in the European Union; Communication COM(2022) 500 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 13 July 2022: 2022 Rule of Law Report on the rule of law situation in the European Union.

independence of the country's central bank, the retirement age for judges and prosecutors, and the independence of Hungary's data protection supervisory authority.[36] The 2013 Tavares report by the EP critically reviewed the state of democracy and the rule of law in Hungary and called for the European Council to become active.[37] In 2017 and 2018, the EP and the Commission initiated art. 7 TEU procedures against Poland and Hungary, which have however not been brought to a formal vote in the Council yet. The Council, on its side, initiated an annual "Rule of Law Dialogue" in 2014, which turned out to be the nucleus of the peer reviewing procedure that is currently beginning to take shape. In 2019, the incoming von der Leyen Commission announced that fostering the observance of democracy and rule of law standards would be one of its priorities. This has led to the introduction of the so-called "Rule of Law Report" by the Commission, published for the first time in September 2020. Finally, the EP and the Commission tried to push a value-based conditionality mechanism in the discussions around the 2021-2027 MFF and the "Next Generation EU" budget. While there is no space within this *Article* to survey these instruments in detail, the chapters below each briefly review their main tenets and the successes and problems that the various mechanisms have run into. This provides the background against which the potential of the peer reviewing initiative will be discussed.

III.1. The article 7 procedure and the rule of law framework

Art. 7 TEU gives the European Union the possibility to address violations of one of the fundamental values of the Union as laid down in art. 2 TEU. This is done through a multistage procedure, which had originally been established in the Treaties of Amsterdam and Nice, but had not been used until 2017.[38] Under the framework of art. 7(1) TEU, the Council can – on the initiative of the Commission, the EP, or its own – determine the "clear risk of a serious breach" of the EU's fundamental values in a member state. It can also

[36] For a detailed discussion of the use and effects of infringement procedures against Poland and Hungary, and the potential of infringement proceedings in addressing the current rule of law crisis, see P Bogdanowicz and M Schmidt, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) CMLRev 1061; KL Scheppele, DV Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3. Infringement proceedings are not discussed in the present *Article* because of its focus on the *political* mechanisms that the EU may use against transgressing states.

[37] Report 2012/2130(INI) of the Committee on Civil Liberties, Justice and Home Affairs of 24 June 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012).

[38] The short-lived measures adopted by the other 14 member states against Austria in 2000 because of the participation of the right-wing FPÖ in the federal government were adopted on a bilateral basis and outside of the EU procedures. The ensuing political disaster did however reduce the willingness of the EU to use the art. 7 TEU procedure; see KL Scheppele and L Pech, 'Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?' cit.; B Schlipphak and O Treib, 'Playing the Blame Game on Brussels: The Domestic Political Effects of EU Interventions Against Democratic Backsliding' (2017) Journal of European Public Policy 352.

address recommendations to the member state concerned, in both cases acting by a 4/5 majority of its members. Before doing so, the concerned member state must have been heard and the EP must have consented to the Council becoming active by a two-thirds majority of the votes cast, representing a majority of its members (art. 354 TFEU). Art. 7(2) TEU goes a step further than this. It allows the European Council, on the initiative of a third of the member states or the Commission, to declare a "serious and persistent breach" of the values mentioned in art. 2 TEU by a member state; thus going beyond the recognition of a mere *risk* for such breaches. To do so, the European Council decides by unanimity, excluding the member state concerned (art. 354 TFEU). The consent requirements for the EP are the same as in art. 7(1) TEU. Following such a decision, the Council may in a next step decide to suspend voting and other rights of the member state concerned, this time acting by qualified majority (art. 7(3) TEU).

The use of art. 7 TEU is preceded by a *structured exchange* between the Commission and the member state concerned, which aims to resolve problems before the formal procedure is triggered. This mechanism (the so-called "Rule of Law Framework") was only used once until now, in 2016 against Poland, but to no avail. After the consultations did not generate results, the Commission triggered an art. 7(1) TEU procedure against Poland over the country's judicial reforms in December 2017. This was followed by a similar art. 7(1) TEU initiative by the European Parliament against Hungary in September 2018, quoting violations of the freedom of opinion and assembly, threats to the independence of the judiciary, corruption, and a crackdown on civil society. Both initiatives have led to consultations with the Polish and Hungarian governments in the Council. However, in neither case was a formal decision taken to establish the existence of a *risk* or even a *breach* of EU values, in line with arts 7(1) and 7(2). Observers mention a number of hurdles that have prevented such decisions hitherto.[39] These hurdles pertain, first, to the consensual culture in the Council and the European Council, which makes it difficult and politically dangerous to ostracise other member states. This may fire back in decisions for which unanimity is required, for instance when adopting the budget or deciding on foreign and security policy matters. Second, the consensus minus one requirement of art. 7(2) TEU in conjunction with art. 354 TFEU has prevented the use of the instrument against either Hungary or Poland, as both states have pledged to veto decisions directed against the respective other member state in the European Council.[40] This is especially so as the Council can act by a qualified majority in determining sanctions under art. 7(3) TEU, which makes it important for these countries to prevent the European Council from passing the art. 7(2) TEU hurdle in the first place. Third, it turned out to be difficult to

[39] RD Kelemen, 'The European Union's Authoritarian Equilibrium' cit.; U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure' (2017) Journal of European Public Policy 337.

