

Gát, Ákos Bence¹

Analysing the new Rule of Law Mechanism of the European Commission: Origins, contexts and questions about of the first Annual Rule of Law Report

The European Commission announced in 2019 its plan to establish an “Annual Rule of Law Review Cycle”, with an “Annual Rule of Law Report” in its core. Consequently, it published its first Annual Rule of Law Report in 2020. Since that time, the official communications of the Commission refer to the Annual Review Cycle as the “Rule of Law Mechanism”.² It is a determining development in the evolution of the European rule of law control, which suggests that the debate on the rule of law will remain in the centre of European institutional and legislative agenda also in the 2019-2024 legislative term. This new instrument of the European Commission shows that the European institutional system is ready to invest more resources and energies in controlling the rule of law in European Member States. This article is going to provide a glimpse on the Annual Rule of Law report and its context. First, it is going to shed light on the origins of this new rule of law protecting mechanism. Second, it is going to explore more closely the report itself as well as the methodological and legal questions it raises.

I. The origins of the Annual rule of law Report

I.1. Previous rule of law controlling mechanisms in the EU

While the protection of the rule of law has long traditions in European countries,³ non-economic type of common values, such as the rule of law, only made it into the EU Treaties quite late, as a result of a slow development process.⁴ The issue of a possible European

¹ Researcher, Nemzeti Közzolgálati Egyetem, Eötvös József Kutatóközpont, Európa Stratégia Kutatóintézet.

² Press release of the European Commission. Strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement rule of law cycle. (17 July 2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4169 (28 October 2020)
Information about the Rule of law mechanism available on the website of the European Commission. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en (28 October 2020)

³ About the subordination of public administration to law as a requirement deriving from the rule of law in Hungary see: András, Patyi; András, Téglási. The constitutional basis of Hungarian public administration. In: Patyi, András; Rixer, Ádám; Koi, Gyula (ed.) *Hungarian Public Administration and Administrative Law*, Passau, Schenk Verlag, (2014) pp. 209-211.

About the constitutional protection of fundamental rights and the rule of law after the entering into force of the Fundamental Law: Téglási, András: *The Protection of Fundamental Rights in the Jurisprudence of the Constitutional Court of Hungary After the New Fundamental Law Entered into Force in 2012*, In: Zoltán, Szente; Fanni, Mandák; Zsuzsanna, Fejes (ed.) *Challenges and Pitfalls in the Recent Hungarian Constitutional Development : Discussing the New Fundamental Law of Hungary* , Paris, Éditions L'Harmattan, (2015) pp. 77-93.

⁴ Gát, Ákos Bence: *Küzdelem az európai szintéren – a Magyarországgal szembeni „jogállamiság”-kritika feltáratlan összefüggései*. Budapest, Közép- és Kelet-európai történelem és társadalom kutatásért Közalapítvány, (2019), pp. 66-109.

Téglási, András *Az emberi jogok védelmének nemzetközi rendszere*. In: Bende, Zsófia; Halász, Iván (szerk.) *Összehasonlító alkotmányjog: Fejezetek az alkotmány, az állam, az államszervezet és az alapvető jogok témaköréből*. Budapest, Nemzeti Közzolgálati Egyetem, Közigazgatástudományi Kar, (2014) pp. 154-160.

control of the respect of the rule of law in Member States appeared even later, in the early 2010s. The German, Dutch, Danish and Finnish Foreign Ministers called on the Commission in a joint letter on 6 March 2013 to set up a mechanism to verify the compliance of EU Member States with the rule of law criteria.⁵ The European Parliament formulated a similar claim in its resolution of 3 July 2013, also known as the “Tavares Report”.⁶ Subsequently, in its Communication of 11 March 2014, the Commission announced the establishment of a Rule of Law Framework.⁷

The Rule of Law Framework took the shape of a structured dialogue between the Commission and the given Member State regarding which the Commission considers breaching the principle of the rule of law. The mechanism was established on the analogy of the usual infringement procedures that the Commission applies against the Member States in case it considers that their national legislation is in breach of European law. This instrument was a considerable novelty, since it allowed the Commission to examine for the first time if Member States respected the values listed in article 2 of the Treaty on European Union, even if the matter of the examination fell outside the competences of the European Union.⁸

