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| From: | General Secretariat of the Council |
| To: | Delegations |
| Subject: | COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL - Further strengthening the Rule of Law within the Union State of play and possible next steps |

Delegations will find attached a document from the European Commission : Further strengthening the Rule of Law within the Union State of play and possible next steps



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

Further strengthening the Rule of Law within the Union
State of play and possible next steps

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I. INTRODUCTION

The rule of law is one of the founding values of the European Union,¹ as well as a reflection of our common identity and common constitutional traditions. It is the basis of the democratic system in all Member States, necessary to ensure the protection of fundamental rights. It is also central to making the European Union work well as an area of freedom, security and justice and an internal market, where laws apply effectively and uniformly and budgets are spent in accordance with the applicable rules. The rule of law ensures that Member States and their citizens can work together in a spirit of mutual trust; trust in public institutions, including in the justice system, is crucial for the smooth functioning of democratic societies. The rule of law is also one of the principles guiding the EU's external action.² Altogether, it is a well-established principle, well-defined in its core meaning, and which can be objectively assessed so that shortcomings can be identified on a sound and stable basis.

What is the rule of law?

The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. Under the rule of law, all public powers always 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 rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review³ including respect for fundamental rights; separation of powers; and equality before the law.⁴ These principles have been recognised by the European Court of Justice and the European Court of Human Rights.⁵

The European Union itself is based on the rule of law, and every action taken by the EU is founded on Treaties that have been approved voluntarily and democratically by all the Member States. Given its importance for the confidence of citizens in the Union and the effective delivery of its policies, the rule of law is of central relevance to the future of Europe. There has been a deepening recognition of the central place of the rule of law in how the EU works and there is a common understanding from several corners on the need to improve the way respect for the rule of law is ensured in the European Union.⁶ In addition, recent case law of the Court of Justice of the European Union has made an indispensable contribution to strengthening the rule of law, reaffirming the Union as a community of

¹ Article 2 of the Treaty on European Union.

² Article 21 of the Treaty on European Union.

³ Article 19 of the Treaty on European Union establishes an obligation for Member States to ensure effective judicial protection. As set out by the Court of Justice, the very existence of effective judicial protection “is of the essence of the rule of law”, Case C-72/15 *Rosneft*.

⁴ Communication from the Commission to the European Parliament and the Council *A new EU Framework to strengthen the Rule of Law* of 11.3.2014, COM(2014) 158 final.

⁵ Annex to the Communication from the Commission to the European Parliament and the Council *A new EU Framework to strengthen the Rule of Law* of 11.3.2014, COM(2014) 158 final, and recent case law of the European Court of Justice, Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*; case C- 216/18 PPU, *LM*, case C-619/18, *Commission v Poland* (order of 17 December 2018).

⁶ Rule of law has caught up in the current debate on the future of Europe, for example, with important interventions from different European political groups as well as from Member States.

values.⁷ This Communication seeks to enrich the debate on further strengthening the Rule of Law within the Union and to invite reflection and comment on the matter by all stakeholders. On that basis, the Commission will draw its own conclusions in June.

European integration has itself made a significant and lasting contribution to a rule-based order in Europe. The Union has gradually built an area of freedom, cooperation and stability in which Member States, citizens and businesses can rely on a framework of predictable and equitable rules and a system of effective judicial remedies. In such a realm, peace is secured, democracy can flourish, and business can thrive. Nevertheless, in recent years there has been a growing acknowledgment that the Union's fundamental values and principles, including the Rule of Law, are under pressure and need particular attention. It has thus become clear that more needs to be done to ensure that the rule of law is strengthened and upheld throughout the Union.

If the rule of law is not properly protected in all Member States, the Union's foundation stone of solidarity, cohesion, and the trust necessary for mutual recognition of national decisions and the functioning of the internal market as a whole, is damaged. Rule of law related deficiencies can also have an impact on the economy, just as effective judicial systems and robust anti-corruption frameworks are crucial for a well-functioning business environment and sound public finances.⁸

An issue related to the rule of law in one Member State impacts the Union as a whole and so, whilst national checks and balances should always be the first recourse, the Union has a shared stake in resolving rule of law issues wherever they appear. Recent challenges to the rule of law in some Member States have triggered concern about the ability of the Union to address such situations. Confidence that shortcomings can be resolved would help to strengthen trust both between Member States and between the Member States and EU institutions.