[40] C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity Under Article 7 TEU' cit.; U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU' cit.

achieve the required two-thirds majority in the EP in the Hungarian case, because of continuing resistance in the EPP to act against the Fidesz government.[41]

III.2. The budget conditionality mechanism

Frustrated with the lack of progress on the two ongoing art. 7 TEU procedures, a broad coalition of EP members, the Commission, and numerous member states have pushed to make the payment of EU funds conditional upon observance of human rights, democracy, and the rule of law. These discussions took up pace in 2018 with the Commission proposal for a "new mechanism to protect the Union's budget",[42] and reached a high in the fall of 2020, in the context of negotiations over the 2021-2027 MFF and the "Next Generation EU" budget to deal with the fallout of the Corona crisis. In November 2020, Council and Parliament reached an agreement according to which the EU can reduce or halt payments from the EU budget if breaches of rule of law principles in a member state could jeopardize the financial interests of the EU. This would also be possible if there is only a *risk* of damages to EU financial interests (thus adding a preventive element). On the demand of the EP, a list of situations that would constitute a breach of the rule of law was adopted, which contains explicit references to the independence of the judiciary, arbitrary or unlawful decisions by public authorities, or the availability and effectiveness of legal remedies.[43] Another positive aspect of the regulation is that the decision to impose financial sanctions can be made by qualified majority in the Council on a proposal by the Commission,[44] so that there are no similar veto possibilities as in the art. 7 TEU procedure.

While these are significant developments, the fact that rule of law breaches in a Member State have to be demonstrated to "affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way"[45] constitutes a potentially weak spot in court cases and in any

[41] This obstacle has been removed though by Fidesz' decision to leave both the EPP parliamentary group and the EPP party family in March 2021.

[42] Proposal for a Regulation Communication COM(2018) 324 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 May 2018 on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

[43] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, arts 3 and 4(2).

[44] *Ibid*. art. 6, especially art. 6(10) and (11). A decision of the Council is preceded by a complicated procedure in which the Commission has to establish evidence of a breach of the rule of law, also hearing the concerned member state (art. 6(1-9)).

[45] *Ibid*. art. 4(1). Case C-156/21 *Hungary vs European Parliament and Council of the European Union* ECLI:EU:C:2022:974, opinion of AG Campos Sánchez-Bordona, para. 149: "Financial conditionality is restricted to those breaches of the rule of law which have a sufficiently direct link to budgetary implementation and which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union"; and para. 167: "The sufficiently direct link ensures

case "reinforces the level of proof to be provided by the Commission when proposing measures".[46] Moreover, the regulation could only be adopted after the opposition by the Polish and the Hungarian governments had been addressed through a political compromise that the new mechanism would not be applied for the time being. In particular, it was agreed that a CJEU ruling on the new mechanism would have to be waited for, and that application guidelines would have to be developed before the Commission would act on them.[47] While the CJEU dismissed Poland's and Hungary's actions for annulment of Regulation 2020/2092 on 16 February 2022, it confirmed that funds could only be withheld if rule of law violations would directly impact or at least constitute a serious risk of impact on the sound financial management or the protection of the EU's financial interests. Thus, the problem remains that "instead of protecting the rights of citizens in the country in focus, the mission was redefined as protecting the money of taxpayers (especially in net contributors of the MFF). This [...] implied that if the EU money was not subject of abuse, the Union would have no issue with the breakdown of rule of law and the decline of democracy".[48] In summary, the effectiveness of the conditionality mechanism will be fettered by two factors: first, the need for the Commission to establish sufficient proof for clear causal effects of *specific* rule of law breaches on financial interests of the EU will likely lead to a cautious and time-consuming approach of the Commission; second and linked to this, the fact that not all rule of law breaches can be targeted by the conditionality regulation, but only those where the abovementioned link to the financial interests of the EU can credibly be established.

Looking at the failure of the two EU sanctioning instruments to deliver significant outcomes hitherto, there is a need to review the potential of further instruments that the EU has at its disposal.[49] Such instruments fall into the *normative* approach to compliance

that the conditionality mechanism will not apply to all serious breaches of the rule of law, but will be limited to serious breaches that are closely related to implementation of the budget".

[46] A Dimitrovs and H Droste, 'Conditionality Mechanism: What's in It?' (30 December 2020) Verfassungsblog verfassungsblog.de. For a critical review of the regulation, see I Staudinger, 'The Rise and Fall of Rule of Law Conditionality' (2022) European Papers www.europeanpapers.eu 721.

[47] Conclusions of the European Council (EUCO 22/20) from General Secretariat of the Council to Delegations of 11 December 2020, para. 2(c). See the critical discussions by A Alemanno and M Chamon, 'To Save the Rule of Law You Must Apparently Break It' (11 December 2020) Verfassungsblog verfassungsblog.de; A Dimitrovs, 'Rule of Law-Conditionality as Interpreted by EU Leaders' (11 December 2020) EU Law Live eulawlive.com; N Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' (2021) European Papers www.europeanpapers.eu 101; KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (13 December 2020) Verfassungsblog verfassungsblog.de.

[48] L Andor, 'The Rule of Law Stalemate' (22 October 2020) The Progressive Post progressivepost.eu.

