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RULE OF LAW THROUGH THE MIRROR GLASS – IS THE NEW 2020 ENLARGEMENT METHODOLOGY A PRE-ACCESSION TEU ARTICLE 7 MECHANISM?

The rule of law in the EU is a very complex concept due to its nature, different understanding and its diverse practical implementation, which has led to rule of law backsliding. In parallel, the rule of law represents a crucial pillar of the conditionality policy of new accession processes. The EU's recent enlargement methodology introduced more stringent and conditional criteria for progress. This resulted in similarities between TEU Article 7 sanctioning mechanism and the new enlargement methodology that implies elaborate sanctions approach for candidate countries in cases of values' breaches, backsliding, stagnation and lagging behind. The EU polity has, therefore, taken advantage of the empiric knowledge about the rule of law within its own borders and in the enlargement countries, constantly moving between the thin and the thick concept of the rule of law. The two processes have been feeding into each other, therefore, resulting in a growing convergence.

Key words: *EU accession negotiations. – Western Balkans. – Sanctioning mechanism. – TEU article 7. – Enlargement methodology.*

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1. INTRODUCTION

In general, the rule of law represents a dynamic concept and notion with many definitions and emanations in various societies of the modern world. The EU itself, its Member States and the broad academic doctrine seem hopeless at defining what it means, too (Kochenov 2015, 7–8). The Union – being an organisation created voluntarily by its Member States, which in turn introduce distinctive, diverse and sometimes opposing societal, legal, cultural and other notions and traditions of the rule of law – is now experiencing serious challenges to the common understanding of what the rule of law represents. Its legal system is a *sui generis* form of legal order with overlapping and intersecting institutions on one hand, and the pan-European legal norms on the other hand (Culver, Giudice 2012, 75), which makes the situation appropriately complex. On the other hand, the rule of law is a necessity, a basis for EU law, which ensures the constant control of legislation through law. This makes it a principle important for the persistence of the idea of a unified polity that shares and respects a plethora of Union legal acts. However, the foundations of the European integration lie in Western societies. The concepts of values that the EU cherishes today are built upon the customs and traditions of Western Europe rather than of Eastern or South-Eastern Europe. This rift over the rule of law concept should to be considered when assessing the recent developments of the risks and breaches of the values of the Union.

The premise is that a common understanding on the rule of law does not exist at the level of the EU and that its form fluctuates between the thin and the thick concept. The thin rule of law is a formal view, of rather rule-by-law, of law as an instrument of government action with individual rights, property, contract, privacy and autonomy, which is all closer to the views of those Member States that object to the pervasiveness of the thick concept in the EU and provide for more of a thin or formal version (Drinoczi 2019, 6) than a thick one. The thick rule of law, on the other hand, includes formal legality, individual rights and democracy, and even social welfare rights (Tamanaha 2004, 111–112) and is best represented by the example of liberal democracy (Møller, Skaaning 2010, 8). The scale of the rule of law from the thin to the thick one can then be applied to the varying approach that some Member States/societies in the Union have in defining what the rule of law means for them. Although the EU has managed to build up its approach to creating its own definition of the rule of law (European Commission for Democracy through Law 2016) and develop mechanisms and procedures, such as Article 7, Rule of Law Framework, rule of law annual reports on Member States, to oversee and protect the rule of law concept as it is seen in Brussels, the fact persists that not all the Member States can agree on

what the rule of law is in essence. In the words of the Hungarian Justice Minister Judit Varga, 'Every state interprets the rule of law in light of their own historical, social and legal development. Accordingly, if we try to impose a one-size-fits-all version of the rule of law for all states, this could easily lead to the violation of national constitutional traditions' (*Hungary Today* 2021). The Calhounian[1] moment (*The Economist* 2021) that the EU is now experiencing is overburdening the relationship of the institutions such as the Court of Justice of the EU and Member States' courts. However, it is not just the brawl between the institutions, it is much more dangerous as it is the struggle for precedence of the Union acquis over national legislation, and vice versa, it is precariously undermining the unity of the Member States and undercutting the foundations of the EU – its acquis and, even more so, the common values.

The primary legal source for the rule of law in the EU is the triangle of three treaty articles: well-known Article 2 and Article 7 TEU, as well as the 'enlargement' Article 49 of the Treaty of Lisbon (TEU). Article 2 defines the EU values and their importance for the Union, while Article 7 develops the protective mechanisms. The fact that the rule of law is a *sine qua non* value is further reaffirmed through Article 49, which states that only European states that respect the values referred to in Article 2 and are committed to promoting them may apply to become a member of the EU. The EU, which was initially created as an economic community, has been gradually developing the elements of fundamental values and their promotion and protection in its primary and secondary legislation. The process picked up speed in the early 1990s with the new energy for both new internal integration forms within the EU and the enlargement towards the new democracies Eastern Europe. The Maastricht and Amsterdam treaties laid the legal foundations for the European values and embedded the rule of law as one of these while the Nice and Lisbon treaties continued the work and further strengthened the concepts. The past decade has also seen new initiatives and ideas on how to further develop the protection of the common concept of the rule of law in the EU through infringement procedures, a rule of law framework, various judiciary and anti-corruption initiatives and reports, conditionalities on using EU funds, and finally the most important one – procedures under Article 7.

[1] John Calhoun was an American politician and Vice-President of the USA before the Civil War, who advocated nullification – the right for states to strike down federal laws they deemed unconstitutional.

These developments coincided with the inability of Romania and Bulgaria to exit the Cooperation and Verification Mechanism,[2] which was set as a post-accession rule of law conditionality tool, as well as rapid negotiations of Chapter 23 (Judiciary and Fundamental Rights) for Croatia. On the other hand, discord on the issue of the common view of what the rule of law represents and discussions about it started being increasingly vocal. Hungary first and then Poland became perceived and ranked as illiberal democracies that had started to reverse on their approach to the Article 2 values, in what Lührmann and Lindberg call the third wave of autocratisation, unfolding with gradual setbacks under a legal façade (Lührmann, Lindberg 2019, 1095). This backsliding of rule of law has led to the first ever triggering of the sanctioning mechanisms of Article 7, with procedures ongoing at this time.