That is why the EU has been building up a number of instruments to help enforce the rule of law. These go beyond Article 7 of the Treaty on European Union, the most prominent mechanism for protecting all common values, even if it is used only exceptionally. A preventive framework is in place since 2014.⁹ Other ideas are now under discussion, including the Commission's proposal to help protect the EU's financial interests if there are generalised deficiencies linked to the rule of law,¹⁰ and the establishment of a European Public Prosecutor's Office should also help promote a coordinated judicial response to such risks across the Member States.¹¹ All these instruments rest on a common understanding of what is meant by the rule of law, what its key features are, and where deficiencies may arise.

⁷ Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*; case C-284/16, *Achmea*; case C-216/18 PPU, *LM*; case C- 621/18, *Wightman*; case C-619/18 R, *Commission v Poland*, order of 17 December 2018.

⁸ Well-performing public institutions contribute to higher growth and are a precondition for the successful delivery of other reforms. Empirical analyses show that better institutional quality is generally associated with higher productivity, see *Annual Growth Survey 2019*, COM(2018) 770 final.

⁹ See footnote 4 above.

¹⁰ Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States - COM(2018) 324.

¹¹ https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en

In short, the rule of law is a central pillar of our vision for the future of Europe. As part of the reflections linked to the Sibiu informal European Council of 9 May 2019 and the next Strategic Agenda of the European Council, this Communication takes stock of the experience of recent years and sets out some possible avenues for reflection on future action. It draws on the existing public debate on the rule of law in the European Union and invites Union institutions and Member States, as well as other stakeholders, to contribute ideas to how the rule of law toolbox could develop in the future.¹²

II. THE RULE OF LAW TOOLBOX TODAY

1. Article 7 TEU and the rule of law framework

Article 7 TEU remains an exceptional, but the most emblematic, tool for the EU to act in case of serious rule of law failings in a Member State.¹³ The procedure to invoke a clear risk of a serious breach under Article 7(1) TEU has been triggered in two cases so far: in December 2017, by the Commission in respect of Poland,¹⁴ and in September 2018, by the European Parliament in respect of Hungary.¹⁵ Whereas the full consequences of the procedure under Article 7 TEU are very significant, and whilst the dialogue with the Member State concerned within the Article 7 TEU framework has in itself an intrinsic value, progress by the Council in these two cases could have been more meaningful. The Council has had to establish new procedures to apply the Article in practice, which still need to prove to be fully effective.

The **Rule of Law Framework** was set out by the Commission in 2014,¹⁶ and its role has been acknowledged by the Court.¹⁷ It provides a staged process of dialogue with a Member State, structured with opinions and recommendations from the Commission. The goal is to prevent the emergence of a systemic threat to the rule of law, at which point an Article 7 TEU procedure would be required. The first – and so far only – time the Rule of Law Framework has been used came with the start of a dialogue with Poland in January 2016.¹⁸ While the dialogue helped identifying problems and framing the discussion, it did not solve the detected rule of law deficiencies and the Commission triggered the Article 7(1) TEU procedure in December 2017.

¹² This initiative focuses on strengthening the rule of law but does not encompass larger areas of democracy or fundamental rights. However, the rule of law is intrinsically linked to fundamental rights and democracy: while the rule of law focuses on limiting and independently reviewing the exercise of public powers, it also promotes democracy by establishing accountability of those wielding public power and is indispensable to protect fundamental rights.

¹³ See also 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.

¹⁴ 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 (COM(2017) 835 final, 20.12.2017)

¹⁵ European Parliament resolution of 12 September 2018 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 (2017/2131(INL)).

¹⁶ See footnote 4 above.

¹⁷ See case C-619/18 R, *Commission v Poland*, order of 17 December 2018.

¹⁸ The dialogue took place from January 2016 to December 2017. The Commission adopted one opinion and four recommendations.

2. Infringement proceedings and preliminary rulings

The Commission has launched several **infringement proceedings** in reaction to serious rule of law problems, linked to a breach of Union law, an avenue for EU action which has increasingly gained traction through recent rulings of the European Court of Justice (“the Court”).