[49] This is a statement recognizing the political difficulties in using the existing sanctioning instruments. It is not a call for ending the political initiatives to make use of them. Moreover, there is clear academic and political interest to have an encompassing discussion on what the EU can do in the current rule of law crisis.

discussed in section II.1 above. Two of these instruments stand out, namely the Commission Rule of Law Report, and the Council's Rule of Law Dialogue.

III.3. The Commission rule of law report

The Rule of Law Report by the European Commission is a recent addition to the EU's toolbox in addressing rule of law concerns. It is based on two EP resolutions in 2015 and 2018 that called on the Commission to establish a comprehensive monitoring system for the rule of law that would target *all* member states, irrespective of the existence of any specific concerns over the rule of law.[50] The EP resolutions called for a system that would include an annual cycle of reporting and of recommendations to the member states. The Juncker Commission issued a communication in April 2019, which put up a number of issues for discussion, but refrained from making clear proposals.[51] This was followed by a communication in July 2019 which announced the will of the (outgoing) Juncker Commission to foster a "rule of law culture" and to step up the monitoring tools of the Commission.[52] A key proposal in this respect was the publication of an annual Rule of Law Report, which "would provide a synthesis of significant developments in the Member States and at EU level" and "could highlight best practices and identify recurrent problems".[53] This step was interpreted as an attempt to turn the spotlight away from Poland and Hungary as the only transgressors and to generate an EU-wide discussion on the issue instead.[54]

Heeding these earlier initiatives, the von der Leyen Commission issued the first Rule of Law Report in September 2020, and the second and the third in July 2021 and July 2022.[55] While – apart from Poland and Hungary – Bulgaria, Croatia, Romania, and Slovakia are described as facing specific issues in both the 2020 and the 2021 reports, the reports also describe problematic developments in Western member states, such as Austria, Germany, Italy, and Spain. The 2022 report additionally includes a set of country-specific recommendations for each member state.

[50] Resolution (2015/2254(INL)) of the European Parliament of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights; Resolution (2018/2886(RSP)) of the European Parliament of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights.

[51] Communication COM(2019) 163 final from the Commission to the European Parliament, the European Council and the Council of 3 April 2019 on Further strengthening the Rule of Law within the Union: State of play and possible next steps.

[52] Communication COM(2019) 343 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 July 2019 on Strengthening the rule of law within the Union A blueprint for action.

[53] *Ibid*. 11.

[54] Deutsche Welle, 'Jährlicher Grundwerte-Check für EU-Staaten' (17 July 2019) Deutsche Welle www.dw.com.

[55] Communication COM(2020) 580 final cit.; Communication COM(2021) 700 final cit.; Communication COM(2022) 500 final cit.

The report is remarkable in the breadth of sources that it builds on. It contains information provided by national contact points, interviews and consultations with stakeholders in all member states, virtual country visits, input from several European agencies and networks, and information assembled by other international organizations, specifically the CoE's Venice Commission and its GRECO (Group of States Against Corruption) committee. The report focuses on four areas: the quality of the justice system, the anticorruption framework, media freedom, and other institutional issues related to checks and balances. While media freedom (a key area of concern in many EU member states) is an addition to common understandings of the rule of law, the report is silent on broader issues related to the rule of law, such as the transparency and accountability of government conduct, or the protection of fundamental rights. Likewise, the report goes to great lengths in detailing national anticorruption frameworks, but is much less elaborate on whether these measures target key problems in the country. The report is also rather silent on government procurement and the use of EU funds.[56]

Another problem of the reports is that the chosen language is soft and does not go further than referring to "concerns" or sometimes "serious concerns", usually with reference to the views of third parties. This was criticized by the EP in a resolution on the 2020 report, in which it called the report "overly descriptive" and called "on the Commission to make future reports more analytical". Moreover, the EP considered "it necessary that future reports should contain country-specific recommendations on how to address the concerns identified or remedy breaches, including deadlines for implementation, where appropriate, and benchmarks to be followed up on" and called on the Commission "to include in the reports indications of the follow-up on the implementation of its recommendations and remedial action".[57]

While the Commission pledged to "carefully reflect" on these proposals,[58] the country-specific recommendations introduced with the 2022 report fall short of these proposals. While each country receives a number of recommendations, many of these recommendations keep generic ("take steps", "continue efforts"), and none of them sets a timeframe by when a certain benchmark or target has to be achieved. The recommendations are put into the context of the "preventive nature of the report" and are intended to "support Member States in their efforts [...], to encourage positive developments, and to help them identify where improvements or follow-up to recent changes or reforms may be needed".[59] While the Commission pledges to review the follow-up to its recommendations in future editions

[56] For a review of the 2020 report see A Mungiu-Pippidi, 'Unresolved Questions on the EU Rule of Law Report' (20 October 2020) Carnegie Europe Blog carnegieeurope.eu.

[57] Resolution (2021/2025(INI)) of the European Parliament of 24 June 2021 on the Commission's 2020 Rule of Law Report, consideration 5. Also see considerations 50 and 61.

[58] Communication COM(2021) 700 final cit.