At the same time, the enlargement process has grown to be ever more conditional, i.e. based on more stringent and demanding rule of law criteria, especially through the most recent waves of accession talks. The new approach to negotiating rule of law chapters, in 2012 for Montenegro, and in 2014 updated for Serbia, was created in order to allow for a new generation of Balkan candidates to start accession talks. After long deliberations and discussions on when and under what conditions to open accession negotiations with Albania and North Macedonia, the EU came out with the new methodology (European Commission 2020a) and negotiation frameworks in 2020, thus allowing for the new two candidates to start the process. Invited to voluntarily do so, Montenegro joined the new methodology in May 2020 (European Integration Office, Government of Montenegro 2020) while Serbia announced its intention to participate in July 2020 (*European Western Balkans* 2020). The European Commission prepared a working document on the application of the revised enlargement methodology to the accession negotiations with Montenegro and Serbia (Council of the European Union 2021) in March 2021, which set further guidelines on how and to which aspects the new methodology would apply to the already negotiating candidates. These two processes, the first touching the delicate situation of the unity and agreement of EU Member States on the key provisions of its treaties, and the second that concerns the conditionality presented to the EU membership candidates, have been developed with a growing number

[2] The Mechanism for Cooperation and Verification was designed by the European Commission to monitor the post-accession implementation of commitments of Bulgaria and Romania in the area of judicial reform, corruption and organised crime. Although set up as a transitional measure in 2007, it is still valid for these two Member States as neither has managed to leave it.

of identical or similar tools for the protection of the rule of law. The latest negotiation frameworks for Albania and North Macedonia show that the Article 7 features are applied and introduced into its sanctioning procedures.

This paper offers a presentation and comparison of similarities between the two models and argues that the aggravating situation with the rule of law in Europe has to a great extent influenced the approach to the negotiation modalities. The experience involving primarily new Member States, which could not accomplish the necessary rule of law standards, in the opinion of the rest of the EU and the central European Member States, which demonstrated that reversibility in relation to fundamental values is possible and tangible, has had a considerable impact on making new negotiation talks longer and slower, and more profound in the EU demands and much more complex in the applied conditionality policy. On the other hand, the tools and mechanisms used in the enlargement process have in turn offered much inspiration and material for an increased rule of law conditionality within the Union itself. Therefore, this interactive experience worked in two directions, deriving inspiration from enlargement for the EU in its dealing with breaches of the fundamental values in the EU and vice versa, influencing future accession processes.

2. THE EU AND VALUES IN MEMBER STATES AND CANDIDATE COUNTRIES

The renowned Article 2 of the TEU states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. It further expands in the same paragraph stating that these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. These values were not part of the original treaties in the 1950s. It was only with the Maastricht Treaty that the notion of the principles of liberty, democracy and respect for human rights and fundamental freedoms, and the rule of law was introduced, although only in the preamble of the Treaty. Finally, Article F of the Treaty of Amsterdam introduced the fundamental values as the principles on which the EU is founded. These legal provisions in the primary EU legislation were later expanded and reinvigorated, through the Treaty of Nice (improving the mechanism in cases of values breaches) and the Treaty of Lisbon, leading to the legislative framework as we know it today.

The EU regards the rule of law as a prerequisite for the protection of all of the Article 2 TEU fundamental values. At the same time, new methods and approaches to promoting and protecting them have been the focus of the Union in the past decade. This has led to the fact that now the EU possess various instruments, such as infringement procedures for cases when EU law or Article 7 TEU procedure is breached. The Framework for Rule of Law (European Commission 2014) was proposed by the European Commission in 2014 and adopted by the Council (Council of the European Union 2014) after it was concluded that the traditional mechanism of the infringement procedure had not functioned properly in the case of the rule of law breaches. At the same time, Article 7 (paras. 2 and 3) was considered not flexible and sufficiently appropriate for Member States to be used against their fellow Member States, or it was an extremely high benchmark to achieve (Halmai 2018, 16). The Rule of Law Framework was, therefore, seen as a midway approach in addressing systemic threats to the rule of law in all the EU Member States. This mechanism permits the European Commission to start a dialogue with EU Member State in order to prevent the growth of systemic threats to the rule of law, but we can argue that it has primarily served to avoid situations where the Article 7 TEU procedure needs to be activated. Therefore, the Framework provides more in terms of techniques, dialogue and protective mechanisms than infringement, but is less effective and deterring than the Article 7 procedure. Although it introduced supplementary steps and levels of communication with Member States, in the end the Framework has not managed to dissuade Member States and prevent the initiating of Article 7. Building on the experience involving the 2014 Framework, in 2019 the European Commission proposed a new, improved mechanism (European Commission 2019b) to replace it. On this basis, the Commission presented its first round of annual rule of law reports in September 2020 (European Commission 2020b). This new rule of law peer review showed 28 'concerns' and 2 'serious concerns' in Poland, followed by 16 and 3 in Bulgaria and 11 and 1 respectively in Hungary (*Politico* 2020).

Article 7 TEU is the main and the most powerful mechanism for the protection of the common values of the EU, including the rule of law. Some call it a 'nuclear option' (quoting the famous State of the Union speech by EC President Barroso in 2013 (European Commission 2013a), others a 'paper tiger' (Osterdahl 2019, 241), which shows how controversial the mechanism really is. The preventive mechanism of this Article is reserved for exclusively a 'clear risk of a serious breach' in paragraph 1. This paragraph represents a tool that offers the Council the authority to give a warning before a 'serious breach' has actually materialised. At the same time the real sanctioning mechanism is presented in paragraph 2 of Article 7 TEU for the cases of 'serious and persistent breach by a Member State' of the values set out in

Article 2. Through the provisions of this paragraph the Council can suspend certain rights deriving from the application of the treaties to the EU country in question, including the voting rights of that country in the Council.