Effective judicial protection by independent courts is required by Art 19(1) TEU as a concrete expression of the value of the rule of law. That provision lies at the heart of a number of preliminary references from national courts and of infringement procedures launched by the Commission before the Court. Already in 2006, the Court ruled that the notion of ‘judicial independence’ is an autonomous concept of EU law and that this implies that judges must be protected against any external intervention that could jeopardise their independent judgment.¹⁹ This was followed in 2018 by a number of important judgements. First, the Court held that Member States are required by Union law to ensure that their courts meet the requirements of effective judicial protection, a concrete expression of the rule of law, and that the independence of national courts is essential to ensure such judicial protection.²⁰ In other judgements, the Court has defined in further detail the requirements of the guarantees of independence and impartiality, noting their pivotal importance for both the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU and for secondary law instruments based on the principle of mutual trust.²¹ The Court also issued interim measures to suspend national reforms that would affect judicial independence.²² Further cases brought by national courts and the Commission are pending before the Court.

There is also an evolving jurisprudence of the Court highlighting how systematic problems related to the rule of law may have a specific **impact in the area of Union finances**.²³

3. Other mechanisms and frameworks

A number of other mechanisms and frameworks help address rule of law issues in Member States, either in a comprehensive way through dedicated instruments, or through other steps on the surveillance of national policies or the application of EU law. These tools have an important early warning and preventive role as they can address rule of law issues in the Member States before it becomes necessary to have recourse to Article 7.

- The **European Semester** cycle of economic, fiscal and social policy coordination provides country specific analysis and makes recommendations for structural reforms encouraging growth. Analysis under this instrument covers the fight against corruption, effective justice systems, and reform of public administration. When serious challenges in these areas are identified in individual country reports, the Council adopts targeted country specific recommendations.

¹⁹ Case C-506/04, *Wilson*.

²⁰ Case C-64/16, *Associação Sindical dos Juizes Portugueses*; Case C-49/18, *Escribano Vindel*.

²¹ In terms of the composition of a judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members as well as of the disciplinary regime governing judges, Case C-216/18 PPU *Ireland v. LM* and Case C-8/19 PPU, *RH*.

²² Case C-619/18 R, *Commission v. Poland*, Order of 17 Dec. 2018.

²³ This includes preliminary rulings on the need for effective investigation of tax fraud or fraud with Union funds (see e.g. cases C-617/10, *Akerberg Fransson*; C-105/14, *Taricco*; C-42/17 *M.A.S.*; and C-612/15 *Kolev*).

- The annual **EU Justice Scoreboard** looks at a range of indicators to assess the independence, quality and efficiency of national justice systems. This comparative tool is complemented by country specific assessments, presented in the Country Reports, which enable to make a deeper analysis based on the national legal and institutional context.
- The **Cooperation and Verification Mechanism** was established as a specific mechanism for Bulgaria and Romania when they joined the Union in 2007, to assist the two Member States to address remaining shortcomings in the areas of judicial reform, the fight against corruption and, for Bulgaria, organised crime.²⁴ This mechanism is a transitional measure with the goal of closing it once the defined benchmarks have been satisfactorily fulfilled. The experience gained is relevant when addressing rule of law challenges in all Member States.
- The Commission's **Structural Reform Support Service** provides technical support for structural reform in the Member States, including in areas relevant to strengthen respect for the rule of law such as public administration, the judicial system, and the fight against corruption. The support is provided on the request of Member States and is tailor-made to address needs reflecting defined reform priorities.²⁵
- The **European Structural and Investment Funds**, and funds supporting **Justice and Security policies** also help Member States to strengthen public administration and the judiciary as well as enhance the Member States' capacity to fight corruption.²⁶ The Funds have also helped to improve institutional capacity of public authorities and effective public administration through applying *ex-ante* conditionalities (in the 2014-2020 funding period, to be succeeded by "enabling conditions" under the 2021-2027 Multiannual Financial Framework).²⁷ This strengthens the framework for applying the rule of law.
- As part of proposals for the next Multiannual Financial Framework, the Commission has proposed a **new mechanism to protect the Union's budget when generalised deficiencies regarding the rule of law in Member States affect or risk affecting that budget**.²⁸ Respect for the rule of law is an essential precondition to comply with the principles of sound financial management and to protect the Union's budget. The proposed regulation would allow the Union to take appropriate and proportionate measures to address those issues.

²⁴ https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en

²⁵ Regulation (EU) 2017/825 of 17 May 2017 established the Structural Reform Support Programme, with €142.8 million over the period 2017-2020. Regulation (EU) 2018/1671 of 23 October 2018 amended Regulation (EU) 2017/825 to increase the financial envelope of the Structural Reform Support Programme and adapt its general objective, bringing the financial envelope to €222.8 million. In the context of the MFF proposals for 2021-2027, the Commission has proposed to allocate €840 million to technical support, and to include the instrument for technical support in the proposal for a Reform Support Programme, which also includes a 'reform delivery tool' and a 'convergence facility'.