[59] Communication COM(2022) 500 final cit. 2.

of the report, it also emphasises "consistency and synergies with other processes".[60] Specific references are made in this respect to financial support measures, the dialogues in the Council (section III.4 below) and the rule of law peer review, but also to the budget conditionality mechanism. Regarding the latter, it is argued that "the Commission may take into account the Rule of Law report […] when identifying and assessing breaches of the principles of the rule of law that affect the financial interests of the EU".[61]

III.4. The Council's annual rule of law dialogue

The Council's Rule of Law Dialogue, as established in 2014, seeks to "promote a culture of respect for the rule of law" in the EU. From the beginning, it was determined that the dialogue should "be based on the principles of objectivity, non-discrimination and equal treatment of all Member States".[62] On this basis, three dialogues were held in 2014, 2015, and 2016. In its first evaluation in 2016 by the General Affairs Council, the dialogue received a mixed appraisal. While the member states agreed that the dialogue should be continued in principle, they called for it to be "more result-oriented and better structured", and stressed the need for a more systematic preparation and focused discussions.[63] The Council suggested a mix of interactive discussions on the situation in the member states as well as debates on specific topics. In the context of the present paper, it is notable that the 2016 Council conclusions called for a re-evaluation of the dialogue by "the end of 2019, when the Member States should be more ready to consider the possibility of turning the dialogue into an annual peer review exercise".[64] The 2019 evaluation of the dialogue reached about the same conclusions as in 2016. The member states again called "for the dialogue to be stronger, more result-oriented and better structured, […], and for proper follow-up to be ensured".[65] Importantly, Poland and Hungary refused to endorse these conclusions.

Academic evaluations of the dialogue likewise paint a negative picture. While the existence of the dialogue as such is seen as a positive element, its "toothless" and "largely self-congratulatory nature" and the lack of a true dialogue are viewed critically.[66] As observed by Ravo, "governments were just invited (not obliged) to present on a particular

[60] *Ibid*. 4.

[61] European Commission, *2022 Rule of Law Report - Questions and Answers* ec.europa.eu.

[62] Conclusions 17014/14 of the European Council and the Member States meeting within the Council of 16 December 2014 on ensuring respect for the rule of law.

[63] Summary 14565/16 from Presidency to Delegations of 17 November 2016 on the evaluation of the Rule of Law Dialogue among all Member States within the Council.

[64] *Ibid*.

[65] Presidency conclusions 14173/19 from Presidency to Delegations of 19 November 2019 on evaluation of the annual Rule of Law Dialogue.

[66] KL Scheppele, 'EU Can Still Block Hungary's Veto on Polish Sanctions' (11 January 2016) Politico www.politico.eu.

aspect of the rule of law in their country. There were no questions, no reviews of a country's performance and no recommendations".[67] Pech and Kochenov describe the dialogue as "unhelpful if not counterproductive" and as merely offering a "façade of action in the absence of critical engagement with the crucial issues". As a possible way of improving the instrument, they identify the peer review proposal.[68]

IV. The EU rule of law peer review

Against the backdrop of the discussions above, the establishment of a peer review on the rule of law in the EU is the latest addition to the EU's toolbox in addressing rule of law deficits. Since November 2020, four reviews of individual member states were held in the General Affairs Council, in November 2020, April 2021, and November 2021, and April 2022. Given the recentness of the initiative and the fact that there are no first-hand accounts of the concrete functioning of the peer review, the assessment of the instrument has to focus on an appraisal of the agreed procedures. This will happen against two benchmarks: on the one hand, the extent to which the instrument of peer review can in principle react to the shortcomings of existing EU instruments, as identified in section III. On the other hand, the peer review will be assessed against factors that make peer reviews function well or less well in other international organizations.[69]

IV.1. History of the initiative

As discussed above, the introduction of a peer review to monitor the observance of rule of law is a proposal to give better structure and more power to the Council's Rule of Law Dialogue. The initiative gained pace in 2019, when the Belgian, Dutch, and German Foreign Ministers launched an initiative to introduce a periodic peer review on the rule of law. The objective was to initiate "a substantive exchange of views on the way the rule of law is implemented, monitored, guaranteed and enhanced within the respective legal and political systems of each of us Member States".[70] During the launch of the initiative, German Minister of State on Foreign Affairs, Michael Roth, also stated that "maybe our new mechanism can build bridges between East and West, North and South to overcome the stereotypes".

[67] L Ravo, 'EU Governments' Upcoming Rule of Law Peer Review: Better Get off on the Right Foot' (9 November 2020) Euractiv www.euractiv.com.

[68] L Pech and D Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (Working Paper June 2019) RECONNECT Policy Brief reconnect-europe.eu 4.

[69] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; V Carraro and H Jongen, '*Peer Review in Financial Integrity Matters* cit.

[70] D Reynders, M Roth and S Blok, 'Fundamental Values Check-Up: Let's Intensify Our Dialogue!' (28 November 2020) Federal Foreign Office www.auswaertiges-amt.de.