The Rule of Law Framework consists of three stages. As a first step, the Commission assesses whether there are any obvious signs of the rule of law being threatened in a Member State or not. The Commission informs the public about the initiation of the procedure but keeps the contents of the proceedings and hearings confidential at this point, in order to make it easier to find a compromise and a successful solution with the Member State. If no solution satisfactory to the Commission can be reached at this stage, the procedure enters a second phase. In this, the European Commission gives already more publicity to the ongoing dispute with the Member State. It addresses a so-called “rule of law recommendation” to the Member State, the main elements of which are also made public. As a third stage, the Commission monitors the follow-up given by the Member State concerned to the recommendation addressed to it. If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission assesses the possibility of activating one of the mechanisms set out in Article 7 TEU.

In 2014, the legality of the Commission’s Rule of Law Framework was disputed by the Legal Service of the Council of the European Union,⁹ which phrased a detailed legal criticism in connection with the new mechanism.¹⁰ According to the Legal Service, the Commission had neither the legal basis, nor the competence to create the new mechanism

⁵ The letter of the German, Dutch, Finish and Danish Foreign Ministers to the President of the European Commission (6 March 2013)

https://www.eerstekamer.nl/eu/documenteu/_brief_nederland_duitsland/f=/vji8oh6slx9o.pdf (3 January 2019)

⁶ European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (Strasbourg, 2013)

<https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//EN> (20 December 2016)

⁷ Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law (Strasbourg, 2014)

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158> (10 November 2016)

⁸ Gát, Ákos Bence: La genèse et la relation des différents instruments de la politique publique européenne de l’État de droit, In *Jogelméleti Szemle*, 2020/1. szám, pp. 17-33.

http://jesz.ajk.elte.hu/2020_1.pdf (29 October 2020)

⁹ This body, part of the General Secretariat of the Council, gives opinions to the Council, in order to ensure that Council’s acts are lawful and well-drafted both form and content wise. The Legal Service also represents the Council in judicial proceedings before the European Court of Justice, the General Court and the Civil Service Tribunal.

<https://www.consilium.europa.eu/en/general-secretariat/> (24 January 2019)

¹⁰ Council of the European Union, Opinion of the Legal Service. Commission's Communication on a new EU Framework to strengthen the Rule of Law: – compatibility with the Treaties (Brussels, 27 May 2014)

<http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en> (20 July 2017)

described above. I am going to detail this question at a later point.

While the Legal Service of the Council felt that the Commission went too far with its Rule of Law Framework, the European Parliament started working on a third, alternative rule of law mechanism, declaring that the solution of the Commission was not comprehensive enough. The European Parliament adopted a resolution on 25 October 2016, which consisted of recommendations to the Commission on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.¹¹ The mechanism suggested by the Parliament would have monitored annually all Member States. However, the Parliament's initiative in order to be effective would need that the Commission officially presents a legislative initiative following the indications of the Parliament. Though, on 17 January 2017 the Commission refuted the proposal of the EP by the following argumentation:

“The Commission has serious doubts about the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a committee of “experts” and about the need for, feasibility and added value of an inter-institutional agreement on this matter. Some elements of the proposed approach, for instance, the central role attributed to an independent expert panel in the proposed pact, also raise serious questions of legality, institutional legitimacy and accountability. Moreover, there are also practical and political concerns which may render it difficult to find common ground on this between all the institutions concerned.