²⁶ The revision of the Commission Anti-Fraud Strategy intends to strengthen the Commission analytical capability to assess Member States' capacity to fight against fraud as well as the effectiveness and efficiency of assistance provided to the Member States. Additionally, and to strengthen the protection of EU financial interests, the Commission provides guidance to Member States on the design of National Anti-Fraud Strategies, which aim at identifying and addressing existing weaknesses in national systems and at strengthening coordination among national bodies and with the EU level, including with OLAF.

²⁷ Proposal for a Common Provisions Regulation (COM/2018/375), Article 11.

²⁸ See footnote 10 above.

- The **European Anti-Fraud Office (OLAF)** detects and investigates fraud, corruption and other offences affecting the EU financial interests and issues recommendations that allow the national authorities to start administrative or judicial procedures. The establishment of the **European Public Prosecutor's Office (EPPO)** will mark a fundamental development in the institutional framework at EU level and in the fight against offences affecting the EU financial interests. The EPPO will become operational at the end of 2020 with the power to conduct criminal investigations and prosecute criminal offences affecting the Union's budget. It will cooperate closely with OLAF.
- As a central facet of EU external policy, the rule of law has become progressively more central to the **EU accession process** and to **neighbourhood policy**. Reinforcing key institutions such as the judiciary and strengthening work to combat corruption have become increasingly key themes in the EU's efforts to promote reform towards meeting the Copenhagen criteria for accession.²⁹ The rule of law is also firmly anchored in the accession negotiations, where the overall speed of the negotiations depends on progress in this area.³⁰ The Western Balkan Strategy of February 2018³¹ puts an ever stronger emphasis on rule of law reforms and underlined respect of the rule of law as an essential condition for EU accession.

III. THE WIDER DEBATE ON THE RULE OF LAW

The increasing importance of the rule of law as a common concern has been reflected in wider debates in the Union institutions and bodies³², as well as other fora³³.

In October 2016, the **European Parliament** adopted a resolution on an EU mechanism on democracy, the rule of law and fundamental rights.³⁴ The resolution called for the Commission to set up a comprehensive monitoring of all Member States and EU institutions and a yearly cycle of reporting and recommendations. This call was reiterated in 2018.³⁵ In addition, the European Parliament has adopted resolutions with regard to the rule of law in several Member States.

In addition to its clear institutional role under Article 7 TEU, the **Council** has set up a yearly rule of law 'dialogue' in the General Affairs Council, each year focusing on a particular theme. A review of this process is planned under the Finnish Council Presidency in autumn 2019.

²⁹ See https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en.

³⁰ Specifically chapter 23 - Judiciary and Fundamental Rights and chapter 24 - Justice, Freedom and Security.

³¹ COM(2018) 65 final.

³² Such as the Committee of Regions.

³³ Such as the Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights.

³⁴ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

³⁵ European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)).

A number of **national parliaments** have also contributed to the reflection on the rule of law by adopting resolutions and holding debates on this topic.³⁶

Beyond the EU setting, the **Council of Europe** has played a crucial role in developing definitions and standards with relevance to the rule of law. The rule of law is mentioned as an element of common heritage in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The rulings of the European Court of Human Rights have significantly contributed to the definition, promotion and strengthening of the rule of law, and have underlined the close relationship between the rule of law and democratic society. The Council of Europe's Venice Commission published a 'Rule of Law Checklist' in 2016.³⁷ The Council of Europe has also applied this approach in specific cases concerning Member States, through deploying the expertise of the Venice Commission and the Council of Europe Group of States against Corruption (GRECO), as well as through specific monitoring.

European judicial networks, expert groups and lawyers associations, as well as civil society organisations, have also helped the evolution of a common understanding at European and national level and play a key role in promoting common standards and best practice.

IV. ASSESSING THE EXPERIENCE SO FAR

Experience so far points to certain common features which could inform future reflections, based on a number of core principles. First, there is a legitimate interest from both the EU and other Member States in the proper functioning of the rule of law in every Member State. Second, the primary responsibility to ensure the rule of law must lie on each Member State, and the first recourse should always be to national redress mechanisms, as not only the EU's but also national legal orders need to be respected. Third, the EU's role in this area must be objective and treat all Member States alike, and must rest on the contribution of all its institutions in accordance with their respective institutional role. Finally, the objective must not be to impose a sanction but to find a solution that protects the rule of law, with cooperation and mutual support at the core.