[71] On the same occasion, Poland made its support for a peer review dependent upon a "full guarantees of impartiality, objectivity, the role of EU institutions and states and relations with other procedures regarding fundamental rights". [72]

During the 2019 evaluation of the Rule of Law Dialogue mentioned above, there was broad support for the Belgian-Dutch-German proposal by 26 member states (except Hungary and Poland). The Presidency conclusions note the necessity of a "concrete elaboration of the procedure and modalities of a periodic peer review mechanism on the rule of law" and mention the planned use of the country-specific evaluations in the Commission's Rule of Law Report.[73] The availability of this new source of information thus became an important trigger for the new peer review. In the next step, the German Presidency announced to "launch a new peer review mechanism during its Presidency" a few days after the first Rule of Law Report was published on 30 September 2020.[74] Specifically, Germany proposed to introduce half-yearly "country-specific discussions" in parallel to the existing annual dialogue in the Council and emphasized that these discussions were to be "candid and critical".[75]

The first such exercise was conducted during the EU General Affairs Council of 17 November, comprising five EU member states selected by EU protocol (Belgium, Bulgaria, Czech Republic, Denmark and Estonia).[76] The next review round was held on 20 April 2021, covering Germany, Ireland, Greece, Spain and France, the third on 23 November 2021, discussing Croatia, Italy, Cyprus, Latvia, and Lithuania, and the fourth on 12 April 2022, covering Luxembourg, Hungary, Malta, The Netherlands, and Austria. The periodicity of the review, the discussion of evidence on individual countries, and the peer assessment of that information thus turned the previous Rule of Law Dialogue into a genuine peer review, a development that observers discussed as "a significant step forward".[77]

IV.2. Which institutional design for the initiative?

The institutional design of peer reviews can be usefully analysed according to the stages that a peer review typically goes through, namely *i)* the collection of information phase, *ii)*

[71] A Brzozowski, 'Belgium, Germany Make Joint Proposal for EU Rule of Law Monitoring Mechanism' (19 March 2019) Euractiv www.euractiv.com.

[72] *Ibid*.

[73] Presidency conclusions 14173/19 cit. points 15, 8, and 10. The Finnish presidency specifically mentions the establishment of a 'new mechanism for peer review' on the rule of law as one of the objectives of its presidency; see: Finland's Presidency of the Council of the European Union, *Strengthening the Rule of Law* eu2019.fi.

[74] Federal Foreign Office, *Germany: Working to Promote the Rule of Law in Europe* (2 October 2020) Federal Foreign Office www.auswaertiges-amt.de.

[75] *Ibid*.

[76] Germany did not participate because of its holding the presidency.

[77] L Ravo, 'EU Governments' Upcoming Rule of Law Peer Review' cit.

the evaluation and assessment phase, and *iii)* the follow-up and dissemination phase.[78] Another important aspect of the reviews is the scope of their assessment, *i.e*. the breadth of the topics covered. While the institutional evolution of the rule of law peer review is still in flux, a number of observations can be made, following the dimensions mentioned above.

a) Scope of review

The November 2019 Council conclusions announced a "comprehensive, genuine and interactive discussion broadly focused on the rule of law situation in the Member States and in the Union as a whole, taking into account both positive and negative trends". Further, the conclusions mentioned the planned use of the (country-specific) evaluations in the Commission's Rule of Law Report.[79] Building on this, the initial four rounds of the review followed the (limited) scope of the Commission report reviewed above. It thus covers the areas of: *i)* quality of the justice system, *ii)* anti-corruption framework, *iii)* media pluralism, and *iv)* other institutional issues related to checks and balances. While these are all important elements, the list is obviously limited and ignores the interdependence of the rule of law discussion with human rights and democratic standards. It is also much more circumscribed than the rule of law checklist issued by the CoE's Venice Commission.[80] This problem is unlikely to be addressed by the Council itself, but depends on the Commission's ambition in putting together its Rule of Law Report. As of now, there are no indications that the Commission intends to widen up the scope of its report.

b) Collection of evidence

The peer review is based on the information collected in the context of the Commission's Rule of Law Report. This report draws on a broad range of evidence collected by the Commission and the secretariats of other international organizations, most prominently the CoE's Venice Commission and the CoE's peer review in its Group of States against Corruption committee (GRECO). It also draws on assessments by the EU Fundamental Rights Agency, and a broad set of consultations of the EU with stakeholders at the national level,

[78] This differentiation of different phases of peer review diverges from a frequently cited distinction of phases in OECD publications F Pagani, 'Peer Review as a Tool for Co-operation and Change' cit. 20-21; U Wellen, 'The OECD Peer Review Mechanism' cit. 269–70. These authors distinguish the "preparatory phase", the "consultation phase" and the "assessment phase". For the purpose of the present study, the preparation and consultation phases as described by Pagani and Wellen are collapsed into the "collection of information" phase. The "assessment phase" discussed by Pagani and Wellen is relabelled "evaluation and assessment", in order to better grasp the complexity of this phase. Finally, I look at the "follow-up and dissemination" phase, which is not systematically covered by the OECD authors. Also see V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

[79] Presidency conclusions 14173/19 cit. points 8 and 10.

[80] UN Human Rights Regional Office for Europe, *The Case for a Human Rights Approach to the Rule of Law in the European Union* europe.ohchr.org. Similar criticism can be found in Resolution (2021/2025(INI)) cit. considerations 34-42.

including national human rights contact points, governmental actors and civil society sources. It is especially important in this respect that the government itself is consulted on the report and in the process of doing so becomes part of the ongoing dialogical process. The high (annual) frequency in which the Commission report is produced further enhances this effect.

