

MEDEL CONTRIBUTION TO THE DEBATE LAUNCHED BY THE EUROPEAN COMMISSION ON “FURTHER STRENGTHENING THE RULE OF LAW WITHIN THE UNION”

Ref: Communication from the Commission to the European Parliament, the European Council and the Council, COM (2019) 163 final - Further strengthening the Rule of Law within the Union, State of play and possible next steps

MEDEL – *Magistrats Européens pour la Démocratie et les Libertés*, has presented a joint contribution to the debate above mentioned as member of the *Platform for an Independent Judiciary in Turkey*.

MEDEL hereby presents its individual contribution to that debate, stressing, however, that this individual contribution does not affect the collective one already presented, which it fully subscribes.

The European Commission has structured the request for contributions in three pillars (with topics/questions), which we will follow in this document: promotion, prevention and response.

I. **Promotion: Building knowledge and a common Rule of Law culture**

It is now finally recognized that there is a set of principles and minimum standards which are at the core of the Rule of Law, regardless of different traditions or judicial cultures and which are the basis of a common shared ground of understanding between all Member States.

MEDEL already raised that issue in its contribution to the *Assises de la Justice*, organized by the European Commission in November 2013, and the European Court of Justice has clearly started to affirm it as a general principle of EU Law (Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*).

It is therefore clear how fundamental the importance is to promote the knowledge of that set of core values common to all Member States, point of view that MEDEL fully subscribes.

Topics raised

- **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?**

MEDEL would like to make two different propositions on this topic.

1. The diversity of national systems in all Member States is often presented as an excuse or justification by governments who are putting the Rule of Law at risk – the existence



of “national constitutional traditions” or the “specific judicial culture” of a certain country is many times put forward as the reason for the implementation of measures who objectively undermine the independence of the Judiciary.

Dialogue and common understanding can only be based on mutual knowledge of different national systems and traditions. It is impossible for relevant players in the field of the Rule of Law to engage in a productive dialogue without having a deep knowledge of the organisation of the judicial systems of other Member States. This knowledge, however, is now extremely limited, due to the lack of cross-border information or constant changes in the laws concerning the Judiciary. MEDEL believes that the European Commission, seen its role in the promotion of dialogue between all Member States, is in a key position to promote that common knowledge.

Although it was a positive step the introduction in the *Independence Chapter* of the 2019 *EU Justice Scoreboard* of figures and indicators about bodies and authorities involved in disciplinary proceedings, it is essential to have clear, objective and descriptive information about the way the Judiciary is structured in all Member States. In MEDEL’s perspective, this is a *sine qua non* condition for any other measure of promotion of dialogue about the Rule of Law within the Union.

MEDEL suggests that the European Commission improves the Justice Scoreboard and publishes on a regular basis (annually or biannually) a report on the organisation of judicial systems in all Member States, with information on the way the different judicial systems are structured (ranging from how judges and prosecutors are recruited, appointed, evaluated, punished or dismissed, the existence or not of high councils, their composition, appointment of its members and competences, etc.).

2. Since the setting up of the Copenhagen criteria, in 1993, the European Commission has developed an intensive and important work of dialogue with different States, be it those who meanwhile entered the European Union or those who still have ongoing accession negotiations. Although negotiations are obviously dealt with on a State-by-State basis, it is possible to draw some common lines and principles on what was required from the candidate States.

MEDEL believes that it is important to have a global picture of the main common lines of the objective measures that were demanded from candidate countries in the field of the Rule of Law and the Independence of the Judiciary. Seen the individual nature of accession negotiations, it would be essential to have a single document where these common lines could be identified. This would be an important way of promoting the existing EU standards on the Rule of Law.

MEDEL suggests that the European Commission publishes a document summarizing the negotiation processes engaged since the setting up of the Copenhagen criteria, 26 years ago, clearly identifying the main common lines that may be drawn from those individual negotiation processes in the field of the Rule of Law.

- 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?

Another consequence of the dialogue between European Institutions and different States was the increase of academic attention to the issues related to the organization of the Judiciary (from the perspective of its independence and not only its efficiency), with many authors now writing about the topic and evaluating the outcome of that dialogue (v.g. *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited*, ed. Michal BOBEK, Hart Publishing, Oxford: 2015).