The need to promote rule of law standards

The case law of the European Court of Justice and the European Court of Human Rights provide for the key EU requirements and standards to be respected by the EU and its Member States to safeguard the rule of law. Also, the Council of Europe has developed standards and issues opinions and recommendations which provide well-established guidance to promote and uphold the rule of law.³⁸ These requirements and standards are the

³⁶ For example the Resolution of the French Parliament *Résolution relative au respect de l'état de droit au sein de l'Union européenne*; the debate of 14 February 2019 at the EU affairs Committee of the Dutch Parliament; or the debate of 12 March 2019 at the Belgian House of Representatives, Committee of Foreign Affairs. National parliament interest has also been reflected in the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union.

³⁷ The Rule of Law Checklist, European Commission For Democracy through Law (Venice Commission), CDL-AD(2016)007.

³⁸ E.g. the Recommendation CM/Rec(2010)12 on 'judges: independence, efficiency and responsibilities'; Venice Commission 'Rule of Law Checklist', CDL-AD(2016)007; Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality; as well as the Opinions of the Venice Commission and the Evaluations of the Group of States against Corruption (GRECO).

bedrock for the respect of the rule of law in all Member States, irrespective of their constitutional structures.

Key principles, such as the independence of the judiciary and the separation of powers should be embedded in the political culture of Member States. When a general European standard can be brought to bear, it can be seen both as a benchmark to assess a possible shortcoming, and as guidance for a solution.

However, experience has shown that this case law and these principles and standards are not always sufficiently known at national level. If standards are not sufficiently known, they cannot play a relevant role in informing national policies nor can they sufficiently feed into the debate around national reforms, and may be challenged in the dialogue with EU institutions.

Recognising warning signs

There can be many advantages in identifying rule of law warning signs early. If a development of potential EU concern can be detected early and acknowledged by the Member State involved, that concern can be voiced at EU level more usefully, and this can be sufficient to trigger national checks and balances without needing more formal steps at EU level. This early warning can come in different ways.

Recurring problems are easier to identify quickly. At the core of the rule of law is the necessity of all public powers to be subject at all times to established values, rules and procedures. When public powers and elected majorities in a Member State disregard the applicable law or procedures, this is a very evident warning sign. For example, many recent cases with resonance at EU level have centred on the independence of the judicial process. The judiciary is at the heart of the rule of law, and attempts by political actors to undermine its independence and the binding force of its decisions by instigating political or other pressure on individual judges, by interfering in specific cases, by a failure to respect judicial decisions, or by a reopening of final judicial decisions, are familiar themes. Other recent examples refer to weakened constitutional courts or other checks on the laws passed by Parliament and on Government actions, or an increasing use of executive ordinances. An unclear law-making process can make it easier for political majorities to weaken or by-pass checks and balances. Repeated public attacks from one branch of the state on another erode the fundamental principle of the separation of powers. Issues in such areas therefore act as warning signs that a potential rule of law problem is building, and can provide an opportunity for dialogue and potential remedy at an early stage.

More widely, high-level corruption and abuse of office are linked with situations where political power is seeking to override the rule of law. Structural weaknesses can also create a context providing a heightened risk of rule of law issues. Structural weaknesses in judicial systems, such as insufficient guarantees for judicial independence, give rise to an enhanced risk of pressure on the judiciary. Similarly, general shortcomings in public administration can create the ground for arbitrary decisions and provide opportunities for corruption, as well as circumstances in which officials may find it more difficult to resist pressure. Such issues serve as indicators of possible rule of law problems.

The first signs of concern concerning Rule of Law deficiencies tend to come from actors inside the Member State. Freedom of expression and information and media freedom and pluralism is another founding value on which the European Union is built. Civil society and

independent media are essential watchdogs in healthy democracies and thus play a key role in holding to account those in power, engaging in public debate and challenging public decisions. Attempts to weaken or pressure such actors are therefore another warning sign.

Deepening Member State specific knowledge

The level of awareness about such signs, and therefore the ability of the Union to address them in good time, depends on the state of knowledge of the Commission, other institutions and other Member States. Certain warning signs can only be identified by acquiring a deep understanding of Member States' practices through a dialogue with authorities and stakeholders. Such country-specific knowledge is essential to help preventing possible rule of law threats and to respond to them effectively where necessary. It is also important to ensure that reforms undertaken by Member States fully comply with EU legal requirements and European standards on the rule of law. Finally, deepening the country knowledge is necessary to determine how EU funds and technical assistance can best support the rule of law in the Member States. Fairness, objectivity and equal treatment must be part of any system to uphold the rule of law in the Union. Technical expertise and the capacity for analysis at the Union level is key to ensuring that assessments take full account of national traditions but can still clearly identify where problems exist.