Importantly, the way in which the collected information is evaluated is entirely in the hands of the Commission. This is defended by the Commission with reference to its role as "guardian of the treaty", but has also made it easier for Orbán and his likes to portray the information as the product of an unaccountable Brussels bureaucracy.[81] Orbán also tried to discredit the evidence collected from civil society players in the case of Hungary as stemming from sources funded by George Soros.[82] As discussed above, the evaluation and assessment of the situation by the Commission is rather cautious. In particular, there are no recommendations in the Rule of Law Report by the Commission which the Council could endorse and thus lend political weight to them.

c) Evaluation and assessment

The current rate of five countries per presidency period means that each member state is reviewed in the Council about every 2,5 to three years. This is less frequent than the reviews in the European Semester, but still in line with a number of well-functioning peer reviews such as the OECD's Economic and Development Review Committee (every 2 years). Other peer reviews show a much lower frequency.[83]

The review happens during one of the regular meetings of the General Affairs Council, using the non-public part of the meetings. This means that the review not only takes place behind closed doors; but also that only very limited time can be devoted to the review because of the many other issues on the agenda. A publicly available report of the third review cycle mentions that "around half an hour" was devoted to each of the five member states, comprising a short introduction by the Commission, and a presentation by each national delegation of "key developments and the particular aspects of its national rule of law framework". This was followed by "a round of comments in which other

[81] M Birnbaum and Q Ariès, 'E.U. Issues its First Rule-of-Law Report, Angering Leaders of Hungary and Poland' (30 September 2020) The Washington Post www.washingtonpost.com.

[82] V Orbán, 'Europe Must Not Succumb to the Soros network' (25 November 2020) www.miniszterelnok.hu. In this context, the (yet to materialize) plans by Poland and Hungary to set up their own "Rule of Law Institute" are notable. The stated aim of the institute is to ensure that their countries are not subjected to "double standards" and to provide "an alternative interpretation" of the situation. See S Walker and D Boffey, 'Hungary and Poland to Counter Critics with "Rule of Law Institute"' (28 October 2020) The Guardian www.theguardian.com. The blog About Hungary, *Rule of Law* abouthungary.hu gives an insight into how the Hungarian government seeks to discredit the rule of law principles and the corresponding EU instruments.

[83] For instance, the Environmental Performance Reviews of the OECD are only held every 10 years, while the peer reviews for medium-sized and smaller countries in the WTO Trade Policy Review Mechanism are held every 5 or 7 years, depending on size.

delegations shared their experiences and best practices in relation to the developments mentioned".[84] The very limited time devoted to the review is in contrast to other peer review exercises which usually take between half a day and a day per country, and sometimes (in the case of the WTO Trade Policy Review Mechanism) stretch out over two days. Even the UN Human Rights Council, which shows a very brief review time in comparison (3,5 hours per case), devotes much more time than the EU peer review.[85]

While no first-hand observations of the process are available, the limited time implies that no real discussion between the delegations is possible, let alone a joint assessment of the peers about the situation. The Council seems to abstain from making assessments on performance and does not seem to issue recommendations that could be followed up on during the next review cycle. Likewise, it seems that reviewed states are not pushed to make specific commitments to their peers, which the Council could return to in the next review of the respective country. The absence of these elements means that no peer pressure can be exerted. This is a key weakness of the new peer review.[86]

It remains to be seen which effects the introduction of country-specific recommendations in the Commission's 2022 Rule of Law Report will have on the discussion in the Council. The existence of such recommendations could provide greater focus to the discussions among member states. A focus on these topics could lend further political weight to the Commission report. It seems unlikely though that the GAC would formally adopt conclusions asking members states to heed specific recommendations from the Rule of Law Report. The fact that the most recent peer review in April 2022, which covered amongst others Hungary, "did not lead to the adoption of conclusions"[87] is notable in this respect.

d) Follow-up and dissemination

The way in which the rule of law peer review will be followed up on is unclear. There are two main reasons for scepticism: first, as observed above, there seem to be no recommendations by the Council to the countries under review that could be followed up on in

[84] European Council, *General Affairs Council*, 23 November 2021 consilium.europa.eu.

[85] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; T Conzelmann, 'The Politics of Peer Reviewing: Comparing the OECD and the EU' in T Blom and S Vanhoonacker (eds), *The Politics of Information: The Case of the European Union* (Palgrave Macmillan 2014) 49.

[86] Peer pressure has been discussed as a powerful element of peer reviews; see G Dimitropoulos, 'Compliance Through Collegiality' cit.; F Pagani, 'Peer Review as a Tool for Co-operation and Change: An Analysis of an OECD Working Method' cit. 16-17. As argued by Milewicz and Goodin in their review of the UN Universal Periodic Review (UPR), the dialogue during the review session is crucial: While "the Interactive Dialogue of the UPR itself may be only minimally deliberative – although that highly public moment of peer-to-peer accountability is arguably the key to its evoking commitments from states regarding their human rights performance. The prospect of being held to account in that way generates intense and ongoing deliberation before and afterwards that [...] seems to have made a positive difference to states" human rights performance. KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit. 519.

