

**Council of Europe’s secretariat comment to the Communication from the Commission on  
*Further strengthening the Rule of Law within the Union***

***State of play and possible next steps***

The present document is the Council of Europe’s Secretariat contribution to the European Commission’s Communication on the setting up of a mechanism for further strengthening the Rule of Law within the European Union<sup>1</sup> (Communication). It is based on previous discussions with the European Commission and responds to the Commission’s invitation to stakeholders to contribute with ideas on how the rules of law toolbox could be developed in the future.

The Council of Europe has the standards and mechanisms to support the European Union (EU) in the effective enforcement of the Rule of Law through the 3 pillars of promotion, prevention and response.

**1- Promotion: building knowledge and a common rule of law culture**

➤ **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?**

The Council of Europe is home to most of the pan-European legal standards in the area of the Rule of Law. These binding and non-binding “Rule of Law standards” have been adopted by its bodies in areas such as the independence of justice (including constitutional justice), the proper functioning of state institutions, the combat against torture, the fight against corruption and related crimes, non-discrimination and equality before the law.

As the Communication states, the Council of Europe Rule of Law standards, as well as its opinions and recommendations “are the bedrock for the respect of the rule of law in all Member States, irrespective of their constitutional structures”<sup>2</sup>.

Also, the then PM of Luxembourg and present President of the Commission, Jean-Claude Juncker, indicated in his 2006 Report “*Council of Europe-European Union: a sole ambition for the European Continent*”:

---

<sup>1</sup> (COM(2019) 163 final.

<sup>2</sup> Idem, p. 8.

*“It would thus seem appropriate [...] that EU bodies should give formal effect to the spirit of Article 6.2 of the Treaty on the European Union, on which co-operation with the Council of Europe is based, by making it a [...] rule that the decisions, reports, conclusions, recommendations and opinions of these monitoring bodies:*

- 1. will be systematically taken as the first Europe-wide reference source for human rights;*
- 2. will be expressly cited as a reference in documents which they produce.”*

The strengthening of the Rule of Law mechanism in the EU should be achieved against a set of clear, transparent and objective criteria. These can be further promoted by ensuring that, when acting within their institutional prerogatives (e.g. EU RoL framework, Article 7 TEU, Cooperation and Verification Mechanism, European Semester, enlargement process or association and partnership processes), EU institutions regularly take into consideration the Council of Europe’s existing “Rule of Law standards”, including the case law of the European Court of Human Rights, relevant Recommendations of the Committee of Ministers, standards and opinions of the Venice Commission, opinions and/or findings of the relevant Council of Europe advisory and monitoring bodies.

- **What 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?**

The structural functioning of the advisory and monitoring mechanisms of the Council of Europe *per se* promotes discussions on the Rule of Law at national level. First of all, it should be noted that all EU member states participated in the elaboration of the Council of Europe “Rule of Law standards” which are therefore common to all European states. In addition to the European Court of Human Rights, the Council of Europe has a number of monitoring and advisory bodies whose task is to monitor and support states in complying with and effectively implementing the “Rule of Law standards”, thereby establishing an ongoing dialogue and exchange with national authorities. While the legal basis, working modalities and composition of these bodies are diverse, their recommendations constitute sources of verification for the implementation of the “Rule of Law standards” by member states. Moreover, through its Parliamentary Assembly, composed of members of national parliaments, and country specific or thematic reports presented and debated in the framework of the Parliamentary Assembly’s work, the Council of Europe promotes debates on the rule of law in its member States’ national parliaments<sup>3</sup>.

---

<sup>3</sup> See, in this context Parliamentary Assembly Resolution 2273 (2019) on the Establishment on a European Union mechanism on democracy, the rule of law and fundamental rights.

Many activities promote the conditions necessary for the Rule of Law. This primarily concerns issues related to the existence, organisation and efficient functioning of institutions necessary for the Rule of Law: institutions of justice (civil, criminal, administrative), independence of judges, institutions of law enforcement and execution of judgments, non-judicial institutions such as the Ombudsman and national human rights institutions.

The Council of Europe also promotes respect for Rule of Law principles through its co-operation activities implemented through large-scale projects at the national level. They focus on the manner in which those structures and institutions operate, seeking to ensure that qualitatively they respect the requirements of Rule of Law and of course of the specific treaty obligations to which the state is a party. The relevant projects include a wide range of activities, such as<sup>4</sup>:

- provision of legislative expertise to ensure that national regulatory frameworks conform to the requirements of the Rule of Law and that member states are aware of the implications as regards actual implementation;
- strengthening the awareness of the specific requirements related to the appointment, dismissal, career developments and salaries for judges and prosecutors;
- training of legal professionals (judges, prosecutors, lawyers); members of the high judicial councils so as to strengthen the administration of justice; auxiliary court personnel (clerks, registrars) and bailiffs; civil society groups and their legal representatives on how to contribute to the public debate, how to be a "check" on the administration and the judiciary, and how to advocate specific human rights/judiciary related issues;
- improvement of the management of detention facilities (pre-trial and following sentencing);
- preventing and combating corruption and other economic crimes.

➤ **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?**

The Memorandum of Understanding between the Council of Europe and the European Union<sup>5</sup> explicitly provides that *“the Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe”* and that *“the European Union regards the Council of Europe as the Europe-wide reference source for human rights. In this context, the relevant*

---

<sup>4</sup> CM(2008)170, November 21 2008.

