The rule of law dialogue: five ideas for future EU presidencies

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Key recommendations:

- Increase the amount of time available for the dialogue and/or consider making more of available time by splitting Member States into smaller working groups chosen by lot;
- Choose a thematic focus for each dialogue. Use the dialogue to identify challenges faced by Member States within the thematic focus by reference to the findings of existing monitoring mechanisms (UN, Council of Europe, EU Fundamental Rights Agency) and examine how the national rule of law infrastructure (judiciary, NHRIs, media, civil society) is contributing to upholding the rule of law in this area;
- Involve the national rule of law infrastructure and regional and international human rights bodies in a seminar preparatory to the dialogue;
- Ensure a genuine exchange of views during the dialogue by stimulating Member States to ask questions, offer good practice solutions and make recommendations to be taken on by their peers;
- Facilitate implementation of recommendations by establishing/identifying a rule of law fund to support the rule of law infrastructure, offer technical assistance to Member States, and require Member States to report back on implementation of recommendations.

In December 2014 the Member States agreed in the General Affairs Council (GAC) to establish a 'dialogue' involving all EU governments, the objective of which is 'to promote and safeguard the rule of law'. Governments agreed that all Member States should be treated objectively and equally using a 'non partisan and evidence-based approach', and that in the course of the exercise Member States are bound by the principle of 'sincere cooperation'. Governments also agreed that the process

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should be 'complementary with other EU Institutions and International Organisations, avoiding duplication and [take]… into account existing instruments and expertise in this area'.[1]

The first rule of law dialogue, which took place on 17 November 2015 under the Luxembourg presidency of the EU, can be considered a positive first step. Over half of the half-day session was dedicated to the dialogue, where Member States raised a variety of issues and showed a welcome degree of openness and self-reflection. This paper sets out five ideas for future presidencies of the European Union to help it make its rule of law dialogue as effective as possible.

The nature of the dialogue: monitoring or implementation

As noted by the GAC's Conclusions on ensuring respect for the rule of law, EU Member States are subject to a number of mechanisms that monitor the state of implementation of their international human rights obligations, in particular through Council of Europe and United Nations bodies. This includes country reporting geared towards identifying systemic challenges with rights implementation, (such as that carried out by the Council of Europe's Commissioner for Human Rights or UN human rights treaty bodies and 'special procedures'), and monitoring via individual cases (for example, through the European Court of Human Rights and UN treaty bodies).

The GAC's dialogue is intended to be complementary to these processes, rather than to duplicate their work. As such, the dialogue would achieve little added value if it became a monitoring exercise. Furthermore, to maintain impartiality and objectivity, monitoring functions are generally assigned to bodies whose members are experts, independent of national governments. This also makes the Council an inappropriate forum for monitoring.

The dialogue can bring added value if it is directed towards assisting Member States to implement their obligations, in particular, the implementation of recommendations issued to Member States by regional and international rights monitoring bodies. While comprehensive data on implementation of recommendations by human rights supervisory bodies is limited, this does appear to be a problem. For example, compliance with decisions issued by UN treaty monitoring bodies on individual cases appears to be extremely low at around 12%.[2] Council of Europe and UN human rights

1 Council Conclusions on ensuring respect for the rule of law, Doc. No. 17014/14, 16 December 2014.

2 Baluarte, D., and De Vos, C., 'From judgment to justice: Implementing international and regional human rights decisions', 2010, available on: https://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf.

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mechanisms tend to be weak when it comes to follow up activities to stimulate Member States to implement their recommendations.

At the UN, States parties to UN human rights treaties do little to monitor implementation of recommendations and decisions issued by these bodies, other than 'taking note' of the treaty monitoring bodies' annual reports.[3] Since 2008, the UN's Human Rights Council has implemented a process of Universal Periodic Review where every State member of the UN has its human rights record reviewed by its peers over a four and a half year cycle.[4] The information used during the process includes a compilation of findings of UN human rights monitoring bodies. During the review process the State under review may voluntarily accept recommendations made to it by peers. Available data suggests that 'developed' countries fully implement around only half of the recommendations that they have accepted.[5]

