European Commission

ASSISES DE LA JUSTICE

DISCUSSION PAPER 4: **RULE OF LAW**

This discussion paper was produced as input to discussions leading up to and during the Assises de la Justice conference (Brussels, 21-22 November 2013). It will also contribute to the preparation of the Commission's Communication on future initiatives in the field of Justice. The content of this paper does not reflect the official opinions of the European Commission or other institutions of the European Union.

I. Introduction:

As President José Manuel Barroso recalled in his State of the Union address this September, safeguarding values, such as the rule of law, is what the European Union was designed for, from its inception to the latest chapters in enlargement.

There is a need to strengthen the foundations on which the European Union is built: the respect for our fundamental values, for the rule of law and democracy. Recently there have been threats to the legal and democratic fabric in some of the European Union's Member States. This confirms that in our EU institutional arrangements, a better developed set of instruments is needed, going beyond the alternatives of the "soft power" of political persuasion and the "nuclear option" of Article 7 TEU[1].

The resolution adopted by the European Parliament on 3 July 2013 and the JHA Council conclusions of 6 June 2013 share this diagnosis. They consider that at this stage of European integration the capacity to address threats to the rule of law within the EU needs to be strengthened.

II. What has been achieved?

The European Union has been set up as a "community of law", based on the respect of fundamental rights and upheld by the Court of Justice of the European Union ("Court of Justice") and by national courts acting as EU courts. Article 47 of the EU's Charter of Fundamental Rights specifies that anyone whose rights under EU law are violated has the right to an effective remedy before an independent tribunal. National courts, acting as EU courts, cooperate closely with the Court of Justice through a system of preliminary rulings. The Commission has a specific role: as guardian of the Treaties it is empowered to initiate infringement proceedings against Member States in case of breaches of EU law.

1 See also the speech of Vice-President Viviane Reding, EU Justice Commissioner, of 4 September 2013, which develops these ideas further: http://europa.eu/rapid/press-release_IP-13-830_en.htm

In such a community of law, respect for the rule of law is fundamental. This is illustrated by Article 2 of the Treaty on European Union (TEU) which refers to the rule of law as one of the values on which the EU is founded, and by Article 7 TEU which provides for a special mechanism in case of breach of these fundamental values.

Beside the remedies provided by national courts in cooperation with the Court of Justice, infringement proceedings have proven to be an important instrument for ensuring respect for the rule of law in Member States. Apart from these general instruments, the EU has developed a number of additional tools and instruments to identify and address concerns about the rule of law in Member States.

1) European Semester and EU Justice Scoreboard

It is clear that an efficient and independent justice system which ensures predictable, timely and enforceable judicial decisions can contribute to trust and stability – both important elements for a sound business and investment environment. Properly functioning justice systems at national level play a key role in creating confidence and supporting growth. For this reason, national judicial reforms are an integral part of the structural reforms in Member States subject to the Economic Adjustment Programmes. For the same reason, the effectiveness of national justice systems has also been a key component of the European Semester exercise, the EU's annual cycle of economic policy coordination. This annual cycle since 2012 includes recommendations for certain Member States to take measures to improve and strengthen their justice system. In 2013, ten Member States received such 'Country Specific Recommendations' to improve or strengthen their justice system.

Within the European Semester exercise, the EU Justice Scoreboard is an information tool which aims to assist the EU and the Member States in achieving more effective justice by providing objective, reliable and comparable data on the functioning of justice systems in all Member States. The data cover the independence, quality and efficiency of justice systems in all EU Member States. The EU Justice Scoreboard is a cooperative mechanism and operates as part of an open dialogue with Member States. While the Scoreboard includes a comparison on the basis of particular indicators, it is not intended to present an overall single ranking, or to promote any particular form of justice system. It is an evolving instrument which could develop into a more comprehensive tool in the future.

2) Cooperation and Verification Mechanism

When Romania and Bulgaria joined the EU on 1 January 2007, they still had progress to make in the fields of judicial reform, corruption and organised crime. To facilitate the entry of both countries into the EU and at the same time safeguard the workings of its policies and institutions, the EU decided to establish a special "Cooperation and Verification Mechanism" to help them address these outstanding shortcomings. The decision establishing the Cooperation and Verification Mechanism underlines the importance of respect for the rule of law and recalls that the EU Treaties are based on the mutual confidence that administrative and judicial decisions and practices in all Member States fully respect the rule of law. When using these instruments, the Commission cooperates very closely, and in a complementary way, with the Council of Europe, which has developed expertise on rule of law matters and national constitutions through its Venice Commission.