However, neither the preventive nor the sanctioning mechanism of Article 7 TEU have been applied in full to date. The Haider case of Austria in 2000 (Ahtisaari, Frowein, Oreja, 2000) was short-lived. It produced a bitter taste and a feeling of disunity in the Council, with premature and procedurally not entirely appropriate measures. This led to the consolidation and enhancement of preventive procedures, i.e. hearing of the EU Member States that were provided for in the Treaty of Nice. The EU had to wait more than 15 years to experience a serious and persistent breach of the rule of law in Eastern Europe. The Union has, therefore, increasingly turned to the prevention of the possible greater internal differentiation in relation to the practical realisation of the rule of law in the Member States, with the logic being that differentiation impedes the functioning of its legal order (Damjanovski, Hillion, Preshova 2020, 3). The two cases of Hungary and Poland, posing a clear risk of a serious breach of the Article 2 values, are the only ones to date, but they have not been finalised yet. Both countries have challenged the 'one size fits all' concept of the rule of law in the Member States. Once the 'Big Bang Enlargement' exploded in 2004, a few could predict that there would be certain new members of the EU in Central Europe who would challenge the unity of the Union and present themselves as illiberal democracies, as Viktor Orbán and Jarosław Kaczyński like to style their governments and political affiliations. This illiberal approach denotes a different attitude towards some of the founding blocks of democracy and rule of law, be it the independence of the judiciary, the autonomy of universities, or the freedom of speech. The differences in the interpretation of what would be the common European standard for the rule of law have produced consequences on both the theoretical and practical level, since not many in the EU could imagine that there would be democratic and rule of law backsliding once a country joins the EU. Once it happened, the harm done to the unity of the EU, as a common space that shares uniform views on the values, has transformed into long-term and very damaging consequences, which will be felt for years. On the other hand, in practical terms, the most acute examples of Poland and Hungary are putting to test the ability of the EU institutions to deal with breaches in certain Member States, but also the ability to find consensus in the Council. Some also see the intervention against Hungary and Poland as a part of the EU constitutionalisation process towards a more structured federal entity (Peirone 2019, 98).

The European Commission presented the Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (European Commission 2017) in 2017, thus initiating for the first time the procedure from Article 7 para. 1 Treaty on the European Union (TEU). On the other hand, the European Commission kept silent about the situation involving the rule of law in Hungary, although pursuant to Article 17(1) TEU it oversees the application of the Union law, therefore being the guardian of the acquis. Therefore, the European Parliament took the initiative and voted on the Resolution calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (European Parliament 2018). The council reacted in line with the provisions of Article 7(1) organising hearings of the concerned Member States throughout 2018 and 2019. However, the hearings were concluded with a clear dividing line between the Western (old) Member States raising questions and Eastern (new) Member States keeping silent (Pech 2019), which further showed the difficulty of reaching a consensus on the approach to potential rule of law breaches.

The EU has been not just divided along the Western/Eastern or old/new axes. Grabowska-Moroz and Kochenov speak about a more distinguished divide into five categories of states: committed enforcers (openly and loudly demanding a stronger role for the EU in enforcing rule of law and being very critical); soft enforcers (less proactive, but committed to rule of law): oscillators (changing positions regarding the enforcement of rule of law); reluctant anti-enforcers (reluctant to express criticism of offending states or to endorse strong rule of law enforcement), and strong anti-enforcers (Poland and Hungary and those who do not like the procedure applied to EU Member States) (Grabowska-Moroz, Kochenov 2020, 44). The scale of approaches to the rule of law issue demonstrates even more prominently the complexity of views, official standpoints and relations among EU Member States, especially in relation to a possible vote in the Council.

The problems of the divide are even more profound considering the lack of possibility to reach the situation where four fifths of the Council Members are needed to vote to finalise the procedure envisaged by Article 7 para. 1. Politics plays a far greater role in the dynamics of the work of the Council than the pure legalists would consent, or to quote Pech who claims that the general and non-explicit nature of the principles of Article 2, that are to be defended by Article 7, makes the establishment of breach by any Member State more political than legal (Pech 2009, 64–65). It should also be considered that this is only the first level of decision making in determining a risk, and not the existence of a serious and persistent breach of rule of law

by a Member State (para 2 of the same article) which calls for a unanimous vote (27 minus the concerned country). At this stage it would be quite hard to envisage the situations in which the 26 Members of the Council would vote to determine serious and persistent breach by either Hungary or Poland since the Council has not dared yet finalise the procedures that would result in the voting of the needed four fifths of its members. Even if this situation happens in the future, the second paragraph mechanism would be extremely difficult to transpire, since Hungary can count on Poland to block the unanimity decision and vice versa. Therefore, the provision of Article 7 para. 3, which could be put into practice through a qualified majority vote, is basically not attainable due to the second level of decision making (see Table 1 below). Hypothetically, this blocking could be avoided if there had been a common procedure of invoking Article 7 for both Poland and Hungary, so that the voting is done *en bloc*.

In any case, the situation with Article 7 is now the one of 'wait and see'. New challenges and problems occurred in 2020 due to the COVID-19 outbreak and its protracted consequences, which turned the focus of the Council, already reluctant to vote on Hungary and Poland, to other issues such as pandemic mitigation measures and the 2021–2028 MFF preparations. However, even these budgetary discussions were marred by the discord among the Member States. Both the adoption and implementation of a regulation that would condition the EU budget for the next perspective, on the basis of the rule of law requirements, have been vehemently opposed by Warsaw and Budapest, with its legality even being challenged before the Court of Justice of the EU. Against the backdrop of the pandemic, these processes are still waiting for a tangible and sustainable solution.

