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A new EU Framework to strengthen the Rule of Law

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL**

A new EU Framework to strengthen the Rule of Law

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1. INTRODUCTION

The rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. Along with democracy and human rights, the rule of law is also one of the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹.

Mutual trust among EU Member States and their respective legal systems is the foundation of the Union. The way the rule of law is implemented at national level plays a key role in this respect. The confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into "an area of freedom, security and justice without internal frontiers"². This confidence will only be built and maintained if the rule of law is observed in all Member States.

The different constitutions and judicial systems of the EU Member States are, in principle, well designed and equipped to protect citizens against any threat to the rule of law. However, recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action. Results have been achieved. However, the Commission and the EU had to find ad hoc solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law.

The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect³. In September 2012, in his annual State of the Union speech to the European Parliament, President Barroso said: "We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU. In the following year's speech, he said that "experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework [...]. The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe."⁴

¹ See the Preamble of the ECHR and Article 3 of the Statute of the Council of Europe (<http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>).

² See Articles 3(2) TEU and 67 TFEU.

³ See the speech of Vice-President Reding, EU Justice Commissioner, "The EU and the Rule of Law – What next?" (http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm).

⁴ See http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm and http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

In June 2013, the Justice and Home Affairs Council underlined that "respecting the rule of law is a prerequisite for the protection of fundamental rights" and called on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues". In April 2013, the General Affairs Council held a comprehensive discussion on the topic.⁵

In July 2013, the European Parliament requested that "Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law"⁶.

This Communication responds to these requests. On the basis of the Commission's experience, the inter-institutional debate and broad consultations⁷, the Communication sets out a new framework to ensure an effective and coherent protection of the rule of law in all Member States. It is a framework to address and resolve a situation where there is a systemic threat to the rule of law.⁸

The framework seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met. It is therefore meant to fill a gap. It is not an alternative to but rather precedes and complements Article 7 TEU mechanisms. It is also without prejudice to the Commission's powers to address specific situations falling within the scope of EU law by means of infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU).

From a broader European perspective, the framework is meant to contribute to reaching the objectives of the Council of Europe, including on the basis of the expertise of the European Commission for Democracy through Law (Venice Commission)⁹.

2. WHY THE RULE OF LAW IS OF FUNDAMENTAL IMPORTANCE FOR THE EU

The principle of the rule of law has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and

⁵ In March 2013, the foreign ministers of Denmark, Finland, Germany and The Netherlands called for more European safeguards to ensure compliance with fundamental values of the Union in the Member States. On the discussion in the General Affairs Council see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf. On the conclusions of the Justice and Home Affairs Council see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf

⁶ See the EP resolutions setting out various recommendations to the EU institutions on how to strengthen the protection of Article 2 TEU (the Rui Tavares Report of 2013, the Louis Michel and the Kinga Göncz Reports of 2014 - <http://www.europarl.europa.eu/committees/en/libe/reports.html>).

⁷ At the Assises de la Justice, a high level conference on the future of justice in the EU in November 2013 which was attended by over 600 stakeholders and interested parties, one session was specifically dedicated to the topic "Towards a new rule of law mechanism". A call for input was organised before and after the conference that attracted numerous written contributions (see http://ec.europa.eu/justice/events/assises-justice-2013/contributions_en.htm).

⁸ As President Barroso highlighted in his State of the Union address of September 2013, the framework "should be based on the principle of equality between Member States and activated only in situations where there is a serious and systemic risk to the rule of law, and triggered by predefined benchmarks" (see http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm).

⁹ The Venice Commission, officially named the European Commission for Democracy through Law, is the Council of Europe's advisory body on constitutional matters (see http://www.venice.coe.int/WebForms/pages/?p=01_Presentation).

the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.

Those principles include **legality**, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; **legal certainty**; **prohibition of arbitrariness of the executive powers**; **independent and impartial courts**; **effective judicial review including respect for fundamental rights**; and **equality before the law**¹⁰.

Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components¹¹.

This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.

Within the EU, the rule of law is of particular importance. Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as "an area of freedom, security and justice without internal frontiers". Today, a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State¹². Those are clear examples of why all Member States need to be concerned if the rule of law principle is not

¹⁰ For an overview of the relevant case law on the rule of law and the principles which the rule of law entails see Annex I.

¹¹ The Court of Justice does not refer to the rule of law as simply a formal and procedural requirement, but also highlights its substantive value by specifying that a "Union based on the rule of law" means that the EU institutions are subject to judicial review of the compatibility of their acts not only with the Treaty but "with the general principles of law which include fundamental rights" (see *ex pluribus*, Case C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-06677, para 38 and 39; *Joined Cases C-402/05 P and C-415/05 P, Kadi*, [2008], ECR I-06351, para 316). This has been also confirmed by the European Court of Human Rights which gives the rule of law a substantive nature by establishing that it is a concept inherent in all articles of the ECHR (see for example *ECtHR Stafford v United Kingdom*, 28 May 2001, para 63). It must be highlighted that in the French version the Court does not use only the terms "pre-eminence du droit" but also "Etat de droit".