The Commission considers that, first, the best possible use should be made of existing instruments, while avoiding duplication. A range of existing tools and actors already provide a set of complementary and effective means to promote and uphold common values. The Commission will continue to value and build upon these means.”¹²

The Commission, which considered that the rule of law mechanism of the EP did not have sufficient legal basis, refused at the same time the critics of the Legal Service of the Council according to which the Rule of Law Framework of the Commission was also illegal. In fact, the Commission decided to apply its Rule of Law Framework in practice, and announced on 1 June 2016 that it adopted a rule of law opinion regarding Poland.¹³ It moved the procedure against Poland into the second phase on 27 July 2016 and adopted a rule of law recommendation,¹⁴ which was followed by a second recommendation on 21 December 2016 and a third one on 26 July 2017.¹⁵ Since at the end of the procedure, the Commission still considered that Poland did not manage to address its concerns adequately, it decided to launch the Article 7 procedure on 20 December 2017.¹⁶ For the time being, Poland is the only

¹¹ European Parliament resolution 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 (Strasbourg, 2016) http://www.europarl.europa.eu/doceo/document/TA-8-2016-0409_EN.html (30 October 2016)

¹² Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, adopted by the Commission on 17 January 2017 (European Commission, Brussels, 17 January 2017) <http://www.europarl.europa.eu/oeil/spdoc.do?i=27630&j=0&l=en> (10 November 2017)

¹³ Press release of the European Commission. Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers. (Brussels, 1 June 2016) http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm (10 October 2017)

¹⁴ Press release of the European Commission. Rule of Law: Commission issues recommendation to Poland. (Brussels, 27 July 2016) https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2643 (10 October 2017)

¹⁵ Press release of the European Commission. Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland. (Brussels, 21 December 2016) https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4476 (10 October 2017)

¹⁶ Opening remarks of First Vice-President Frans Timmermans, Readout of the European Commission discussion on the Rule of Law in Poland. (Brussels, 20 December 2017). https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_5387 (2 February 2019)

country against which the Commission applied the Rule of Law Framework.

1.2. The initiative to enlarge the existing rule of law toolkit of the EU

The establishment of the Annual Rule of Law Report of the Commission shows that the Commission changed its position in a few years and decided to further enlarge its rule of law controlling toolkit with a mechanism that would monitor systematically all EU Member States. Indeed, in its first Annual Rule of Law report the Commission states that the Annual Rule of Law Report, as part of the bare new Rule of Law Mechanism of the Commission “*further reinforces and complements other EU instruments that encourage Member States to implement structural reforms in the areas covered by its scope, including the EU Justice Scoreboard and the European Semester, and now the Next Generation EU instrument. [...] It added, that “other elements in the EU’s rule of law toolbox will continue to provide an effective and proportionate response to challenges to the rule of law where necessary.”*¹⁷

The 2020 Annual Rule of Law Report present itself as stemming from the programme of the president of the Commission, Ursula von der Leyen. Actually, the report refers to the Political Guidelines of the new president, which “*set out the intention to establish an additional and comprehensive rule of law mechanism as a key building block in the common commitment of the EU and the Member States to reinforce the rule of law.*”¹⁸

Although the above-mentioned commitment is present in the new president’s political programme, the Annual Rule of Law Report is in reality a political heritage of the previous Commission lead by Jean-Claude Juncker. In fact, the origins of this new European rule of law tool go back to the end of the mandate of the previous Commission. Frans Timmermans, former first vice-president of the Commission announced on 3 April 2019 that the time arrived “*to reflect together with all institutions, Member States, different authorities and stakeholders on how to defend and bolster the rule of law in the Union.*”¹⁹ The Commission issued a communication in which it assessed the tools at that time available at European level to deal with rule of law issues. It reflected also on possible avenues for the future and put emphasis on the necessity of deepening Member State specific rule of law knowledge.²⁰ The Communication offered several question for reflection, among them: “*How can the EU enhance its capacity to build a deeper and comparative knowledge base on the rule of law situation in Member States, to make dialogue more productive, and to allow potential problems be acknowledged at an early stage? How could exchanges between the Commission and Member States on rule of law issues be most productively organised?*” The Commission invited “*the European Parliament, the European Council and the Council, and the Member States as well as relevant stakeholders, including judicial networks and civil society, to reflect on the issues presented in the Communication and contribute with concrete ideas on how the*

¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report. The rule of law situation in the European Union, COM/2020/580 final, (Brussels, 30 September 2020)