Nonetheless, the experience with the inability of the EU institutions, and primarily the Council, to deal with the breach of the values on which the EU is founded, has had its impact on the procedures and the preparation of how the EU will approach the new generation of negotiating countries. This can be seen in all the stages of Article 7 and the enlargement negotiations provisions, as shown in Table 1. The cases or causes of triggering sanctioning mechanisms are the same: (clear risk of) serious and persistent breach of the values on which the EU is founded, i.e. the rule of law. The enlargement methodology adds the backsliding to the possible risks, due to the progressive nature and dynamism of the accession negotiations. Therefore, a candidate country may not just host a clear risk of the rule of law breach, but also backslide on the rule of law and other commitments to the EU during its progress towards membership.

Once the risk is recognised, in the case of Article 7, the initiative can come from the European Commission, European Parliament, and one third of the Member States. The two mentioned European institutions have already both triggered the Article 7 mechanism in the case of Poland and Hungary, respectively, while it is highly unlikely at this stage to have one third of Member States initiate any such procedure on their own peers. Conversely, while the 2012 methodology had the same approach, in regard to the Commission and one third of the Member States (the Parliament having no role in this aspect of Enlargement Policy), the new 2020 methodology recognises the possibility of a duly motivated request of only one Member State. This is a big gamechanger, allowing any Member State to invoke such a corrective and strict procedure on candidate countries, and it stands in sharp contrast to the practice based on the Treaty of Lisbon provisions.

The hearing of the country in question is envisaged in all cases as allowing the State concerned to express its position on the matter. The decisions, on the other hand, vary based on the established facts and are suited to the status of the country: member (determination of existence of breach, suspension of certain rights) or non-member status (putting on hold certain chapters or full suspension of negotiations, or descaling of pre-accession support), as shown in Table 1. At the same time, the voting procedure is a mixture of various approaches of the EU to the field where we also see the recent introduction of a reverse qualified majority voting as a possibility in the 2020 methodology, if the EU wants to simplify the procedures to achieve a quick response. Finally, the European Parliament is either consulted or informed on the process, strengthening its position consistently.

What needs to be accentuated is the fact that there are no deadlines in the case of the Article 7 procedures, which leads to the deferment of decisions until the Council is ready to pronounce itself on the matter, as in the cases of Poland and Hungary. The same holds for the 2012 methodology which remains silent on deadlines. While we can expect that the negotiation frameworks for Albania and North Macedonia will prescribe precise deadlines for making decisions, we can also envision them stipulated in the recently adopted Rule of Law Conditionality Regulation.

Table 1 – Similarities among the two negotiating frameworks (2012 and 2020) and the Article 7 TEU mechanisms

	Article 7 TEU para. 1	**Article 7 TEU para. 2**	**Article 7 TEU para. 3**	**2012 METHODOLOGY**	**2020 METHODOLOGY**
Case/situation	In the case of **a clear risk of a serious breach** of the values referred to in Article 2, by a Member State	In the case of **a serious and persistent breach** of the values referred to in Article 2, by a Member State	Where a **determination under paragraph** 2 has been made	In the case of a **serious and persistent breach** of the values on which the Union is founded, by a **candidate country**	In the case of **a serious and persistent breach** of the values on which the Union is founded, by the **candidate country**, or where there is significant **backsliding** in a cluster or under a specific chapter that has not yet been provisionally closed.
Initiative by institutions	On a **reasoned proposal** by the **European Parliament** or by the **European Commission**	The **European Council,** or by the **Commission**		the Commission **will**, on its own initiative	the Commission **can**, on its own initiative
Initiative by Member States	By **one third of the Member States**	On a proposal by **one third of the Member States**		At the request of **one third of the Member States**	At the duly motivated request of **a Member State**
Action by the Candidate/ Member State	Before making such a determination, the Council **hears the Member State** in question and may address recommendations to it, acting in accordance with the same procedure.	after inviting the Member State in question to submit its **observations**		**Hearing** of the candidate country	**Hearing** of the candidate country
Type of a decision	determines a **clear risk** of a serious breach of the values referred to in Article 2, by a Member State	determines the **existence** of a serious and persistent breach of the values referred to in Article 2, by a Member State	may decide to **suspend certain rights** deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the Member State's government in the Council. The Council, acting **by a qualified majority**, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation that led to them being imposed.	recommends the **suspension of negotiations** (and propose the conditions for eventual resumption)	1. recommends the negotiations **be put on hold** in certain areas; 2. **suspends** negotiations overall. 3. in the case of provisionally closed chapters, they can be **re-opened or reset**; 4. the scope and intensity of EU funding could be **adjusted downward**.

	Article 7 TEU para. 1	Article 7 TEU para. 2	Article 7 TEU para. 3	2012 METHODOLOGY	2020 METHODOLOGY
Voting procedure	the Council, acting by a **four fifths majority of** its members	acting by **unanimity**	the Council, acting by a **qualified majority**	the Council will decide by **qualified majority**	the Council will decide by qualified majority; whenever relevant, **simplified procedures**, including **reverse qualified majority** voting, may be used to attain a quick response.
Role of the European Parliament	the EP shall provide the **consent**	the EP shall provide the **consent**; the EP will be **informed**		the EP will be **informed**	the EP will be **informed**

3. THE NEW ENLARGEMENT METHODOLOGY

The new enlargement methodology of the EU, in regard to Albania and North Macedonia, was created in order to overcome the deficiencies in the EU's new approach to negotiating Chapters 23 and 24, which was established in 2012 (European Commission 2012), but also in order to placate the Member States that have not been overly keen on opening new negotiation processes with more Balkan countries. The EC Communication 'Enhancing the accession process – A credible EU perspective for the Western Balkans' (European Commission 2020a) came as a result of a tumultuous process of negotiations between the Member States and the European Commission on how to overcome the blockade of the opening of accession talks with Albania and North Macedonia in the autumn of 2019. Namely, these two Balkan countries received the recommendation of the European Commission to open the accession talks in April 2018 (European Commission 2018b). The June 2018 Council responded positively to the progress of both countries, but also expressed the need for additional activities to be undertaken so that the first intergovernmental conference (IGC) for the opening of accession talks could be organised by the end of 2019 (Council of the European Union 2018). Along these lines, the June 2019 Council tried to reach a compromise on the decision to organise the IGC by the end of the year, yet failed in doing so and therefore decided to postpone the decision until October 2019, at the latest (Council of the European Union 2019a). In spite of long discussions and negotiations, during the summer of 2019 the Member States could not reach a satisfying common decision, which led to yet another postponement

at the October 2019 Council (Council of the European Union 2019b), and the commitment of the European Council to reach a decision by the time of Zagreb Summit in May 2020 (European Council 2019).