¹² See Case C-168/13, *Jeremy F v Premier Ministre*, not yet published, para 35 and 36.

fully respected in one Member State. This is why the EU has a strong interest in safeguarding and strengthening the rule of law across the Union.

3. WHY A NEW EU FRAMEWORK TO STRENGTHEN THE RULE OF LAW

In cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and, hence, to the functioning of the EU as an area of freedom, security and justice without internal frontiers. In such situations, the EU needs to act to protect the rule of law as a common value of the Union.

However, experience has shown that a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the instruments currently existing at the level of the Union.

Action taken by the Commission to launch **infringement procedures**, based on **Article 258 TFEU**, has proven to be an important instrument in addressing certain rule of law concerns¹³. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law.¹⁴

There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law. For these situations, the **preventive and sanctioning mechanisms provided for in Article 7 TEU** may apply. The Commission is among the actors which are empowered by the Treaty to issue a reasoned proposal in order to activate those mechanisms. Article 7 TEU aims at ensuring that all Member States respect the common values of the EU, including the rule of law. Its scope is not confined to areas covered by EU law, but empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously. As explained in the Commission's Communication on Article 7 TEU, this is justified by the fact that "if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs"¹⁵.

Nevertheless, the preventive mechanism of Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach" and the sanctioning mechanism of Article 7(2) TEU only in

¹³ See, for example, cases C-286/12 *Commission v Hungary*, not yet published (equal treatment as regards the compulsory retirement of judges and public prosecutors); C-518/07 *Commission v Germany* [2010] ECR I-01885 and C-614/10 *Commission v Austria*, not yet published (independence of data protection authorities).

¹⁴ The Commission's action to ensure compliance with the Charter of Fundamental Rights illustrates this legal limitation stemming from the Treaty itself. As explained in its Communication "Strategy for the effective implementation of the Charter of Fundamental rights" of 19 October 2010 (COM(2010) 573 final), the Commission is determined to use all the means at its disposal to ensure that the Charter is fully respected by the Member States. This concerns in particular Article 47 of the Charter which provides that everyone whose rights guaranteed by EU law are violated has the right to an effective remedy before an independent tribunal. However, this can be done by the Commission vis-à-vis Member States "only when they are implementing Union law", as set out explicitly in Article 51 of the Charter. See for example Case C-87/12, *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, not yet published, C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, not yet published and C-617/10, *Åklagaren v Hans Åkerberg Fransson*, not yet published.

¹⁵ Communication from the Commission of 15 October 2003: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final.

case of a "serious and persistent breach by a Member State" of the values set out in Article 2 TEU. The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort.

Recent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State.

There are therefore situations where threats relating to the rule of law cannot be effectively addressed by existing instruments¹⁶. A **new EU Framework to strengthen the Rule of Law** as a key common value of the EU is needed in addition to infringement procedures and Article 7 TEU mechanisms. The Framework will be complementary to all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law¹⁷. It reflects both the objectives of the EU to protect its founding values and to reach a further degree of mutual trust and integration in the area of freedom, security and justice without internal frontiers.

By setting up a new Framework to strengthen the Rule of Law the Commission seeks to provide clarity and enhance predictability as to the actions it may be called upon to take in the future, whilst ensuring that all Member States are treated equally. On the basis of this Communication, the Commission is willing to engage in further discussions with the Member States, the Council and the European Parliament on these issues.

4. HOW THE NEW EU RULE OF LAW FRAMEWORK WILL WORK

The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched.

In order to ensure the equality of Member States, the Framework will apply in the same way to all Member States and will operate on the basis of the same benchmarks as to what is a systemic threat to the rule of law.

4.1. What will trigger the new Framework

The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.

The new EU Rule of Law Framework is not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice. These cases can and should be dealt with

¹⁶ In some cases, systemic deficiencies related to the rule of law may be tackled using the Cooperation and Verification Mechanisms (CVM) based on the Acts of Accession for Romania and Bulgaria. However, these mechanisms, which have their basis directly in primary EU law, address pre-accession-related and therefore transitional situations. They are therefore not suitable for addressing a threat to the rule of law in *all* EU Member States.

¹⁷ Article 8 of the Statute of the Council of Europe provides that a Member State that has "seriously violated" the principles of the rule of law and human rights may be suspended from its rights of representation and even be expelled from the Council of Europe. Like the mechanisms set out in Article 7 TEU, this mechanism has never been activated.

by the national judicial systems, and in the context of the control mechanisms established under the European Convention on Human Rights to which all EU Member States are parties.

The main purpose of the Framework is to address **threats to the rule of law** (as defined in Section 2) which are **of a systemic nature**¹⁸. The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national "rule of law safeguards" do not seem capable of effectively addressing those threats.

The Framework would not prevent the Commission from using its powers under Article 258 TFEU in situations falling within the scope of EU law. Nor would it prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU¹⁹.