The fact that the Council of the EU called on the European Commission to elaborate a mechanism to protect the EU's fundamental values, and that it has seen the need to establish its own rule of law dialogue, strongly suggests that something more than the UPR is needed to help foster respect for the EU's fundamental values by its Member States.[6] The Council has added value over existing fora as a means to foster better implementation of the EU's fundamental values by its Member States for at least two reasons. First, the EU's Member States, at least in theory, have already gone a long way to implementing international and European human rights standards as part of the process of joining the EU. This high level of convergence allows EU Member States to be more ambitious and self-reflective during the dialogue, by comparison to the UPR. Second, media attention is focussed to a greater extent on the EU than the Council of Europe or UN monitoring mechanisms, providing a stronger incentive for Member States to work in good faith towards implementing their obligations. Put otherwise, when human rights is discussed at EU level, Member States pay more attention than they do at the Council of Europe and the UN.

Based on the foregoing, it is recommended that the dialogue focus on supporting Member States to address challenges that have already been identified by Council of Europe and UN monitoring

3 See e.g. Report of the Third Committee of the UN General Assembly, Promotion and protection of human rights, UN Doc. A/69/488, 3 December 2014.

4 UN General Assembly Resolution 60/251, Human Rights Council, UN Doc. A/RES/60/251, 3 April, 2006; Human Rights Council Resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007.

5 This is based on analysis of implementation of recommendations voluntarily accepted by nine governments as part of the UPR process. Two of the countries analysed are EU member states (UK and the Netherlands). Frazier, D., 'Evaluating the implementation of UPR recommendations: A quantitative analysis of the implementation efforts of nine UN member states', 2011, 16, available on: http://www.upr-info.org/sites/default/files/general-document/pdf/-david_frazier_paper_upr_implementation_2011-2.pdf.

6 Council Conclusions on fundamental rights and the rule of law, Doc. No. 10168/13, 29 May 2013.

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mechanisms.[7] That is, rather than duplicating existing monitoring exercises, the dialogue should focus on implementation of recommendations issued by international supervisory bodies.

Use of time: longer sessions or smaller groups

One meeting of the GAC allows little time for all 28 Member States to go into depth on a given issue, particularly if each government is to go beyond making a statement on their own challenges and good practices and move into an exchange of views. Even if an entire half-day session were devoted to the rule of law dialogue, each Member State would have less than ten minutes of speaking time. While the first rule of law dialogue saw a relatively open and self-reflective presentation by each Member State, governments did not engage in an exchange of views. This limits the potential of the dialogue as a means of offering peer support between Member States, for instance, by offering each other good practice examples that may address problems being faced by their counterparts, or making recommendations to each other.

This does not compare favourably with other forms of inter-state dialogue in which all EU Member States participate currently. Under the UN Human Rights Council's UPR the duration of the review for each State is three and a half hours, with seventy minutes set aside for the State under review to speak.[8] In recent years, government representatives meeting in the Committee of Ministers of the Council of Europe have allocated almost ten full working days each year to discuss implementation of individual European Court of Human Rights judgments by their peers.[9]

The above examples strongly suggest that a considerably longer length of time is needed than that set aside for the EU's first rule of law dialogue. Future presidencies could consider making the most of the time available, by:

a. Using a full two-day meeting of the GAC, rather than allocating only one agenda item.

b. Dividing Member States into smaller working groups, for instance, groups of four States. These seven working groups could work in parallel and report back to the plenary of 28 Member States,

7 This is not to say that supplementary sources of information should be excluded, such as reports from civil society organisations that relate to issues that have not been given consideration by monitoring mechanisms.

8 Human Rights Council Resolution 17/119, UN Doc. A/HRC/DEC/17/119, 19 July 2011.

9 List of meetings available on: http://www.coe.int/t/dghl/monitoring/execution/wcd/dhmeetings_EN.asp?.

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allowing other Member States to put further questions and make further comments. Members of each working group could be selected by lot.

In the long run, the Council should consider holding the process over a longer number of days and every six months under each presidency, rather than once each year. This would significantly increase the amount of time available. The Council might also consider running a two-year cycle, according to which seven Member States would be reviewed every six months, allowing for all Member States to present their national situation every two years. Allowing more time could allow the dialogue to take place with all Member States participating together, rather through parallel working groups.