In MEDEL's view, a reflection is needed on the successes and shortcomings of the 26 years that have passed since the setting up of the Copenhagen criteria and on the intensive activity of the European Commission in the field of the Rule of Law (either in accession negotiations or in the CVM mechanisms of Bulgaria and Romania): which were the main challenges and difficulties faced either by the European Commission in the dialogue with those States or by the States themselves in implementing institutions and structures in the field of Rule of Law and the independence of the Judiciary.

MEDEL suggests that the European Commission promotes a cross-border debate with academic institutions and NGO's from the area of justice, with the objective of making an impartial and objective assessment of the activities of the past 26 years in the field of Rule of Law promotion in the Union. In order for the debate to be as wide as possible, funding should be made available and strict criteria should be set up, demanding joint applications of institutions (Universities and NGO's) of a minimum number of Member States (ideally not less than 5), always including some from the more recent Member States, where the measures demanded by the European Institutions have been applied.

- 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?

MEDEL's experience of recent years unfortunately points more to the need of protecting the Judiciary against undue interferences from national parliaments than to the need of promoting debates in them. It is obvious that Member States have to be more involved in the promotion of the discussion on the Rule of Law. However, this can only be achieved through the increase of participation of judicial associations and other relevant players from the civil society and establishing mechanisms for their effective involvement (even if merely consultative) in Rule of Law related matters.

MEDEL believes that:

- **recommendations should be addressed to Member States by European authorities, demanding the participation of judicial associations and NGO's in all legislative debates on matters directly affecting the Rule of Law;**

- funding programs should be set up to support initiatives from judicial associations intended to increase public awareness about Rule of Law issues (v.g., open court days, conferences in schools by judges and prosecutors about fundamental rights and the importance of an independent judiciary).
- 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?

From the experience of the accession negotiations in the countries of some of our member associations, MEDEL sees as extremely important – even decisive – the cooperation with the Council of Europe and its bodies (consultative, judicial or deliberative). We feel, however, that sometimes governments try to find in the intervention of the Council of Europe’s bodies (such as the Venice Commission, for instants) support to measures that many times undermine the Rule of Law. This objective is sometimes achieved by surrendering incomplete or inaccurate information to the bodies of the Council of Europe.

MEDEL stresses the need to strengthen and reinforce cooperation between the European Commission and the Council of Europe and believes that the European Commission has a decisive role in providing accurate and complete information on individual States.

In addition, **MEDEL wishes to make clear its strong opposition to a peer-to-peer review mechanism between Member States as the one that has recently been proposed.**

We here recall the severe problems that the Union has faced in recent times in the cases of Poland or Hungary and the limitations that derive from the unanimity required by art. 7 of the treaty for imposing sanctions. A peer-to-peer review mechanism between Member States would only bring greater difficulties, opening the door to further reciprocal blockings by infringing Member States to the intervention of European Institutions.

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

Although in a long term perspective we may think of stronger and more developed tools and mechanisms of intervention of the Union in what regards the Rule of Law in Member States, the

serious challenges the Union has been facing in countries such as Poland or Hungary and that may arise in other Member States demand an immediate response.

Therefore, **MEDEL believes that the existing Rule of Law Toolbox already allows for a concrete and to a certain extent effective answer to the risks and challenges which are now being posed in some Member States. Engaging in further discussions about new mechanisms, although important for the future, must never lead to a passive attitude from the part of European authorities, in a time where a strong reaction is essential to stop growing menaces to the independence of the Judiciary.**

Topics raised

- *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?*

On this topic, we refer to what was already above said about the need to organize information on the different judicial systems of all Member States, in order to allow comparative analysis and a quicker understanding and reaction of proposed changes. This report, in addition to the State assessments and the *EU Justice Scoreboard*, would be, in our view, an essential element to the promotion of the common standards of Rule of Law to the early prevention of possible infringements.