[87] European Council, *General Affairs Council* (12 April 2022) www.consilium.europa.eu.

terms of peer pressure in the Council and a review of implementation records during the next review meeting. The peer review thus lacks the character of a repeated exercise, which would arguably increase the "shadow of the future" and compel states to heeding behavioural expectations of their peers.[88] It thus lacks a crucial element through which states could be forced into an ongoing regime dialogue on the rule of law. Second, the lacking publicity of the procedure crucially inhibits the exertion of public pressure on transgressors.[89] No minutes or other material on the procedure and its outcomes are published by the Council. Many other peer reviews make material from the meetings available online, such as meeting minutes, summaries of the discussion, or (in the case of the UN Universal Periodic Review) even a live stream of the meetings. While keeping the doors closed may allow candid exchanges and sharing confidential information,[90] lacking publicity prevents political parties or civil society groups to pick up on review results and use them to exert public pressure on their governments.[91]

IV.3. Can the EU peer review address the problems of other approaches?

As the discussion above shows, the new rule of law peer review introduces some new elements to the EU's toolbox for addressing rule of law deficits, while at the same time suffering from some obvious problems. In terms of positive developments, the peer review clearly extends the Annual Rule of Law Dialogue in the Council. There is a true focus on the situation in a particular country instead of the less specific discussions in the dialogue. Building on the Rule of Law Report by the Commission, the member states are scrutinized against a fixed and relatively detailed (if however limited) catalogue of criteria. Each member state has to explain and justify its performance in these areas and is no longer in control of the topics under review, as was the case in the dialogue. Another positive aspect of the new peer review is that it covers all member states and is conducted on a regular basis. No claims can be made that the new instrument has been specifically designed to ostracise Hungary and Poland, even though the findings emerging from the Rule of Law Report (on which the peer review is based) may still be discredited as pro-Western and as biased.[92] As a regularly employed instrument, the peer review is less

[88] KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit. 527.

[89] Also see L Ravo, 'EU Governments' Upcoming Rule of Law Peer Review' cit.

[90] V Carraro and H Jongen, 'Leaving the Doors Open or Keeping them Closed? The Impact of Transparency on the Authority of Peer Reviews in International Organizations' (2018) Global Governance 615-635; JK Cowan and J Billaud, 'Between Learning and Schooling: The Politics of Human Rights Monitoring at the Universal Periodic Review' (2015) TWQ 1175.

[91] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.; U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU' cit.

[92] See for instance the blog published on the occasion of the second Rule of Law Report by Zoltan Kovacs, Hungarian Secretary of State for Public Diplomacy and Relations, in which the report is described as "a biased, politically motivated collection of blatant double standards"; Z Kovács, 'A European

extraordinary than the initiation of an art. 7 TEU procedure or the application of measures under the budget conditionality procedure. It may thus not be subject to the same public attention and politicization. A third welcome aspect is the relatively short review cycle. Countries will be reviewed every 2.5 to 3 years in the Council and annually by the Commission, which makes the rule of law situation a quasi-permanent point of attention for the EU and the member states. Provided that there is a political will, this allows a focused and specific dialogue with the country concerned. Such a focused dialogue can make an important contribution to the "rule of law culture" that the Commission and the Council aim at.

These positive aspects of the peer review have to be balanced against the problems reviewed above. The time allocated for the review of each country is very brief. A good part of the meeting seems to be spent on presentations by the Commission and the reviewed country, further limiting the time available for discussion and comments by the peers. The review also suffers from the absence of country-specific recommendations by the peers or the Council Secretariat, which prevents a more permanent review of shortcomings and the respective efforts of the country to remedy these problems. Given the little time available during the meetings of the General Affairs Council, the formulation of such recommendations during the meeting is impossible and could only work if the Council Secretariat prepared a list of recommendations that could be adopted during the meeting. Peer pressure can only work if the peers formulate clear behavioural expectations that need to be heeded by the time of the next review round. Finally, the lacking availability of documents from the review decreases the public visibility of the reviews and prevents a greater engagement of civil society and the broader public. Public pressure around the Rule of Law peer review is thus virtually non-existent.

The comparison with other international peer reviews shows that the instrument can be organized in a more ambitious format. As observed above, the time reserved for each review session is extremely short in comparison to other review exercises, which devote time between 3.5 hours (UN Universal Periodic Review) up to two days per reviewed country (WTO Trade Policy Review Mechanism). Presumably, the limited time given to the peer review in the General Affairs Council meetings is paralleled by a rather low priority that the General Affairs Council Secretariat is giving to the matter. Many peer reviews, especially in the OECD, but also in the CoE's GRECO end with a clear set of recommendations that the peers endorse and that reviewed member states commit to address by the time of the next review meeting. There are only some international peer reviews (such as the UNCAC Implementation Review Mechanism) which do not have recommendations, but this comes at the cost of a generally negative assessment of this review by

Commission Failure: Rule of Law Report a mere Regurgitation of our Political Opponents' Favorite Accusations' (21 July 2021) About Hungary abouthungary.hu.

participants.[93] Other peer reviews such as the UN Universal Periodic Review and the WTO Trade Policy Review Mechanism end by summing up a list of recommendations and questions by the member state, which has been shown to generate pressure on the reviewed member state.[94] Finally, and in contrast to the secretive nature of the EU rule of law peer review, most other peer reviews are providing a much richer documentation of the review and the documents discussed, ranging from searchable online databases of review documents and minutes of the meeting to the availability of webcasts of the review sessions for the UN Universal Periodic Review.[95] This aspect is especially important to safeguard both the ongoing dialogical nature of the review and to facilitate peer pressure. Therefore, while being a step forward, the new peer review in its current format leaves much to be desired. It is easy to mock it as another example of the EU's "new-instrument creation cycle", through which the Council, the Commission, and the EP are not only creating and using different instruments but are also pursuing different philosophies as to how the rule of law crisis of the EU can best be remedied.[96]