The initiative of the Dutch presidency to hold a preparatory seminar for the second dialogue in 2016 is a welcome step. Importantly, it can allow entities other than national executives to feed into the dialogue. In particular, the seminar should be open to participation from the bodies and sectors that make up the national rule of law infrastructure (discussed further below), namely, representatives of national justice systems, national human rights institutions, the media and civil society organisations. For the seminar to be most effective in its contribution to the dialogue, the choice of topic should be as close as possible to that chosen for the dialogue itself. As discussed below, the thematic focus of the rule of law dialogue is potentially extremely wide. The preparatory seminar should be used to allow the national rule of law infrastructure to give its perspective on the challenges and good practices these bodies and sectors encounter in their work to uphold human rights standards in the area of the thematic focus chosen for the dialogue. As well as including representatives of the national rule of law infrastructure, the seminar should incorporate the expertise of bodies responsible for monitoring implementation of human rights standards at regional and international level, in particular relevant Council of Europe and UN rights bodies and the European Union Agency for Fundamental Rights (FRA).

Substance: thematic focus or free choice

The Council appears to have endorsed a broad notion of the rule of law, which includes respect for international human rights law generally, and not merely principles such as equality before the law, the independence of the judiciary and promulgation of laws according to a pre-determined process. This is apparent from the Luxembourg Presidency's discussion paper for the rule of law dialogue, as well as the issues raised by Member States during the first dialogue, such as terrorism, freedom of

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expression, migration and hate speech.[10] This approach allows for a very wide scope of issues to be raised by Member States – which they indeed did during the first dialogue.

Allowing each Member State the freedom to determine which topic to raise may have the advantage of incentivising openness by governments, because they are able to choose topics on which they are less sensitive to criticism. However, selecting a thematic focus for the dialogue is more likely to meet the GAC's stated goal of promoting the rule of law. First, it makes it easier for Member States to learn from each other, as one government's examples of good practices are more likely to speak to another country's examples of challenges. Second, a thematic focus is more likely to generate an exchange of views and a true dialogue, because all Member States will be well briefed on the same topic, and so feel more comfortable responding to each other's interventions. Third, focusing on a particular issue also allows Member States to identify shared challenges that could benefit from an EU level response.

National rule of law infrastructure

The range of possible thematic focuses is obviously broad, if one considers that the dialogue could address any issue within the corpus of international human rights standards. Given that the implementation of international human rights law depends on the proper functioning of certain national bodies and sectors, the most appropriate focus for the dialogue would be to examine the health of this national infrastructure.

The Luxembourg presidency's note on the dialogue adopted the following definition of the rule of law:

> '[A] principle of governance by which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights norms and standards. Moreover, the rule of law entails adherence to a number of principles: be it supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness or procedural and legal transparency.'

According to this interpretation of the concept, the national infrastructure responsible for safeguarding the rule of law can be understood to include those bodies or sectors that: a) play a role in

10 Note from the Presidency, Ensuring the respect of the rule of law, Doc. No. 13744/15, 9 November 2015. See also Highlights and Main results of the General Affairs Council, 17-18/11/2015, available on: http://www.consilium.europa.eu/en/meetings/gac/2015/11/17/

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ensuring that governments act within the limits of the law, and b) exercise influence over the content of the law, either directly by interpreting and reviewing legislation, or indirectly by informing and influencing public and political opinion. The following bodies or sectors play such a role:

The judiciary, by ensuring that public and private entities act within the limits of the law and that the law is properly and fairly implemented, including respect for fundamental rights;

National human rights institutions, which may play a role in: implementation of the law where they have a dispute settlement function or participate in litigation or support litigants; conducting analysis of legislation and policy to ensure conformity with fundamental rights standards; contributing to balanced public and political debate by raising awareness on fundamental rights issues;

The media, because it informs and shapes public and political opinion and because it contributes to accountability of government towards the law and the electorate;

Civil society, which plays a role in: implementation of the law through litigation or assisting litigants; and contributing to balanced and informed public and political debate (e.g. through awareness raising, analysis and making recommendations) on fundamental rights issues.