We also refer in this matter to what is referred in the contribution given by the *Platform for an independent Judiciary in Turkey* – **MEDEL believes that from the experience of countries where the Rule of Law has been put in danger, it would be very important to make a list of “alert triggering” measures – changes in the laws governing the Judiciary that may in themselves not be abstractly endangering of the Rule of Law but have proven to be so in practice. This would be an essential tool to an early detection of risks to the Rule of Law.**

- *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?*

Based on the proposition just made of creating a list of “alarm triggering” measures, **MEDEL believes that a previous notification procedure could be designed. As it already happens in budgetary matters, reforms or changes in the main laws concerning the Judiciary could be subject to previous mandatory communication to the European Commission for a first assessment of their compatibility with the Rule of Law standards.**

Even if the opinion of the European Commission would not have binding force, it would have two very relevant consequences:

- a previous and early knowledge by the European Commission of all proposed measures that could undermine the Rule of Law in all Member States;
- a decisive contribution from European authorities to the internal debate that may be carried out in the Member State concerned.

The opinion of the European Commission could involve a previous assessment by the European Parliament, even if only through its workgroups, in order to give it a more wide and democratic legitimacy.

III.

Response: Enforcement at Union level when national mechanisms falter

In this specific topic, the recent jurisprudence of the European Court of Justice has changed the European reality concerning the Rule of Law in a decisive way, as it is stressed in the *Communication from the Commission to the European Parliament, the European Council and the Council, COM (2019) 163 final*.

The European Commission and national players have now an effective way to counterattack threats to the Rule of Law that may arise in Member States. It is time to use it, thus contributing not only to defend the Rule of Law from existing menaces, but also to boost the development and densification of a coherent jurisprudence on the Rule of Law in the European Union.

Topics raised

- How can the relevant case law of the Court of Justice be effectively disseminated and its potential fully used?

We here refer to the suggestion made above on publishing a periodical report on the organisation and structure of the individual Member States.

MEDEL suggests that in the report on the judicial systems of individual Member States, a summary of that period's most relevant jurisprudence from the European Court of Justice on the Rule of Law is included.

- 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?

We also refer here to the suggestion previously made of the creation of a previous notification procedure when changes to the fundamental laws on the Judiciary are concerned. This procedure could involve a first assessment by the European Parliament, before the opinion of the European Commission, thus allowing a deeper knowledge of the situation and a timely

coordination between both institutions in the case of adoption of the measures contrary to the Rule of Law by the concerned 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)?*

The lessons learned from the situation in Poland is that the protection of the Rule of Law requires a comprehensive and coherent monitoring mechanism to be applied to EU Member States, as strict as that applied to candidate countries, not just a tool for emergency situations but a regular assessment system.

MEDEL expresses its support for the policy outlined in the European Parliament Resolution (25 October 2016), reiterated in 2018, also mentioned in the Communication COM (2019) 163 final, which recommends to the European Commission the creation of a comprehensive EU mechanism on democracy, the Rule of Law and fundamental rights under art. 295 TFEU, and the proposal for a dedicated Union Pact (Pact for DRF) which is intended to apply, without distinction, to every member state and EU institution, to put the whole EU under democratic surveillance, promoting a horizontal and general approach to the Rule of Law.

Also, cooperation and coordination with the Council of Europe is decisive to the success of the effective response to threats to the Rule of Law. Whenever the Venice Commission is seized by a State which is also a Member State of the European Union, if the Venice Commission finds that the Rule of Law is being put at risk, mechanisms should exist in order to trigger procedures from the European Union institutions that could ultimately end in possible infringement procedures. **MEDEL suggests opinions of the Venice Commission that find a risk for the Rule of Law in a Member State be considered in order to trigger a consultation procedure to be conducted by the European Commission, that could ultimately end in an infringement procedure.**

- *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?*

As MEDEL has constantly stated in recent years, one of the main challenges threatening the cohesion of the Union is the response to migration. This is an area where basic fundamental rights are at stake and the values that are at the core of the Union and were enshrined in the Charter of Fundamental Rights are being more seriously threatened, due to the lack of an European coordinated answer and the refusal of some Member States to cooperate in a joint effort to face migration flows.

On the other hand, deficiencies in the Judiciary of a Member State put also in danger long acquired Union freedoms and the internal market. If, for instants, the judicial system of a



determined Member State is put in such a situation that the rights of minorities are no longer guaranteed, freedom of movement within the Union is severely threatened.

It is therefore essential that what is now already recognised as in the area of the financial interests of the Union may also be recognised as essential for all areas of EU laws and policies.

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