The main obstacle to reaching the needed consensus in the Council was France, both in the case of Albania and the case of North Macedonia, while the Netherlands had issues with the opening of negotiations with Albania. French President Macron insisted that the actual methodology of the accession negotiations was flawed and that it needed to be altered in order to be more adapted to the rule of law needs (Berretta 2019). Consequently, the French issued a non-paper calling for a renewed approach to the accession process and full compliance with the rule of law and the acquis (Government of France, 2019). One of the French demands was that the European Commission develop a new methodological framework for the negotiations of the new candidate countries, where France wanted to have four principles – gradual association, stringent conditions, tangible benefits, and reversibility – translated into the future methodology. And, indeed, the European Commission presented the new draft for the methodological framework to the Member States in early 2020, which was subsequently adopted and presented on 5 February 2020. This led to the decision of the Council for General Affairs, on 25 March 2020, to open the accession talks with Albania and North Macedonia and to start the preparation for the first intergovernmental conference with these two countries (Council of the European Union 2020).

The Communication underlined the need to further improve the effectiveness of the overall accession process and its implementation on the ground, especially in the area of fundamentals i.e. the rule of law, political and economic criteria, and public administration reform. The EU, on the basis of its concerns about the state of rule of law in the region, asked the Western Balkans political leadership to deliver more commitment and credibility within the reforms in the fundamentals cluster, which need to be tangible and sustainable. Thus, support to fundamental democratic and rule of law reforms, and alignment with core European values and the highest EU standards became the central issue in the negotiations for membership and it was accentuated even more than in the new approach on the rule of law of 2012. Nine years ago, it was pointed out that the 'countries aspiring to join the Union must demonstrate their ability to strengthen the practical realisation of the values on which the Union is based at all stages of the accession process' (European Commission 2012, 4). Consequently, the latest approach builds on these words and expands the stringency of rules, which in turn influenced the 2020 negotiation modality to differentiate significantly in certain parts from the previous negotiating frameworks for

Montenegro and Serbia. The key innovations are clusters, elaboration of the reversibility principle, strengthened conditionality, inclusion of reversed qualified majority voting (QMV) instead of QMV for the decision making, in cases when the Council wants to decide through simplified procedures in a quick response, as well as that all relevant chapters of the acquis shall be cross-checked against anti-corruption policies.

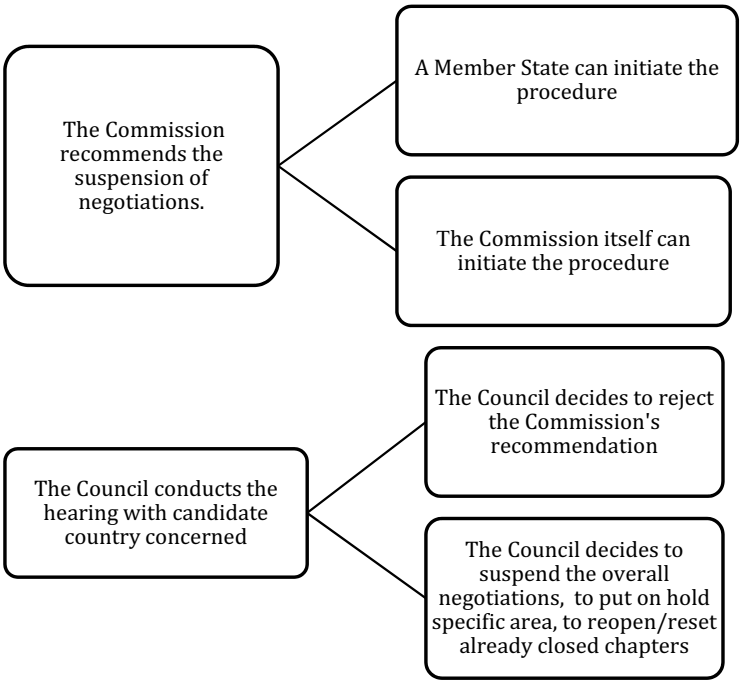
The chapters of future negotiations will be organised in clusters. Out of the six of them, the first one on the fundamentals is the most important. The new methodological framework prescribes the opening the Fundamentals cluster (the two key chapters, 23 – Judiciary and Fundamental Rights, and 24 – Justice, Freedom and Security; as well as three related ones: 5 – Public Procurement, 18 – Statistics, and 32 – Financial Control) first and it also adds that they will be closed last, the provision that did not exist in the 2012 negotiation framework. In addition to these five chapters, the Fundamentals cluster will also focus on economic criteria, the functioning of democratic institutions, and public administration reform. The new approach also clearly states that no other negotiating cluster will be opened before the Fundamentals cluster is opened, as well as that the progress under this cluster will determine the overall pace of the negotiations, while no other chapter will be provisionally closed before the interim benchmarks for Chapters 23 and 24, therefore giving the Fundamentals chapters an overall influence over the opening or closing of new clusters or chapters. Hence, the new approach will be even more stringent and exclusive to the overall dynamics of opening accession chapters. The clusters system will make the possibility of preparing or starting negotiations in other areas of the Union acquis, such as agriculture, transport, intellectual property, etc., even more difficult or even impossible if there is no satisfactory progress in the Fundamentals cluster.