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580> (28 October 2020)

¹⁸ *ibid.*

¹⁹ Rule of Law: The Commission opens a debate to strengthen the rule of law in the EU, Press Release of the European Commission, (Brussels, 3 April 2019)

https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1912 (28 October 2020)

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Further strengthening the Rule of Law within the Union, State of play and possible next steps (Brussels, 3 April 2019)

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163> (28 October 2020)

rule of law toolbox could be enhanced in the future.” They added, “building on this reflection process and the ongoing debate, the Commission will return to this issue with its own conclusions and proposals in June 2019.”²¹

The communication of 3 April 2019 on “*Further strengthening the Rule of Law within the Union*” was issued just before the European Parliamentary elections which took place between 23 and 26 May 2019. This timing seems to be in connection with the European elections campaign of which the protection of the rule of law was one of the major topics. For instance, during the main debate between the lead candidates held on 15 May 2019 and largely broadcasted by European media, the concluding question referred to the situation of European values within the European Union.²² One should also note, that Frans Timmermans, the Commissioner in charge of the rule of law was also a lead candidate at the European elections to become president of the European Commission.²³

Another interesting fact related to the timing of the report is that the outgoing Commission decided to introduce such a mechanism at the very end, or more exactly after the end of the 2014-2019 legislative term. We can read in the communication on the 3 April 2019 that the Commission was considering to establish a new rule of law instrument and projected a major announcement for June 2019. Accordingly, the Commission started a stakeholder consultation during the election campaign and announced the introduction of the Annual Rule of Law Report some weeks after the vote, on 17 July 2019.²⁴ The political uncertainty related to the European parliamentary elections and the following change of leadership of the EU institutions could motivate this move. The promoters of the idea of an ever enlarging European rule of law control could have the objective to ensure that their policy remains fixed on the political agenda of the next Commission, regardless of the results of the elections. In the same way, the outgoing leadership of the Commission could seek determining the main lines of the new rule of law mechanism, leaving less leeway for the next leadership.

This is after such antecedents that Ursula von der Leyen ensured in her “Political Guidelines for the Next European Commission” her support for “*an additional comprehensive European Rule of Law Mechanism, with an EU-wide scope and objective annual reporting by the European Commission*”.²⁵ The Commission held between 24 March and 4 May 2020 a targeted stakeholder consultation. It also invited all Member States to provide information on the overall legal and institutional framework in their countries and on significant developments since 2019. It is important to note that the scope of the examination was limited to four fields predetermined by the Commission: justice systems, anti-corruption framework, media pluralism, and other institutional issues related to checks and balances.²⁶ With regard to the special context of the COVID-19 pandemic, the rule of law aspects of the measures related to the pandemic also entered the scope of the examination in some cases. According to

²¹ *ibid.*

²² The full versions of the 15 May 2019 Spitzenkandidat debate at the European Parliament available on Youtube: https://www.youtube.com/watch?reload=9&v=IzCa_T8BZVI (28 October 2020)

²³ List of the candidates available in European Elections 2019. (European Parliament). Reference No: 20180820SRV10205. pp. 11-12
<https://www.europarl.europa.eu/pdfs/news/expert/2019/2/service/20180820SRV10205/elections-press-kit-en.pdf> (29 October 2020)

²⁴ Press release of the European Commission. Strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement rule of law cycle (17 July 2019)
https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4169 (28 October 2020)

²⁵ A Union that strives for more. My agenda for Europe. Ursula von der Leyen, candidate for President of the European Commission. Political Guidelines for the next European Commission 2019-2024. p. 14.
https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (28 October 2020)

²⁶ European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report.
https://ec.europa.eu/info/files/2020-rule-law-report-methodology_en (28 October 2020)

the rule of law report, the “*Commission has been closely monitoring the application of emergency measures and this is reflected in the country chapters, where appropriate.*”²⁷

According to information available on the Commission’s website, all Member States sent written inputs, more than 200 stakeholders presented written contributions and the Commission held more than 300 virtual meetings with all Member States, stakeholders and civil society. The rule of law report published on 30 September 2020 presents itself as the result of the assessment of all these pieces of information.