III. The challenges ahead for safeguarding the rule of law in the EU

1) The situations to be addressed

There is a need to reflect on how to strengthen our capacity to act at EU level in situations of crises which cannot be addressed effectively by infringement proceedings. Recent experience suggests that situations with the following common characteristics are the most urgent ones to be addressed:

- **Situations which raise serious concerns relating to the respect of the rule of law**. It is important to focus on the rule of law, because respect for the rule of law is in many ways a prerequisite for the protection of all other fundamental values listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties;
- **The issues at stake are of a systematic and structural nature**. A rule of law mechanism should not be designed to address individual cases of breaches of the rule of law principle, but should focus on situations where the systematic and structural nature of the breach is manifest.
- **There are no more safeguards at national level available to remedy the situation**. This is for instance the case if the possibility of effective legal review is no longer present following a curtailing of the powers or the independence of national courts.

Vis-à-vis such situations, there is a need to reflect on how best to:

- **find an effective process to work out solutions** in open dialogue with the Member State concerned;
- **anticipate** and **prevent** problematic situations; it is better to be informed at an early stage of a structural reform with potential to cause rule of law concerns;
- **establish the relevant facts**;
- **assess** situations in a manner which ensures the objectivity, thoroughness and legitimacy of the analysis, enabling a precise comparative assessment in light of the situation across the EU, and respecting the principle of equal treatment of all Member States;
- take **swift, concrete and effective remedial action** where needed.

Any further action at EU level will require proper political endorsement to ensure legitimacy as well as mechanisms to integrate the necessary expertise, while ensuring equal treatment among all Member States. Cooperation with the Council of Europe should also continue.

2) Possible orientations for solutions under the existing Treaties

A first step would be to exploit the potential already offered by the Treaties, in order to develop an improved way of handling a future rule of law crisis and to consolidate lessons learned. In such a first step a process could be developed to effectively address rule of law crises at an early stage, upstream of the launching of any formal procedures under Article 7 TEU.

One option could be that the Commission establishes a practice of giving "*formal notice*" to a Member State, a kind of formalised warning by which the Commission presents its concerns, where it has reason to believe that a systemic rule of law crisis is on the way to developing in that Member State. The Member State would subsequently have an opportunity to submit its observations. Such issuing of a formal notice could be an effective way of finding solutions to emerging rule of law crises.

To ensure the availability of the necessary expertise, ways should be explored to further develop the cooperation with the Venice Commission, the expert body of the Council of Europe, as well as to draw on the expertise of the judicial networks in the EU (such as the existing networks of the Presidents of Supreme Courts of the EU, the association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils) with which the Commission works closely as well.

3) Possible orientations for solutions requiring Treaty change

A second step could be to anchor a strong basis for a more far-reaching rule of law mechanism in an amendment to the Treaty. Such a significant step could be included in the broader reflections on the future development of the EU.

One option would be to expand the role of the Court of Justice of the European Union in any future mechanism on the rule of law. Currently, the Court of Justice of the European Union can only check whether the procedural rules of Article 7 TEU have been adhered to. One could go further, by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU in a Member State by means of an infringement procedure brought by the Commission or another Member State before the Court of Justice of the European Union.

A Treaty amendment could also be envisaged that lowers the high thresholds for triggering at least the first stage of the Article 7 TEU procedure. This could include giving the Commission specific information-gathering powers, or specific powers to issue sanctions in relation to rule of law violations ahead of political Article 7 decisions.

Member States could also be called upon to give the EU legislator greater powers as regards the mandate of the Fundamental Rights Agency (FRA) by means of a Treaty amendment. The FRA currently can only analyse fundamental rights issues at EU level and is barred, by its mandate adopted unanimously by the Council of the EU, from analysing national situations.

IV. Questions

1. *In terms of respect for the rule of law in a Member State, which circumstances would trigger a need for action at EU level?*

2. *What type of action at EU level would you consider necessary to effectively address rule of law concerns in a Member State?*

Full information on submitting contributions:
http://ec.europa.eu/justice/events/assises-justice-2013/discussion_papers_en.htm