V. Ways ahead?

In the light of the highly visible debates on sanctioning rule of law transgressions in Hungary and Poland, less attention has been paid to the *softer* instruments of the EU in the current rule of law crisis. While instruments such as the new Council peer review and the Commission Rule of Law Report can be discredited as "toothless",[97] these instruments have the advantage of bringing all EU member states under scrutiny against the same standards, without the need to trigger specific procedures. Moreover, the wide consultation exercise that the Commission conducts for the Rule of Law Report gives domestic civil society, but also actors outside of the EU (such as the CoE's Venice Commission), a voice in the process. As preventive tools, the new peer review and the Rule of Law Report by the Commission hold the potential to generate an ongoing dialogue on the "Rule of Law Culture" in the EU. The biggest contribution of the peer review could be to increase the political weight of the Commission Rule of Law Report, by bringing member states

[93] V Carraro, T Conzelmann and H Jongen, 'Fears of Peers?' cit.

[94] V Carraro, *A Double-Edged Sword* cit.; T Conzelmann, 'The Politics of Peer Reviewing' cit.; KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit.

[95] World Trade Organization, *Trade Policy Reviews* www.wto.org; United Nation Human rights Council, *Documentation by Country* www.ohchr.org for the UN Universal Periodic Review; Council of Europe, Group of States against Corruption, *Evaluations* www.coe.int for the CoE's GRECO; Organization for Economic Cooperation and Development, *Economic Surveys and Country Surveillance* www.oecd.org for the OECD Economic Surveys.

[96] L Pech and A Wójcik, '"A Bad Workman Always Blames His Tools": An Interview with Laurent Pech' (28 May 2018) Verfassungsblog verfassungsblog.de. Also see U Sedelmeier, 'Political Safeguards Against Democratic Backsliding in the EU' cit.

[97] RD Kelemen, 'You Can't Fight Autocracy with Toothless Reports' cit.

into a dialogue about how to address areas of concern or country-specific recommendations as identified in the report.

The power of peer reviewing is not only dependent on good institutional design, but also on specific societal pre-conditions that a peer review itself cannot generate. Such pre-conditions are the existence of a lively civil society, a free and critical press, openness to transnational exchange, and a public sphere in which the values that the peer review seeks to protect are not controversial. The crackdown on civil society and media freedom by the current Hungarian and Polish governments, but also their attempts to portray the rule of law concept as a Western ideology used to strip post-Communist countries of their hard-won freedoms, are important in this respect. These actions undermine the fabric of shared values, political transparency, transnational exchange and civil society engagement that can put pressure on recalcitrant governments and trigger domestic reforms.

Peer reviews and other soft instruments cannot revert the illiberal tendencies in backsliding member states. However, they do possess the benefit of at least not severing the "rallying-around-the-flag" effect that the art. 7 TEU interventions have triggered in Hungary and in Poland and that has strengthened, rather than weakened, the governments of these countries.[98] Possibilities to address this "intervention paradox" exist and should focus on involving civil society actors within the countries concerned as allies (in order to decrease possibilities to portray the rule of law discussion as an intervention driven by external actors), the targeting of actors responsible for violations (in order to avoid that a whole country is punished), and the application of monitoring procedures to all member states instead of ostracising a few.[99] Both the art. 7 TEU procedure and the financial conditionality proposal reviewed above do not possess these qualities. While satisfying calls mainly in the Western EU member states to get tough on these two countries, it is yet unclear whether the EU's sanctioning procedures can ever reach the desired effects.

This does not necessarily mean that the new peer review and the Rule of Law Report will do better to address the situation in Poland and Hungary. The new peer review however holds promise in countries in which the decay of shared values and political freedoms is not as advanced as in these two countries. Thinking of the member states singled out in the recent Commission Rule of Law Reports as carrying problems with respect to the rule of law (such as Bulgaria, Croatia, and Malta), the new peer review may be helpful as a preventive tool to signal concerns of the peers in other member states and to engender civil society support for necessary reforms. To achieve this, the new peer review would need to receive more discussion time in the Council, a clearer focus, including country-specific recommendations, better transparency to the outside world, and a proper follow-up procedure. Such a reformed procedure could not only lead to an

[98] B Schlipphak and O Treib, 'Playing the Blame Game on Brussels ' cit.

[99] B Schlipphak and O Treib, 'Legitimiert Eingreifen: Das Interventionsparadox der EU und wie man es vermeiden könnte' (2019) Aus Politik und Zeitgeschichte 26.

ongoing dialogue and a discursive fortification of rule of law standards, but also a broader public debate in the respective member state. Experiences with the Universal Periodic Review show that this peer reviewing scheme has booked some successes in achieving both objectives.[100]

[100] V Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review' cit.; F Cowell, 'Understanding the Legal Status of Universal Periodic Review Recommendations' (2018) Cambridge International Law Journal 164; KM Milewicz and RE Goodin, 'Deliberative Capacity Building through International Organizations' cit.