II. The first Annual Rule of Law Report of the Commission

II.1. Methodological questions

The Annual Rule of Law report consists of several documents. The first one takes the form of a 27-page Communication on “The rule of law situation in the European Union”.²⁸ This document presents the context and the aim of the first Annual Rule of Law Report of the Commission. Then it gives an overview of its assessment regarding the situation in the European Union in the four identified fields. The document is organised by topics and tries to give a synthesis of the overall European situation. It picks up some practices from Member States as examples to illustrate its overall assessment. The second document is a 32-page abstract summarizing the country specific reports.²⁹ This document is organised by country, every one of them has a one-page abstract describing the main findings of the Commission. The third piece of documents consists of the detailed country specific reports.³⁰ In this, the dimensions change considerably depending on the country under examination. Luxembourg has for example only 14 pages, France 15 pages, while Poland and Hungary respectively 26 and 28 pages.

The dimension of the documents, which the Commission was supposed to use to prepare its evaluation, is quite impressive. One can find on the website of the Commission the inputs from the governments of all Member States.³¹ Their length varies in general between 30-50 pages, but there is also a country that provided over 110 pages. Some countries even prepared several documents as addendums to the original inputs. The website of the Commission also contains the inputs from civil society stakeholders who filled the Commission’s online questionnaire.³² The number of such stakeholder contributions varies by country. There are also three countries (Luxembourg, Latvia and Slovakia), for which there is no specific written stakeholder contribution, while in case of Lithuania and Cyprus

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report. The rule of law situation in the European Union, COM/2020/580 final, (Brussels, 30 September 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580> (28 October 2020)

²⁸ *ibid*

²⁹ Rule of law country reports 2020. (European Commission)

https://ec.europa.eu/info/sites/info/files/rule_of_law_2020_country_reports_2_web.pdf (28 October 2020)

³⁰ 2020 Rule of law report - Communication and country chapters. (European Commission) https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en (28 October 2020)

³¹ 2020 Rule of law report - input from member states. (European Commission) https://ec.europa.eu/info/publications/2020-rule-law-report-input-member-states_en (28 October 2020)

³² 2020 Rule of law report - stakeholder contributions. (European Commission)

https://ec.europa.eu/info/sites/info/files/2020_rule_of_law_report_-_stakeholder_contributions.zip.7z (27 October 2020)

stakeholders only provided anonymous inputs.³³ There are horizontal inputs from stakeholders as well, which do not concern a specific Member State and not follow the sample of the previously fixed online questionnaire. In addition, the European Union Agency for Fundamental Rights (FRA) also provided a 42-page contribution referring to its own surveys and reports, as well as to findings of other international organisations.³⁴ Finally, on the Commission's website we can also find the contributions of the Council of Europe for each Member State.³⁵ However, these documents do not contain written evaluations but long lists of links to the websites of the different organs of the Council of Europe, each of which leading to multiple documents of hundreds of pages.

There is no doubt that the Commission collected a very wide range of documents to support its first Annual Rule of Law Report. At the same time, taking into account the enormous quantity of information that it had to synthesize, several questions arise. For example, it is not evident if the Commission had enough administrative capacity to analyse in depth in a very short period of time, during the summer of 2020 all information. Correctly processing the information would have required not only a considerable increase of the number of the Commission's staff, but also recruiting a huge number of highly qualified legal professionals having thorough knowledge and a comparative perspective of the political and institutional systems of different European Member States. In addition, it is not clear, who and on which basis decided which inputs to take into consideration with which weight in case of contradicting information. Even if, this time, the Commission examined all countries, the Annual Rule of Law Report did not bring any additional guarantee for an objective analysis, compared to its previous rule of law controlling tools. The website of the Commission also refers to hundreds of virtual consultations, but they did not publish the content of these consultations.