The European Semester, complemented by the EU Justice Scoreboard, has proven to be a good framework to develop country-knowledge relating to rule of law and a reflection could take place on whether their potential could be further exploited.

Improve EU capacity to react to Rule of Law issues

The experience of the past years, as well as the broader dialogue on the issue, have clearly shown the need to improve the EU's capacity to respond in case of serious challenges to the rule of law. For instance, the experience gained with ongoing Art 7 TEU procedures has revealed a need for further reflection on how this procedure can best be conducted in an effective manner. Also, the diversity of rule of law challenges requires a diversity of responses at EU level.

EU intervention should therefore come in different forms. Even an informal signalling of potential difficulties at an early stage may allow national authorities to think again, or trigger national check and balance mechanisms.

Whilst dialogue is essential, placing it within a structured process increases the chance that the resulting action has the required focus and direction. Many rule of law problems are time-sensitive and the longer they take to resolve, the greater the risk of entrenchment and of damage to the EU, as well as to the Member State concerned. There are advantages in intermediate steps, proportionate to the gravity of the problem and with a lower threshold than action in the framework of Article 7 TEU. When such steps have been implemented, reviews or post-monitoring can also be of benefit: experience suggests that the application of *ex ante* conditionalities to EU funds acted as an important incentive, but, once such a one-off green light has been given, there is a risk of a step back in policy or in structures.

EU action also carries more authority if all institutions take a responsibility in the process, in accordance with their different roles. Intervention by the EU in a crisis is politically sensitive and will always be stronger if supported by a common approach. Support of Commission action from the European Parliament and the Council and stronger internal procedures within the institutions for dealing with rule of law concerns in Member States

can be a powerful way in which to underline the need for a Member State to respond and to increase incentives for finding solutions.

Addressing shortcomings in the long term through structural reforms

The EU has also played an increasing role in strengthening the capacity and functioning of national authorities and institutions playing a role in the national checks and balances.

EU funds have made an important contribution to building capacity in public institutions in support of the rule of law. In the 2014-2020 programming period, nearly half the Member States used Structural Funds to support reforms strengthening the judiciary and public administration, or to help fight corruption. This work can also show that alongside expressions of concern, the EU brings practical remedies. For example, the Commission's Structural Reform Support Service, under the Structural Reform Support Programme, can work alongside national institutions to help rule of law relevant reforms..

The use of EU funds and programmes in strengthening the rule of law will also be more effective when also supported by the recommendations for structural reforms within the European Semester.

More generally, Union policy in areas such as public procurement, better regulation, and cooperation in criminal and civil justice can contribute to ensuring a coherent application of European standards relevant to the rule of law.

V. POSSIBLE AVENUES FOR THE FUTURE

The effective enforcement of the rule of law in the Union can be seen to rest on three pillars. First, the **promotion** of the rule of law, which involves deepening common work to spread understanding of rule of law in Europe. Secondly, **prevention** of rule of law problems, having the capacity to intervene at an early stage and avoiding the risk of escalation. Finally, the ability to mount an effective common **response** when a problem of sufficient significance has been identified.

Promotion: Building knowledge and a common Rule of Law culture

A robust political and legal culture supporting the rule of law in every Member State is the best guarantor of the rule of law. While the Union respects the political and constitutional structures of the Member States, the obligations of Union membership, as well as the democratic heritage of Europe, mean that national rules and structures must reflect EU standards and norms on the rule of law as a common value of the EU and comply with the rules of law guarantees in EU primary and secondary law.

Promoting awareness among the general public on the importance of the rule of law in a democracy can also be helpful and communication activities aimed at reaching out to citizens could be supported.

In order for such a political and legal culture to deepen and be sustained in all Member States, it is important to promote knowledge of rule of law-relevant case law and standards so that, for example, evaluations and opinions by bodies such as the Venice Commission and GRECO are discussed at national level. This will help all parties to know what is expected, and how institutions and laws should reflect basic principles. Common approaches

in these areas can help to promote a strong rule of law culture across all relevant institutions and professions.