Choice of thematic focus

Given that the courts are central to safeguarding the rule of law, the topic of access to justice would be highly appropriate for the dialogue. In several Member States access to justice is becoming more difficult because of various factors, such as the introduction or increase in court fees, cuts to legal aid and resources for the judiciary and, in some Member States, interference with the structural independence of the judiciary.[11] A dialogue on this topic could draw on existing work by the Commission on the EU Justice Scoreboard, which is based mainly on data transmitted by the Member States to the Council of Europe's Commission for the Evaluation of the Efficiency of Justice. This topic also falls to a significant degree within EU competence, given that Member States are under an obligation to ensure that effective judicial remedies are available for the enforcement of rights derived from EU law via the national courts.[12] The theme of media pluralism and independence would also be highly appropriate for the dialogue. The Council, Commission and European Parliament have all recently expressed concern at the challenges facing the media and their detrimental

11 Commission Communication, The 2015 EU Justice Scoreboard, COM(2015) 116 final, 9 March 2015; FRA, 'Access to justice in cases of discrimination in the EU: Steps to further equality', 2012; FRA, 'Access to justice in Europe: An overview of challenges and opportunities', 2011.

12 Case C–222/84, *Johnston*, 15 May 1986, para. 18.

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impact on effective democratic participation.[13] The dialogue could, for instance, be based partly on consideration of the indicators developed by the Commission (the Media Pluralism Monitor), which have already been applied to a number of Member States.[14]

Merging thematic focus with rule of law infrastructure

Given political sensitivities, Member States may be reluctant to focus the dialogue directly on the rule of law infrastructure, and might rather wish to focus on issues that are high on their political agendas, such as migration and asylum. Even if this is the case, governments should still be prepared to fulfil their commitment to promote and safeguard the rule of law by examining the chosen topic through a rule of law lens. That is, to examine the role of the national rule of law infrastructure in dealing with the thematic focus of the dialogue. This would allow for flexibility over the choice of substantive issue while at the same time rooting discussion in the rule of law.

Taking the example of migration and asylum, the dialogue might focus on the question: how are Member States ensuring that their response to increased flows of migrants and asylum seekers respects the rule of law?

Format and process: monologues or dialogue

The GAC's Conclusions on ensuring respect for the rule of law state that the dialogue should be evidence-based, objective and treat all participants equally. However, it is difficult to meet this commitment if Member States are allowed a completely free choice over which of their own rule of law-related challenges they wish to expose to their peers. Governments wishing to ensure a meaningful dialogue will inevitably raise issues that are more serious than governments who are more

13 Education, Youth, Culture and Sport Council Conclusions on media freedom and pluralism in the digital environment, 25 November 2013 (OJ C 32, 4.2.2014, 6); High Level Group on Media Freedom and Pluralism, 'A Free and pluralistic media to sustain European democracy', January 2013, available on: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf; European Parliament resolution on the EU Charter: standard settings for media freedom across the EU (2011/2246(INI)), P7_TA(2013)0203, 21 May 2013.

14 See documentation available via European Commission Digital Agenda for Europe website: https://ec.europa.eu/digital-agenda/en/media-pluralism-monitor-mpm.

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sensitive to criticism. Furthermore, self-selection of challenges by governments is clearly subjective, rather than objective, as set out in the Council Conclusions on ensuring respect for the rule of law.

Country fiches for the thematic focus

To treat Member States equally, objectively and on the basis of evidence, future presidencies could ensure that the dialogue addresses challenges that have been already been identified by Council of Europe and United Nations monitoring mechanisms, as well as reports of the FRA, depending on the thematic focus of the dialogue. The fact that these documents have been issued by independent third parties, through an established process to which all Member States have consented ensures their objectivity and legitimacy in the eyes of national governments. The findings of these bodies, as relevant to the theme under examination, could then be compiled into a country fiche for each Member State.[15] The presidency should also provide a channel for civil society and other stakeholders to submit supplementary information relating to matters that are not adequately covered by the reports of monitoring bodies.[16]

Questionnaires for the rule of law dimension

The presidency could use the preparatory seminar to identify which challenges the national rule of law infrastructure faces when dealing with the chosen thematic topic. Based on the difficulties identified, the presidency could prepare a questionnaire for Member States requesting information about whether they face and how they deal with these issues, including good practice examples.

The country fiches and questionnaires would collectively form the background papers for each Member State when they participate in the dialogue. This will make the dialogue more effective by allowing governments to be up to speed on the challenges faced by their peers. This in turn can facilitate more constructive exchanges because governments will have had some opportunity to reflect in advance of the meeting.