The new methodology calls for a new generation of negotiation documents (roadmaps) to be developed – firstly the *roadmap for the rule of law Chapters 23 and 24*, which would serve as the basis for the opening of accession talks. As in the negotiation framework, e.g. for Montenegro, the action plans for Chapters 23 and 24 were set to constitute the opening benchmarks for these two chapters (Council of the EU 2012, 5), the future roadmaps would replace these action plans and subsequently serve as the opening benchmarks in the case of Albania and North Macedonia, while Montenegro and Serbia would continue using the already agreed action plans for Chapters 23 and 24 (Council of the European Union, 2021). The proposed *roadmap on the functioning of democratic institutions and public administration reform*, from the 2020 Methodology, builds on the expectations expressed in the 2012 New Approach of having the candidates and potential candidates start working

from an early stage on establishing and promoting the core democratic institutions, be it the national parliaments, governments, or judiciaries, i.e. all the necessary and essential parts of any democratic system (European Commission 2012, 4).

As this paper has already presented sanctioning or corrective procedures in parallel with Article 7 procedure, it suffices to say that compared to the 2012 approach, once the procedure is initiated, there is a clear sequence of steps leading to the decision on corrective measures or their lifting in the Council.

Table 2 – Procedure of the sanctioning policy in the institutions



The EU has also decided to apply an innovation in the EU decision-making procedures – a reversed qualified majority voting (RQVM) instead of qualified majority voting, as was the case with Montenegro and Serbia. The introduction of the decision-making mechanism greatly diminishes any chance of blocking the sanctioning procedures triggered in cases of breaching values, stagnation, backsliding or lagging behind. The RQVM usually considerably lowers the threshold for the majority needed to pass proposals, therefore making the adoption of the proposals almost automatic

(Van Aken, Artige 2013, 2). A Commission proposal is considered to be approved by the Council unless rejected by a qualified majority of Council members. On the other hand, it would be enough for it to be supported by a group of Member States representing at least 35% of the EU population, which is basically as large as a blocking minority. Finally, a blocking minority must include at least four Council members, pursuant to Article 16(4) TEU. The RQMV has been used mostly in the context of the Six Pack and the Stability and Growth Pact for sanctioning decision making. However, the legality of the RQMV is questionable since it derogates from the provisions of Article 16(3) TEU, laying down the general rule on voting in the Council (Miglio 2019, 11). Therefore, it remains to be seen if and in which cases and voting procedures this mechanism would be applied in the case of candidate countries, because the new methodology is not clear on it, only specifying its application in need of a 'quick response' (European Commission 2020a, 6).

Finally, the new negotiation frameworks further developed the cases in which the Commission, on its own, or on the proposal of now only one Member State, instead of one third as in the case of the previous Montenegrin and Serbian frameworks for negotiation, can trigger the sanctioning mechanisms. There are three different situations in which this can happen: 1) serious and persistent breach of values; 2) serious or prolonged stagnation or backsliding, and 3) progress of other chapters lagging behind the rule of law chapters (see Table 3). The provisions of the previous negotiation frameworks have been either extended or upgraded, now showing a higher level of detail and complexity.

Table 3 – Change in the sanctioning policy between the two negotiating methodologies of 2012 and of 2020

	2012 METHODOLOGY	**2020 METHODOLOGY**
Provisions in the case of breach	In the case of a **serious and persistent breach** by Montenegro/Serbia **of the values on which the Union is founded,** the Commission will, on its own initiative or on the request of one third of the Member States, recommend the suspension of negotiations and propose the conditions for eventual resumption.	*In the case of:* 1. a **serious and persistent breach** by Albania/North Macedonia of the values on which the Union is founded, the Commission can, on its own initiative or at the duly motivated request of a Member State, recommend the suspension of negotiations.
		2. any serious or prolonged **stagnation** or backsliding in reform implementation in the Fundamentals cluster
		3. any serious or prolonged **backsliding** in reform implementation in the Fundamentals cluster

	2012 METHODOLOGY	2020 METHODOLOGY
Imbalance clause	An **overall balance** in the progress of negotiations across chapters should be ensured. Given the link between the chapters Judiciary and Fundamental Rights, and Justice, Freedom and Security, and the values on which the Union is founded, as well as their importance for the implementation of the acquis across the board, should progress under these chapters **significantly lag behind progress in the negotiations overall,** and after having exhausted all other available measures, the Commission will, on its own initiative or on the request of one third of the Member States, propose to **withhold its recommendations to open and/or close other negotiating chapters, and adapt the associated preparatory work**, as appropriate, until this imbalance is addressed.	4. progress under the Fundamentals cluster significantly **lags behind progress in other areas** and this leads to an overall imbalance of the enlargement negotiations.
General backsliding across the chapters	An **overall balance** in the progress of negotiations across chapters should also be ensured. In the case of provisionally closed chapters, the Commission may **recommend the re-opening** of negotiations, in particular where Montenegro/Serbia has **failed to meet important benchmarks or to implement its commitments.**	Where there is **significant backsliding in a cluster or under a specific chapter** that has not yet been provisionally closed, the Commission can, on its own initiative or at the duly motivated request of a Member State, recommend that the **previous opening of the cluster concerned be reversed**.
Re-opening of chapters/ clusters	In the case of **provisionally closed chapters**, the Commission may recommend the **re-opening of negotiations**, in particular where Montenegro/Serbia has failed to meet important **benchmarks** or to implement its commitments.	In the case of **provisionally closed chapters** the Commission can, on its own initiative or at the duly motivated request of a Member State, recommend the **re-opening of negotiations on the chapter – and the cluster** of which it is a part if the cluster had also been provisionally closed – in particular where Albania/North Macedonia have failed to continue meeting important **benchmarks** or to implement its commitments.
Voting procedure	The Council will decide by qualified majority on such a recommendation, after having heard Montenegro/Serbia, whether to suspend the negotiations and on the conditions for their resumption.	The Council will decide by (reverse) qualified majority on such a recommendation, after having heard Albania/North Macedonia.
Role of the European Parliament	The European Parliament will be informed.	The European Parliament will be informed.