Common approaches, standards and norms do not entail their implementation in an identical manner. But when there is a clear common approach, it is more straightforward to benchmark particular national systems and be confident that they are fit for purpose.

This is particularly relevant because respect for the rule of law depends not only on the existence of laws and institutional structures, but also on institutional practice. For example, the Venice Commission has drawn attention to the importance of loyal cooperation among institutions as a foundation stone for the rule of law – the acceptance by one part of the state that other parts have legitimate functions which need to be respected. This loyal cooperation can find itself under strain even when set out in laws or constitutions. Exchanges of expertise between practitioners in different Member States – such as judges, prosecutors and anti-corruption experts – can help to build a sense of what this means in practice. Other key elements of rule of law and respectful governance in practice include transparent policy- and law-making. At heart, these all recognise that state powers have obligations of accountability, and constraints which need to be respected in a democratic society.

The EU offers a unique platform to develop and promote awareness on rule of law challenges. As the European Parliament has suggested, this could go beyond the EU institutions, to involve national parliaments and other key participants at national level. Civil society is of particular importance, including at regional and local level. The Commission has already proposed to boost funding and support for a thriving civil society, the promotion of media pluralism and networking among stakeholders in the rule of law area, as well as supporting Union-wide organisations, bodies and entities pursuing a general European interest in the field of justice and rule of law.³⁹

The relationship of the EU with the Council of Europe is particularly relevant in the promotion of the rule of law. The EU institutions and Member States could develop this further with a view to promoting a common rule of law culture both within Europe.

The EU could also look at how best to promote the Council of Europe's work on common rule of law standards. The promotion of rule of law standards could also be developed in the direction of peer review, as specifically proposed by some Member States.

Possible questions for further reflection

- How can the EU better promote the existing EU legal requirements and European standards relating to the rule of law, in particular at national level?
- How can the EU best encourage key networks and civil society, as well as the private sector, to develop grassroots discussions on rule of law issues, including its economic dimension, and promote the standards underpinning the rule of law?

³⁹ Proposal for a Regulation establishing the Creative Europe programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013 (COM(2018)366 final, 30.5.2018); Proposal for a Regulation establishing the Rights and Values Programme (COM(2018) 383 final, 30.5.2018); Proposal for a Regulation establishing the Justice Programme (COM(2018) 384 final, 30.5.2018). The new Creative Europe Programme will also support actions aiming at reinforcing Europe's news media sector, journalistic freedom, diversity and pluralism of journalistic content, as well as a critical approach to media content through media literacy.

- Can Member States do more to promote the discussions on the rule of law at national level, including for example through debates in national parliaments, professional fora and awareness raising activities addressed to the general public?
- How should the EU and its Member States step up cooperation with the work of the Council of Europe and other international organisations that uphold the rule of law, including by supporting the work of the Council of Europe and with regard to evaluations and recommendations of the Council of Europe?
- How can the EU build on the work of the Council of Europe and promote common EU approaches? Can peer review between Member States help in this process?
- How can the existing steps taken by the European Parliament and the Council be improved and further developed? Can political groups and national parliaments be more engaged?

Prevention: Cooperation and support to strengthen the Rule of Law at national level

The primary responsibility to ensure respect for the rule of law at national level lies with the Member States. However, the Union can offer important support to Member States to build a long-term approach which helps to ensure that national checks and balances are equal to the challenge – and ultimately that the EU does not have to find itself in a situation where it has to address a rule of law crisis in a Member State. This means helping to build resilience in key systems and institutions to be ready for times of political stress.

A deeper understanding of developments in Member States would help to target this support and to identify risks to the rule of law early on. Areas of relevance could include national checks and balances, judicial independence, quality of the public administration, anti-corruption policies, transparency of the legislative process, and better law-making. Such information-gathering could provide a general framework for regular cooperation and dialogue with Member States, as well as for updating the European Parliament and Council. While it would need to cover all Member States, it could be more intense in Member States where weaknesses or particular risks have been identified. Finally, it would require a balance between the need to build sufficient understanding of national specificities and that of taking financial and human resources into account. The goal of such exercise would be to provide a stronger foundation for early dialogue on political initiatives with rule of law consequences. The reflection should cover whether the use of existing tools, including the European Semester and the EU Justice Scoreboard, could be further developed to better address rule of law issues.

Another complementary avenue would be to deepen cooperation and practical support, in order to maximise a constructive contribution from the Union to resolve issues early and to help build sustainable solutions into ongoing reform processes. This could be at the request of Member States and involve appropriate action plans. The European Parliament and the Council could be involved in defining and promoting such initiatives. This could also include specific attention to the implementation of EU legislation with a rule of law dimension. Technical support to Member States could also be provided under the Structural Reform Support Programme.