Applying this approach to the example of asylum and migration as a possible thematic focus, the country fiche would synthesise the main findings and recommendations issued by relevant Council

15 Inspiration for this can be drawn from the compilations of findings from UN human rights mechanisms produced by the UN Office of the High Commissioner for Human Rights as part of the Universal Periodic Review process. The collation and/or compilation of relevant materials could be drawn up by the European Union Agency for Fundamental Rights in conjunction with the Council Secretariat. See, e.g. Compilation prepared by the OHCHR in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Human Rights Council resolution 16/12: Austria (UN Doc. A/HRC/WG.6/23/AUT/2, 28 August 2015). Similar documents for all EU Member States are available via: http://www.upr-info.org/en.

16 For example, some civil society organisations lack funds to participate in the monitoring activities of UN and Council of Europe bodies.

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of Europe and UN bodies, as well as the FRA, which would show where governments are performing well and where they are facing challenges in maintaining human rights standards relating to migration and asylum.

The questionnaire would provide information on how the national rule of law infrastructure is contributing to maintaining human rights standards. For example: are courts and prosecutors responding to hate crime and hate speech against migrants and asylum seekers? Are courts dealing with asylum claims in line with EU law? Have NHRIs and NGOs been active in public and political debate? Has media coverage been balanced or inflammatory?

During the dialogue, within the thematic focus for debate, each Member State could present its overall assessment of the situation at national level. To allow Member States to provide each other with meaningful support and concrete recommendations, it is suggested that, after outlining the general situation pertaining to the thematic focus under discussion, governments then present the four foremost challenges: two from the country fiche and two from the questionnaire. The challenges chosen by each Member State should be signalled in advance to the other Member States in the working party. This would allow the other Member States in each working party to prepare questions, recommendations and good practice examples for discussion. The presidency could choose to allow each Member State to make a fixed number of recommendations, and require each Member State to accept a particular proportion of these recommendations as part of its follow up to be included in its concluding note (see below).

Outcome

If the GAC is to achieve its stated goal of promoting and safeguarding the rule of law, then the dialogue should lead to tangible steps to address the challenges that Member States identify. The presidency could propose the following steps.

First, the Council could request the establishment of a rule of law fund, or establish a directory of EU funds already available to Member States that could be used to support the rule of law infrastructure. Such funds could be aimed at, for example: establishing specialised posts in NHRIs to work on the thematic focus of the dialogue or provide training to judges and prosecutors. Funding could also be made available, to be administered by an independent third party, to provide support

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to the media sector, for example through training, or funding for investigative journalism, or to make grants to civil society organisations.

Second, based on the challenges raised during the dialogue, each Member State could draw up its own concluding note, with the assistance of the Council secretariat, setting out how it intends to address each of the four challenges it has chosen to elaborate on during the dialogue. Should the GAC choose to require each Member State to accept a particular proportion of recommendations made by its peers, then the accepted recommendations should also be included in the note. The note could also include requests for financial support from EU funds or for technical assistance from EU bodies with relevant expertise, such as the FRA, or UN or Council of Europe bodies. The presidency could specify a given time after which Member States should report back to their peers on what action they have taken.

Third, where common challenges have been identified through the dialogue, the Council could issue a recommendation or guidelines to the Member States. Implementation of such recommendations or guidelines could then be reviewed at a later pre-determined date.[17]

The voluntary commitments made by Member States in their concluding notes are not of themselves legally enforceable. However, the Council Conclusions on ensuring respect for the rule of law state that the dialogue is based on 'sincere cooperation'. The CJEU has found that the duty of sincere cooperation, contained in Article 4(3) of the Treaty on European Union imposes 'reciprocal duties of genuine cooperation' on the Member States and the EU to 'work together in good faith'.[18] Arguably, persistent non-cooperation in the dialogue process would place the Member State in question in breach of its obligations under Article 4(3).

17 Similarly to the Council Recommendation on effective Roma integration measures in the Member States, Doc. No. 16790/13, 6 December 2013.

18 C-507/08 *Commission v Slovak Republic,* 22 December 2010, para. 44. Similarly, Case C-411/12, *Commission v Italy*, 12 December 2013, para 38; Case C-344/12 *Commission v Italy*, 17 October 2013, para. 50; Case C-613/11 C*ommission v Italy*, 21 March 2013, para 38.

