



PRIME MINISTER'S OFFICE
HUNGARY

State Secretariat for EU Relations

**Position paper of the State Secretariat for EU Relations
of the Prime Minister's Office, Hungary
on the Consultation about the Communication of the European Commission
on „Further strengthening the Rule of Law within the Union”**

Budapest
28 May, 2019

In its communication of 3 April 2019 on *Further Strengthening the Rule of Law within the Union – State of play and possible next steps*¹, the European Commission 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. The fact that the Commission will return to this issue as early as in June 2019 with its own conclusions and proposals and the lack of venues for a structured dialogue with stakeholders seem to make the consultation a **rather symbolic exercise**. However Hungary, as a Member State firmly committed to the respect for the rule of law, considers it important to contribute to the consultation.

It is common ground that the Union is founded on the value of respect for the rule of law; a value that is common to the Member States.

The principle of rule of law has been subject to an extensive constitutional dialogue with the participation of international organisations, national constitutional organs, academia and civil society. Nevertheless, this dialogue hasn't changed the nature of **rule of law as a constitutional principle that is constantly being tested and reshaped by the dialogue itself**. Therefore, the starting point of the Commission that intends to portray rule of law as a set of well-defined rules and suggests that compliance can be objectively assessed is a clear misrepresentation of the rule of law concept and a misunderstanding of the related constitutional dialogue.

Hungary reiterates that **the primary responsibility for ensuring the respect for rule of law lies with Member States and their national institutions**. In the course of their activities, national institutions not only apply and ensure respect for rule of law but also shape its content. The Commission communication is silent on the crucial role of national institutions and relegates them into a secondary position where EU institutions, in particular the Commission, may be the judge of the quality and efficiency of national institutions and may step in to complement or replace them. This approach is also based on an obvious

¹ COM(2019) 163 final

misunderstanding of the constitutional dialogue that shapes and implements the concept of rule of law.

Hungary does not share the Commission's analysis that rule of law is under pressure in the EU and needs particular attention. On the contrary, being deprived of its original character as a constitutional principle, rule of law is increasingly used as a tool of political leverage. In fact, rule of law needs **less political attention and more legal and constitutional reflection**.

The Commission communication is also silent on the **Treaty basis of the suggested revision of its rule of law framework**, structures and procedures. However, it should be recalled that in 2014, a majority of Member States found, and Council Legal Service confirmed in its written opinion, that the Commission's rule of law framework is not compatible with the principle of conferral which governs the competences of EU institutions. **Article 2 of the Treaty on European Union (TEU) does not confer any material competence upon the Union**. It certainly does not give the possibility for a continuous and abstract constitutional control: it lists values, including the rule of law, that should be respected by the institutions of the Union and by its Member States when they act within the limits of the powers conferred on the Union in the Treaties. In addition, Article 4(2) TEU provides that **the Union shall respect the national identities of the Member States**, inherent in their constitutional structures. It follows from these provisions that the authoritative interpretation and general review of constitutional rules is not among the powers conferred on the Union by Member States.

As the communication presents in detail, there are a number of **already existing possibilities** to remedy situations where rule of law related issues constitute an infringement of a Member State's obligations under EU law. The Commission as the guardian of the Treaties is required to use these instruments to ensure the application of the Treaties while guaranteeing the principle of equal treatment and non-discrimination of Member States. Most of the activities suggested by the Commission seem to duplicate or circumvent these tools with the effect of perpetuating already settled conflicts and transforming them from legal into political disputes.

The procedure described at Article 7 TEU, a violation of the values of the Union, including the rule of law, should be a last resort and be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions. The suggested non-binding forms of action do not make it possible to disregard these limitations. Specifically, the Commission's proposal for a new mechanism to protect the Union's budget in case of generalised deficiencies regarding the rule of law in Member States in its current form complements and amends the procedure under Article 7 TEU and is therefore incompatible with the Treaties.

The communication seems to confirm a tendency recently advocated by the Commission to transform sector specific instruments and procedures into comprehensive rule of law monitoring devices. Besides the above mentioned concerns related to the lack of Union competence in this area, such approach has also proven to be counterproductive: **the sector specific instruments lose their original focus and become politicised while failing to bring any added value in rule of law related issues and antagonising Member States**. Hungary does not share the Commission's analysis that the European Semester has proven to be a good framework to develop country-knowledge relating to rule of law because the principle

of non-discrimination and equal treatment of Member States with regard to certain subject matters have not been ensured. Thus, this instrument does not offer any further potential for rule of law related purposes.

The communication remains silent on the need to ensure that **rule of law is strengthened and upheld in the activities of EU institutions**. If EU institutions are to engage in a systematic monitoring of all Member States concerning rule of law related issues, as essentially suggested by the Commission, an *ex ante* condition for such activities should be a vigorous control mechanism to ensure respect for rule of law within the institutions themselves. This control mechanism should go well beyond the legality of institutional activities and must provide effective guarantees for the **equal and objective treatment of all Member States as well as a transparent and verifiable use of reliable sources when formulating institutional positions**. Reliance on opinions of external experts and non-governmental institutions raises the question of accountability and transparency.

The communication acknowledges that the **Council of Europe has played a crucial role** in developing definitions and standards with relevance to the rule of law and has established venues for a related constitutional dialogue. As highlighted in recent debates at the Council of Europe Parliamentary Assembly, these standards and institutions are strongly embedded in the institutional and procedural framework and principles of the Council of Europe. Accordingly, when it comes to an enhanced cooperation with the Council of Europe and other relevant international organisations (such as the OSCE/ODIHR or the UN), an extremely cautious approach is needed. While objective and transparent sources like court judgements or opinions of the Venice Commission could be taken into account when assessing possible rule of law issues, the findings and analyses of the Council of Europe should not serve as an automatic basis for measures affecting rights and obligations stemming from EU membership.

Hungary agrees that solidarity, cohesion and trust between Member States are the foundation of the Union. The benchmark against which the proposals in the communication must be measured is whether they enhance solidarity, cohesion and trust. **In its current form the communication points in a direction where mutual trust is replaced by institutionalised mistrust, constitutional dialogue is replaced by expectations of unilateral alignment and cohesion is further weakened by new lines of division between Member States, instead of focusing on strengthening the unity of the European Union.**