4.2. The Framework as a three stage process

Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission will initiate a structured exchange with that Member State. The process is based on the following principles:

- focusing on finding a solution through a **dialogue** with the Member State concerned;
- ensuring an **objective and thorough assessment** of the situation at stake;
- respecting the principle of **equal treatment** of Member States;
- indicating **swift and concrete actions** which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.

The process is composed, as a rule, of three stages: a Commission assessment, a Commission recommendation and a follow-up to the recommendation.

The Commission's assessment

The Commission will collect and examine all the relevant information and assess whether there are clear indications of a systemic threat to the rule of law as described above. This assessment can be based on the indications received from available sources and recognized institutions, including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights²⁰.

If, as a result of this preliminary assessment, the Commission is of the opinion that there is indeed a situation of systemic threat to the rule of law, it will initiate a dialogue with the

¹⁸ With regard to the notion of "systemic deficiencies" in complying with fundamental rights when acting within the scope of EU law, see, for example, Joined Cases C-411/10 and 493/10, N.S., not yet published, para 94 and 106; and Case C-4/11, Germany v Kaveh Puid, not yet published, para 36. With regard to the notion of "systemic" or "structural" in the context of the European Convention of Human Rights, see also the role of the European Court of Human rights in identifying underlying systemic problems, as defined in the Resolution Res(2004)3 of the Committee of Ministers of 12 May 2004, on Judgments Revealing an Underlying Systemic Problem, (<https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=fr>).

¹⁹ See also the Commission Communication of 15 October 2003 (footnote 15).

²⁰ See in particular Article 4(1)(a) of Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights (OJ L 53, p.1).

Member State concerned, by sending a "rule of law opinion" and substantiating its concerns, giving the Member State concerned the possibility to respond. The opinion could be the result of an exchange of correspondence and meetings with the relevant authorities and, where appropriate, be followed by further exchanges.

The Commission expects that the Member State concerned cooperates throughout the process and refrains from adopting any irreversible measure in relation to the issues of concern raised by the Commission, pending the assessment of the latter, in line with the **duty of sincere cooperation** set out in Article 4(3) TEU. Whether a Member State fails to cooperate in this process, or even obstructs it, will be an element to take into consideration when assessing the seriousness of the threat.

At this stage of the process, while the launching of the Commission assessment and the sending of its opinion will be made public by the Commission, the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate quickly reaching a solution.

The Commission's recommendation

In a second stage, unless the matter has already been satisfactorily resolved in the meantime, the Commission will issue a "rule of law recommendation" addressed to the Member State concerned, if it finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it.

In its recommendation the Commission will clearly indicate the reasons for its concerns and recommend that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect. Where appropriate, the recommendation may include specific indications on ways and measures to resolve the situation.

The Commission's assessment and conclusions will be based on the results of the dialogue with the Member State concerned as well as on any additional evidence on which the Member State would also need to be heard in advance.

The sending of its recommendation and its main content will be made public by the Commission.

Follow-up to the Commission's recommendation

In a third stage, the Commission will monitor the follow-up given by the Member State concerned to the recommendation addressed to it. This monitoring can be based on further exchanges with the Member State concerned and could, for example, focus on whether certain practices which raise concerns continue to occur, or on how the Member State implements the commitments it has made in the meantime to resolve the situation.

If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU²¹.

Institutional interaction

The European Parliament and the Council will be kept regularly and closely informed of progress made in each of the stages.

²¹ See also the Commission Communication of 15 October 2003 (footnote 15).

Benefitting from third party expertise

In order to obtain expert knowledge on particular issues relating to the rule of law in Member States, the Commission may, notably during the phase of assessment, seek external expertise, including from the EU Agency for Fundamental Rights²². Such external expertise could notably help to provide for a comparative analysis about existing rules and practices in other Member States in order to ensure equal treatment of the Member States, on the basis of a common understanding of the rule of law within the EU.

Depending on the situation, the Commission may decide to seek advice and assistance from members of the judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the EU²³, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU²⁴ or the Judicial Councils²⁵. The Commission will examine, together with these networks, how such assistance could be provided swiftly where appropriate, and whether particular arrangements are necessary to that end.

The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.

5. CONCLUSION

This Communication sets out a new EU Framework for the Rule of Law as the Commission's contribution to strengthening the capacity of the EU to ensure effective and equal protection of the rule of law in all Member States. It thereby responds to requests from the European Parliament and the Council. While not excluding future developments of the Treaties in this area – which will have to be discussed as part of the broader reflections on the future of Europe –, it is based on Commission competences as provided for by existing Treaties. In addition to the action of the Commission, the role of the European Parliament and the Council will be crucial in reinforcing the EU's determination to uphold the rule of law.

²² The FRA can give advice within the scope of its tasks as defined by Council Regulation (EC) No 168/2007 (see footnote 20).

²³ Network of the Presidents of the Supreme Judicial Courts of the European Union (see <http://www.networkpresidents.eu/>).

²⁴ Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (see <http://www.aca-europe.eu/index.php/en/>).

²⁵ European Network of Councils for the Judiciary (see <http://www.encj.eu>).