Examining in detail the content of the rule of law report does not fall within the scope of the present analysis. This could be the subject of a separate analysis or several separate analyses, which should check all the inputs and compare them with the respective country reports of the European Commission in order to evaluate the quality of this new rule of law instrument. In such works, one should check for example if inputs suggesting positive and negative developments were taken into account equally in the case of each country. It would also be worthy to examine from a European and comparative constitutional law perspective to what extent the choice of concentrating the Annual Rule of Law Report on the aforementioned four selected topics impacted on the final outcome. Limiting the scope of the analysis both in time and in terms of topics could easily lead to a situation that the report does not touch upon important political issues experienced in some Members States during the last few years.

Analysing the Country abstracts allows concluding that the chapters about Hungary

³³The Commission published a document titled "Summary of the targeted stakeholder consultation for the 2020 Rule of Law Report" in which it communicated much higher numbers. Perhaps, the difference is due to methodological differences. For the present analysis, the numbers are provided on the basis of public and anonymous country specific stakeholder inputs sent in through the online questionnaire of the Commission and available on the Commission's website to download.

Summary of the targeted stakeholder consultation for the 2020 Rule of Law Report. (European Commission) https://ec.europa.eu/info/sites/info/files/2020_rule_of_law_report_-_summary_of_the_stakeholder_consultation_en.pdf (28 October 2020) Link to the public and unanimous country specific stakeholder inputs: https://ec.europa.eu/info/sites/info/files/2020_rule_of_law_report_-_stakeholder_contributions.zip.7z (28 October 2020)

³⁴2020 Rule of law report - stakeholder contribution - Fundamental Rights Agency. (European Commission) https://ec.europa.eu/info/sites/info/files/2020_rule_of_law_report_stakeholder_contribution_-_fundamental_rights_agency.pdf (27 October 2020)

³⁵ 2020 Rule of law report - stakeholder contribution - Council of Europe. (European Commission) https://ec.europa.eu/info/sites/info/files/stakeholder_contribution_-_council_of_europe_0.zip (27 October 2020)

and Poland remain the far most negative. In this regard, there is no change in the trend of the last decade; the two countries clearly remain in the focus of the European rule of law control. Even if all Member States received remarks, their nature and gravity are not comparable to those of the two mentioned countries. The report voices the most of the serious concerns about corruption, the situation of media and of the judiciary regarding Hungary and Poland, and to a less extent, regarding some “new” Member States that have also joined the European since 2004.³⁶ The chapter on Hungary for example contains only one positive sentence acknowledging that *“as regards efficiency and quality, the justice system performs well in terms of the length of proceedings and has a high level of digitalisation.”*³⁷ All the remaining sentences exclusively formulate negative assessments and concerns.

The careful reading of the country abstracts also shows that much depends on the wordings. For example, it is eye-catching that the chapter on Hungary observes with concern that *“the independent National Judicial Council faces challenges in counter-balancing the powers of the President of the National Office for the Judiciary in charge of the management of the courts.”*³⁸ While the chapter on the previous page, the one dealing with Luxembourg, where such a judicial council does not exist at all, presents as a positive development of the judiciary system already marked by a high level of independence, that *“a constitutional reform is being discussed in Parliament to further strengthen judicial independence [...] by establishing a council for the judiciary.”*³⁹

II.2. The question of the legal basis

Another important question is if the Annual Rule of Law Report has a sufficient legal basis in European law. The opinion of the Legal Service of the Council which I already referred to earlier is worth being quoted more in detail in this context. On 27 May 2014, the Legal Service assessed in detail the issue of establishing a European rule of law control over the Member States. The Legal Service pointed out that *“According to Article 5 TEU, ‘the limits of Union competences are governed by the principle of conferral’ [...]. Competences not conferred upon the Union in the Treaties remain within the Member States. [...] Article 2 TEU does not confer any material competence upon the Union but, similarly to the Charter provisions, it lists certain values that ought to be respected by the institutions of the Union and by its Member States when they act within the limits of the powers conferred on the Union in the treaties, and without affecting their limits. Therefore, a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions. [...] Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the*