First of all, the *breach of the fundamental values* on which the EU is founded remains the primary cause for the initiation of sanctioning mechanism. In the enlargement this provision has the same guiding principle as Article 7 TEU, while the values remain the founding block of the accession talks pursuant to Article 49 TEU. Thus, negotiations are opened on the basis that a candidate respects and is committed to promoting the values of Article

2 TEU. Therefore, respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities are an essential and basic part of the negotiation process. They are to be understood as the prerequisite for conducting accession talks and as a cross reference to progress in any other chapter of the Union acquis. On the other hand, considering the dynamic nature of negotiations, the other cases of sanctioning are related to the rhythm of accession talks. But even there, the rule of law and other values constitute the backdrop against which everything else is measured. If there is a stagnation or backsliding or if there is no balance of progress between the rule of law chapters and the rest of the chapters or clusters, the EU can trigger procedures similar to Article 7 TEU.

Therefore, the sanctioning can be applied if there is any *serious or prolonged stagnation* within the chapters that belong to the newly created Fundamentals cluster. These situations would occur when a candidate country does not deliver on promised reforms, i.e. when it cannot show that it has fulfilled the objectives from the roadmaps on rule of law and on democratic institutions. This dynamic approach would basically mean that a country negotiating its entry into the EU needs to clearly show an even rhythm of implementing reforms and progressing towards membership. So, for a candidate, it becomes an issue when it, for example, achieves a certain level of preparedness for membership in the area of the judiciary and then stagnates, not taking any further initiative or a follow up; or when it procrastinates with performing anti-corruption legal or institutional reforms while it progresses in other areas of Union acquis that are less controversial or demanding. According to the new methodology, the sanctioning mechanism can be initiated in these situations, the Council can pronounce on its initiative that there exists a stagnation in a candidate country and thus prevent an overall disbalance where most of the work is done across other chapters, but not in the Fundamentals cluster.

This is basically a provision that ensures an overall balance between the progress shown within the rule of law and the rest of the chapters of the acquis. Knowing the importance of Chapters 23 and 24, as well as the EU fundamental values for the implementation of the acquis across the board, the EU insists on the links and causality between achieving good progress in both. This has become known as the '(im)balance clause' and it has started to be mentioned and used in the political discourse, especially in Montenegro. It is obvious that it would not be easy to say what is the measure of balance i.e. how many chapters can be opened and how many closed before the suspension clause is triggered. Consequently, considering that the imbalance clause represents a very serious mechanism that would put on hold the

accession talks of a candidate for a long time due to the complex procedural aspect, the EU has until now applied the approach of balancing in a more informal way. The negotiation framework for Montenegro specified that the chapters Judiciary and Fundamental Rights, and Justice, Freedom and Security should be tackled early in the negotiations (Council of the EU 2012, 16), thus allowing enough time to deal with the complexity of the chapter and the demands for legal, administrative and track record build-up. In practice this meant that Montenegro could open and provisionally close the two easiest chapters Science and Research (Chapter 25) in December 2012 and Culture and Education in April 2013 (Chapter 26) before it met the benchmarks for opening Chapters 23 and 24. When in December 2013 Montenegro finally opened the rule of law chapters, three additional ones that had been in the waiting room were also opened 5 – Public Procurement, 6 – Company Law, and 20 – Entrepreneurship and Industrial Policy. Serbia first opened Chapter 35 – Other and Chapter 32 – Financial Control in December 2015, and then opened Chapters 23 and 24 in July 2016, which allowed it to open and close Chapters 25 and 26, which Montenegro closed before opening the rule of law negotiations. Therefore, based on the mentioned provisions of the negotiation framework, the Member States wanted to have 23 and 24 opened at the outset, delaying the opening (or provisional closing) of other chapters further and further, as we can see in the examples of first Montenegro and then Serbia.

The sanctioning can also be triggered if there is *serious or prolonged backsliding*. In these, specifically difficult situations, a candidate country may adopt legislation or implement measures and, therefore, take steps that can be seen as regressing from the European standards that had been previously reached or adopted. Here it is important to note that the inspiration for the framework that does not leave space for any sign of regression was probably found in the experience of the EU with Hungary (Halmai 2019, 1505) and Poland – which Sadurski also calls 'democratic decay' or 'constitutional rot' (Sadurski 2018, 8) – as well as with Turkey, where a number of endogenous and exogenous factors led to democratic backsliding (Taskinsoy, Kuzey 2020, 16). Although Western Balkans candidates have not been very rapid in their accession to the EU, there have been minimal cases of backsliding in recent years. Montenegro had a legal backsliding in the area of public procurement because of the regression in the provisions within the new Law on Public Procurement, adopted in June 2017, which had reduced the level of compliance with EU rules. Namely, the EU found that it had been prepared by an ad-hoc task force, and without public consultation, which led to the fact that the new law no longer applied to low-value procurement and procurements in the area of defence and security, along with several new exemptions that were not in the EU acquis (European Commission 2018a,

54). Considering the fact that the Public Procurement Chapter (5) is now one of the chapters in the Fundamentals cluster, situations like this could be potentially problematic for the candidates from the Western Balkans.

