



to European Commission
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Introduction

On 3 April 2019 the European Commission published its Communication on further strengthening the Rule of Law within the Union. The Netherlands Council for the Judiciary welcomes the initiative of the European Commission to describe the current state of play and its suggestions for future changes. Respecting, upholding and further strengthening the rule of law is essential to the future of the European Union and especially to its citizens.

In this position paper the Netherlands Council for the Judiciary sets out its view on the state of rule of law within the EU and formulates proposals to further strengthen the rule of law and more specifically the judiciary in the EU.

Strengthening the Rule of Law within the EU – a shared responsibility

In addition to democracy and fundamental rights, the rule of law is one of the fundamental values on which the European Union is established. Important aspects of the rule of law include an independent judiciary and the separation and balance of powers. The preservation and protection of the rule of law is a responsibility of the judicial branch as well as the legislative and the executive branches of government. In recent years, governments in some EU countries have been exerting pressure on the respective judiciaries in their countries. In certain cases, the threat to the rule of law is restricted to a single incident, while in other cases it is more expansive and forms part of government efforts to place the judiciary under the remit of the executive power.

In its Communication on the Rule of Law, the European Commission sets out the existing toolbox to help enforce the rule of law within the EU and makes suggestions for further amelioration of the system.

What is striking about this toolbox and suggestions for the future, is that there is no role for the judiciaries of the Member States. Contrary to European governments and European citizens the judiciary has no formal representation on a European Union level. This means that in the process of creating new EU policies that may affect judiciaries of Member States (for example on the instrument of enforcement at Union level when national mechanisms falter), these judiciaries do not have a role. This is contrary to the national level wherein a government has to consult with the judiciary on proposed changes concerning the judiciary.¹

One could say that the European courts may play a role in this regard. However, the courts are not equipped and do not formally represent the judiciaries of the Member States. Another possibility is that national governments consult with their judiciaries when European policies are changed that may concern its judiciaries. The question is how this will work out when that same government endangers the independence of the judiciary.

¹ <https://www.ency.eu/articles/89>

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The Netherlands Council for the Judiciary therefore believes that the judiciaries of Member States should be better represented within the EU. Setting out a new agenda on the rule of law within the EU is a unique opportunity to translate this into concrete actions.

Proposals for the EU rule of law toolbox

The Netherlands Council for the Judiciary has several proposals and suggestions to further strengthen the rule of law within the Union.

1. *Strengthening the position of judiciaries on EU level*

Judiciaries should be better represented on the level of the EU. This can be done through consultation and advice. In the Netherlands for example the Council for the Judiciary is tasked with advising the government and the States General on generally binding regulations and the policy to be pursued by central government in relation to the administration of justice.²

European networks such as the European Network on Councils for the Judiciary (ENCJ)³, should be considered by the EU as a first point of contact and given an advisory role in the creation of new policies concerning the European judiciaries.

2. *Safeguards for an independent judiciary*

To further reinforce the Judiciaries within the EU safeguards have to be made to ensure their independence even if there is a change of political wind. The ENCJ has developed standards on numerous topics concerning the judiciary: independence and accountability of the judiciary⁴; Councils of the judiciary; selection, appointment and promotion of judges⁵; quality, efficiency and innovation⁶. These standards have been developed by the different European Councils and set out a clear framework to further strengthen judiciaries. They should be used in the European rule of law toolbox to enhance the judiciaries within the EU.

3. *Funding in support of the judiciary*

In the discussion on the new Structural Funds a number of Member States have suggested to include the respect of the rule of law in the conditions for EU funding. This is already the case for candidate countries of the EU. In its 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 the European Commission makes a clear link between the state of the rule of law and the EU budget. In addition to the conditionality of rule of law for EU funding, the Netherlands Council for the Judiciary proposes to earmark a part of the EU funds specifically to the judiciary. These

² Art. 95 of the Act of 18 April 1827 on the composition of the judiciary and the organisation of the justice system.

³ The European Network of Councils for the Judiciary unites the national judiciaries of the EU Member States which are independent of the executive and legislative branches of government, and which are responsible for the support of the Judiciaries in the independent delivery of justice, <https://www.encj.eu/>.

⁴ ENCJ project on Independence and Accountability <https://www.encj.eu/articles/71>

⁵ <https://www.encj.eu/articles/79>

⁶ <https://www.encj.eu/articles/85>

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additional funds could also support the judicial networks in their work as well as in enforcing their role within the EU.

Conclusion

The rule of law is one of the fundamentals of the EU. It affects the daily lives of EU citizens and is essential for economic growth. In its Communication on strengthening the Rule of Law within the Union the Commission sets out instruments to promote, prevent and respond in the field of rule of law. The Netherlands Council for the Judiciary supports the suggestions made by the Commission. However, the Council believes that the rule of law within the EU can be really strengthened when European judiciaries are represented on a EU level. This can be achieved by giving the judiciaries an advisory role. In line with this proposal, the ENCJ should be appointed as a first point of contact when creating policies concerning the European judiciaries. Strengthening the rule of law is not an exclusive task of the executive and the legislative powers, but should be a shared responsibility of all three powers including the Judiciary.