³⁶ Bruxelles sonne l’alerte sur l’État de droit dans l’UE (Brussels sounds the alert on the rule of law in the EU). In [lefigaro.fr](https://www.lefigaro.fr) (30 September 2020)

<https://www.lefigaro.fr/international/bruxelles-sonne-l-alerte-sur-l-etat-de-droit-dans-l-ue-20200930> (28 October 2020)

Commission report finds many EU nations fall short on rule of law. In [politico.eu](https://www.politico.eu) (30 September 2020)

<https://www.politico.eu/article/european-commission-report-finds-many-eu-nations-hungary-poland-malta-bulgaria-falling-short-rule-of-law/> (28 October 2020)

³⁷ Rule of law country reports 2020, European Commission. Abstract – Hungary. (European Commission), p. 21. https://ec.europa.eu/info/sites/info/files/rule_of_law_2020_country_reports_2_web.pdf (28 October 2020)

³⁸ *ibid.*

³⁹ Rule of law country reports 2020, European Commission. Abstract – Luxembourg. (European Commission), p. 20.

https://ec.europa.eu/info/sites/info/files/rule_of_law_2020_country_reports_2_web.pdf (28 October 2020)

existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU. [...]

In other words, the Legal Service of the Council clearly determined that the Commission had created its Rule of Law Framework in 2014 in breach of the bases of EU law, since it wanted to act in a matter in which the European Union had no competence at all. Back then, the Commission's main counter-argument to this was that it had not created a new European procedure, but had come up with an internal decision-making mechanism, which now allowed it to properly weigh the activation of Article 7 TEU against a Member State. The Commission also emphasized that its recommendations made within the framework of the proceedings were not binding. However, the Legal Service was not convinced by this argument. According to the latter, *"the non-binding nature of a recommendation does not allow the institutions to act by issuing such type of acts in matters or subjects on which the Treaties have not vested powers on them; [...] even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect. [...] To build a permanent mechanism for a rule of law study and proposal facility operated by the Commission on the combined bases of Article 7 TEU and Article 241 TFEU⁴⁰ would undermine the specific character of the procedure of Article 7(1) - particularly concerning the way it can be initiated."*

The Legal Service came to the conclusion that *"there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article."*

This legal opinion was issued regarding the Rule of Law Framework that the Commission established in 2014. However, its conclusions are relevant also for the Annual Rule of Law Report. If according to the Legal Service, the Commission did not have the power to create a rule of law mechanism allowing the rule of law control of the Member States at an occasional basis, one could hardly argue that this would be different in case of the Annual Rule of Law Report establishing a much broader, systemic rule of law control, through which the Commission acquires even more power. The observations of the Legal Service according to which the "respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union", or that "there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law" are sufficiently general to be valid also for the Annual Rule of Law Report.

Therefore, even if this is not currently in the centre of attention, the Annual Rule of Law Report could lack sufficient legal basis under EU law. This leads to a paradoxical situation according to which the new European instrument established to control the rule of law in the Member States would be in breach with the rule of law of the European Union.

III. Conclusion

Since the early 2010's the European Union developed several mechanisms in order to control the situation of the rule of law in the Member States. On request of some European countries and the European Parliament, the Commission established its Rule of Law Framework. Later on, the Council put in place a Rule of Law Dialogue and the Parliament

⁴⁰ Under Article 241 TFEU the Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons.

made a proposal for an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.

In 2019, the European Commission announced completing the rule of law toolkit of the European Union by a new instrument, the Annual Rule of Law report. The previous political leadership of the Commission played a determining role in the establishment of this new policy tool, but the Annual Rule of Law Report was first published only by the new Commission, on 30 September 2020. According to the communication of the European Commission, this new tool, analysing the situation in all EU countries, ensures the equal treatment of all Member States. However, the careful assessment of the preparation and the outcome of the first Annual Rule of Law Report raises several methodological questions. Taking into account the 2014 expert opinion of the Legal Service of the Council, the legal basis of the Annual Rule of Law Report can also be questioned, which puts the European rule of law control on uncertain foundations.