Possible questions for further reflection

- How can the EU enhance its capacity to build a deeper and comparative knowledge base on the rule of law situation in Member States, to make dialogue more productive, and to allow potential problems be acknowledged at an early stage? How can existing tools be further developed to assess the rule of law situation?
- How could exchanges between the Commission and Member States on rule of law issues be most productively organised?
- How can EU expertise and support be most effectively channelled to Member States?
- Can preventive steps be given weight through a more inter-institutional approach?

Response: Enforcement at Union level when national mechanisms falter

Rule of law issues with implications for the application of Union law are increasingly being examined by the European Court of Justice through infringement proceedings and preliminary rulings. The Commission will further build on the recent case law of the Court, for example in relation to the independence of national courts and to the effective protection of financial interests of the Union. More generally, the effectiveness of the enforcement of Union law by independent authorities and national courts also contributes to strengthening the rule of law in Member States. Therefore, where necessary, the Commission will continue to ensure the correct application and enforcement of Union law through rule of law-related infringement procedures.

When national rule of law safeguards do not seem capable of addressing threats to the rule of law in a Member State, it is a common responsibility of the EU institutions and the Member States to take action to remedy the situation. As well as the common obligation to defend EU values, there is a common interest in tackling issues such as threats to Constitutional Courts or judicial independence before they can compromise the implementation of EU law, policies or funding. Such action can vary depending on circumstances – such as the existence of an infringement – or to ensure proportionality. Different approaches may also be appropriate in specific policy areas such as the Commission's proposal on protecting the EU's financial interests from the risk of rule of law deficiencies.

The Rule of Law Framework was established by the Commission in 2014 to respond when there are clear indications of systemic risks for the rule of law in a Member State, which could result in a clear risk of serious breach of the rule of law leading to triggering Article 7 TEU. The Framework has been applied in one case so far and served its function of an intermediate step. It helped to establish a dialogue, detailed fact-finding, analysis and recommendations, a knowledge base which has proved useful in further action from the Union. Some refinements could nevertheless be explored. For example, early information to, and support from, the Council and the European Parliament in the process could be intensified. Another option could be to underpin the dialogue and recommendations with specific action plans and technical support to remedy the situation within a given timeline, or to set a clearer limit to the duration of the dialogue phase.

Such changes should maintain the goal of finding solutions to crisis situations and identifying appropriate remedies. This requires effective dialogue and channels of communication. However, it could also be considered whether there should be strengthened

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consequences if a Member State refuses to remedy the situation. This might also flow from a heightened appreciation of the real consequences for the functioning of the Union of persistent rule of law deficiencies in the Member States, something which has already been recognised in the proposal to protect the financial interests of the EU in case of generalised deficiencies as regards the rule of law.

Possible questions for further reflection

- How can the relevant case law of the Court of Justice be effectively disseminated and its potential fully used?
- How can the Commission, the European Parliament and the Council coordinate more effectively and ensure a timely and appropriate response in case of a rule of law crisis in a Member State?
- In what ways could the Rule of Law Framework be further strengthened? Should this include more engagement with other institutions and international partners (e.g. Council of Europe/Venice Commission, Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights)?
- Are there other areas, in addition to the EU's financial interests, where the EU should develop specific mechanisms (including rule of law-related conditionalities) to avoid or remedy specific risks to the implementation of EU law or policies?

VI. CONCLUSION

The Commission invites the European Parliament, the European Council, the Council and Member States, as well as relevant stakeholders, including judicial networks and civil society, and the public at large, to reflect on the issues and questions set out in this Communication. The questions raised indicate a number of areas where improvements could be envisaged.

Such a reflection would in itself contribute to the enforcement of the rule of law by nurturing debate and ensuring continued focus on the issue. The Commission believes that strengthening the enforcement of the rule of law could make an essential contribution to the future of the Union. It would allow for enhanced clarity and consistency, help to ensure that all Member States are treated equally, and protect the common interests of all through the effective application of EU law throughout the Member States.

The Commission will return to this issue in June 2019 with its own conclusions and proposals. These will be informed by the ongoing debate among the institutions and society at large, as well as by the developing case law of the European Court of Justice, and will aim to set out an approach for the strengthening of the rule of law in the Union, within the framework of the current Treaties.