Turkey, on the other hand, has been reported to have a number of cases of backsliding in its European integration. In 2019, the EU noted further serious backsliding in the field of the judiciary in Turkey, with political pressure on judges and prosecutors, and transfers of a large number of judges and prosecutors against their will, with negative impact on the independence and overall quality and efficiency of the judiciary. The area of fighting corruption experienced backsliding since the dismantled preventive bodies were not replaced by an independent body, while serious backsliding endures in regard to human and fundamental rights. There was also serious backsliding in the areas of freedom of expression, assembly, and association and in procedural and property rights. Lastly, in the area of public administration reform in 2019 there was serious backsliding in the area of public service and human resources management (European Commission 2019a, 6–7). The example of Turkey shows how, in the eyes of the EU, a candidate country can backslide on its way towards the EU. It stands as a warning of how things can change even once a country opens accession talks and that the process is not irreversible. All of it has influenced the approach to the new generation of candidates that are negotiating membership and accordingly it has been embedded to the new negotiating frameworks.

Finally, the new negotiation methodology specifies that if any of the mentioned potential problems are noted, the scope and intensity of pre-accession assistance could also be adjusted downward, with the support to civil society being the only one excluded from the descaling of financial assistance to candidate countries. This is a similar provision as laid out in the Regulation on a general regime of conditionality for the protection of the Union budget[3] (European Parliament, 2020), which calls for the adjustments to the suspension or re-budgeting of appropriations in the case of generalised deficiencies as regards the rule of law in the Member States. This, so-called rule of law conditionality regulation, once it enters into its full application, due to the legal challenge that Hungary and Poland launched at the Court of Justice of the EU, would improve the credibility of the enforcement action of the EC by lowering decision-making hurdles (Blauberger, van Hüllen 2020, 8), thus allowing the Commission to act – compared to the inability it faces now – with hard to implement high-ceiling standards of Article

[3] Regulation (EU, Euratom) No. 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, OJ LI 433/1 of 22/12/2020.

7. The conditionality regulation specifies in great detail the procedures needed for the suspension of payments, commitments and disbursement of instalments, and a reduction of funding in the cases of general deficiencies regarding the rule of law. The same is not true of the downscaling of pre-accession assistance, as it is left to the European Commission on how it will approach the said procedure. Nonetheless, the similarities between the two mechanisms – one for the Member States, the other for candidate countries – in sharing experiences and approaches to dealing with possible deficiencies or breaches of the rule of law through economic sanctioning, remain very close to each other, although their potential remains yet to be seen, as it has never been used until now for either case.

4. CONCLUDING REMARKS

The European Union has been undergoing a series of challenges and crises in recent years. One of the less visible ones, but not less important or decisive, has been the crisis of the axiom that the rule of law and respect of values enshrined in Article 2 TEU are of the same content and have a common definition for all the Member States. Equipped with the mechanisms of protection of its fundamental values, as they had been further strengthened and improved with the Treaty on European Union, the community continued to face the first real challenges to the founding values. Hungary and Poland have not just posed a risk to the concept of the rule of law and the unity of the European family, but have also put to the test the ability of EU institutions to initiate and utilise the procedures of the Treaty in order to safeguard the common standard of the principle of rule of law or other values.

On the other hand, the experiences with the latest enlargements have also played their part in changing the approach of the EU to the future member states. First, Bulgaria and Rumania had to enter a specially created post-accession vehicle for ensuring the conditionality based on rule of law – the Cooperation and Verification Mechanism. To this day, 13 years from the entry into the EU, these two countries have not managed to fulfil the criteria of the said mechanism and exit it. The unsuccessful negotiations with Turkey and the fact that Croatia entered the EU without having enough time to fulfil all the rule of law criteria have added to the complexity of the situation.

Therefore, as with the changes in the EU regarding the rule of law, the new approach to negotiating the rule of law chapters for Montenegro and Serbia was instituted in 2012, allowing these two countries to start accession talks. Based on complex and comprehensive action plans, Montenegro and Serbia, started the work on the rule of law, but to this date they have not managed

to fulfil the interim benchmarks set for Chapters 23 and 24. Faced with the need to open new accession talks with Albania and North Macedonia, as well as the opposition to it, the EU presented a new methodology for negotiation in early 2020 and, based on it, in July 2020 started the procedure of the adoption of the two negotiation frameworks, which has not been finalised even after nine months of discussion in the Council.

All the mentioned processes are very much intertwined and have been drawing inspiration one from another. Challenges to the application of the common concept of the rule of law, freedom of speech, and independence of the judiciary in some Member States have generated a more cautious approach towards potential future members of the Union. On the other hand, the inability to pursue fully the procedures of Article 7 has inspired tougher and more developed mechanisms, such as the recently adopted conditionality regulation and the rule of law annual reports of the European Commission. Also, this inability has pushed the EU to make the principle of conditionality even more stringent for candidate countries. In this manner, future negotiations with membership candidates are seen as a contingency for not ending in a situation where the EU would be faced with the possibility of invoking Article 7 mechanisms for future Member States. This is depicted in the upgrades done in the negotiation methodology which now puts many more conditions and criteria on the candidates before they can be deemed ready for various negotiation phases: opening, conduct, and closing of accession talks.

Oppositely, the experience with the recent enlargements and the difficulties that the actual candidates for membership are facing in adapting to the EU rule of law standards, have also induced initiatives and policies on strengthening the rule of law within the EU. The pre-accession conditionalities and mechanisms of monitoring and reporting are much more advanced than the ones that should be applied to the Member States, therefore allowing the EU to utilise this knowledge and experience into the newly created rule of law frameworks and procedures within the EU. In this way, Article 7 and the provisions of the negotiation frameworks for Balkan candidate countries are mirroring and feeding one into other. This is mirrored in the causes for the triggering of the sanctioning procedures, the provisions on who can initiate the procedure, the hearing of the concerned state, the decision-making mechanism, types of decisions and the role of the EU institutions. The Union is, thus, building its rule of law policy on both fronts, although with uneven results and varied dynamics, mirroring experiences from both worlds. This all points to the fact that the two processes will continue to influence each other as the rule of law grows in importance and influence.

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