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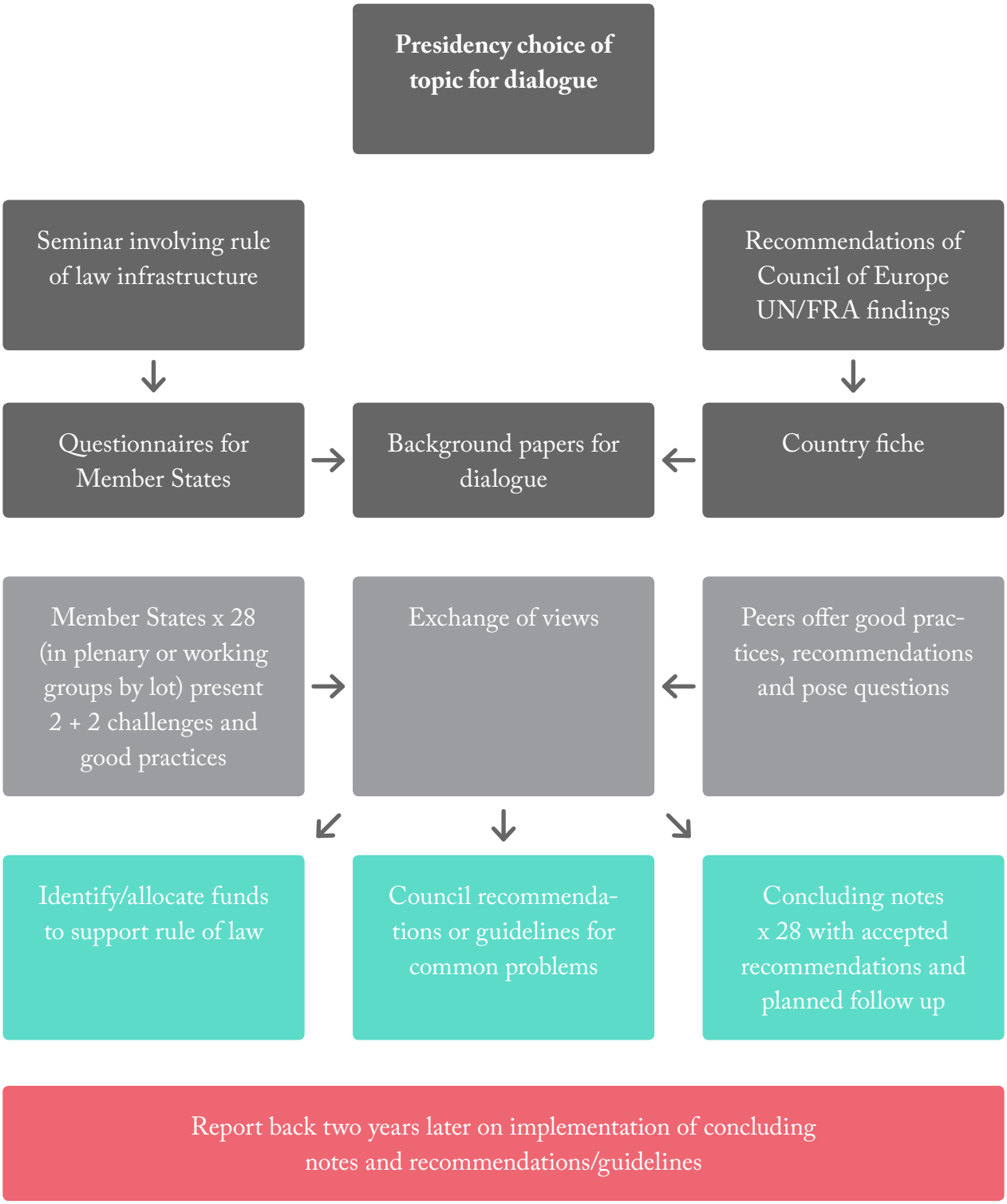

Visualisation of the dialogue process, which could be implemented over a two-year cycle, taking place every six months with seven Member States among their 28 peers, or on a shorter cycle using smaller parallel working groups.

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