<sup>5</sup> Of 23 May 2007.

*Council of Europe norms will be cited as a reference in European Union documents. The decisions and conclusions of its monitoring structures will be taken into account by the European Union institutions where relevant”.*

In that respect, the Council of Europe advisory or monitoring bodies are a unique feature of the Council of Europe: their recommendations (based on collective, even-handed, transparent, objective and rule-based decision making) constitute sources of verification for the implementation of the Rule of Law standards by members States. Consequently, when carrying out its tasks resulting from its institutional prerogatives (e.g. Rule of Law framework, Article 7 TEU, Cooperation and Verification Mechanism, European Semester, enlargement process or association and partnership processes), the EU should intensify the appropriate use of the Council of Europe’s expertise and tools available through its wide-range available advisory opinions and monitoring recommendations of the Council of Europe bodies. This may occur in a threefold way: 1) EU participation in the Council of Europe bodies, 2) responsiveness of the Council of Europe bodies to EU requests pursuant to modalities foreseen by and the relevant rules of the bodies concerned and 3) EU support to the Council of Europe work through an un-earmarked contribution in line with the on-going discussions between the Council of Europe and the EU<sup>6</sup>.

So far, the EU is a member of the European Pharmacopeia and of the European Audiovisual Observatory; the European Commission participates in the meetings of the Venice Commission; discussions about EU’s participation in GRECO are ongoing. An enhanced participation of the EU in the Council of Europe monitoring/advisory bodies, pursuant to modalities that need to be defined and may differ from one body to another, will increase consistency in the respective Organisations’ approaches to common Rule of Law matters in specific countries.

To ensure a good cooperation between the Council of Europe and the EU, the strengthening of the EU Rule of Law mechanism should contain some safeguards, such as a provision indicating that the Commission’s assessment or action regarding the Rule of Law will not affect existing procedures arising from Council of Europe advisory or monitoring mechanisms, along similar lines as Article 53 of the EU Charter of Fundamental Rights. The case law of the European Court of Human Rights, the relevant Recommendations of the Committee of Ministers, standards and opinions of the Venice Commission, opinions and/or findings of the relevant Council of Europe advisory and monitoring bodies should inform the preparatory work of the review.

---

<sup>6</sup> See *Report by the Secretary General for the Ministerial Session in Helsinki, 16 – 17 May 2019, Ready for future challenges- reinforcing 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?**

The Rule of Law is not a new concept: the standards relating to it, while having long remained perhaps less visible than those relating for example to human rights, have been set and developed over the years, notably through the relevant instruments and collegiate procedures in the Council of Europe, including the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights, in particular as regards the functioning of the judiciary and access to independent and impartial justice. The expected accession of the European Union to the ECHR will reinforce the consistency of the legal obligations throughout the continent and, by subjecting the EU institutions themselves to the same obligations and same scrutiny, will reinforce EU's credibility and legitimacy in debating on Rule of Law issues and promoting common and coherent approaches based on the Rule of Law standards enshrined in the ECHR.

Ownership of these "Rule of Law standards" is with all Council of Europe (and European Union) member States. It is therefore important that the enhancement of the current EU Rule of Law mechanism should build on such ownership and be carried out on their basis. Any assessment of the state of the Rule of Law in a given country should be fair and equal, and it is therefore essential that it should be based on clear, transparent and objective criteria. For the sake of fairness and credibility, the criteria used for the assessment should pre-exist the exercise and should be long-standing and recognised by all the member States. These criteria, as explained above, already exist at the level of the Council of Europe. They should be used and explicitly reflected amongst the main reference indicators for the implementation of the Rule of Law procedure. The EU Rule of Law procedure should be harmonised and consistent with the Council of Europe Rule of Law assessment procedures which have been carried out and will continue to be carried out in respect of EU member States.

When assessing the conditions for invoking the EU Rule of Law mechanism, adopting the relevant decisions, and monitoring whether the identified deficiencies have been addressed, the EU should therefore make appropriate use of the available advisory opinions and monitoring recommendations of the Council of Europe bodies, among others.

This means that the internal EU decision-making processes should be informed by and should explicitly acknowledge and rely on the available case law of the European Court of Human Rights, as well as the opinions and recommendations of the Council of Europe's advisory and monitoring bodies, to ensure that there is no double system of measuring, no unnecessary overlap and no inconsistency. All care should be taken to avoid that the enhanced Rule of Law

mechanism result in double-standards if the content of the qualitative assessment and/or the proposed action by the EU is different or contradicts a Council of Europe advisory or monitoring body dealing with a similar issue. This would be confusing for, and potentially jeopardise the application of the “Rule of Law standards” in our member states.

In a time when the Rule of Law is challenged from many sides and in different, national and supranational contexts, it is of paramount importance to strengthen the existing mechanisms and ensure their legitimacy, credibility and sustainability as well as overall consistency. A strong support of the EU to the outcomes of the Council of Europe advisory and monitoring bodies achieves the double objective of strengthening the legitimacy of the EU action on the basis of a consolidated and robust Rule of Law-system to which all EU member states are part, and of supporting the sustainability of the system itself.

## **2- Prevention: cooperation and support to strengthen the Rule of Law at national level**

- **How can the European Union 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?**

A two-steps procedure could be devised for the EU to take into account Council of Europe advisory bodies’ opinions or monitoring bodies’ recommendations: (i) when available, these opinions or recommendations should always inform the EU’s assessment to determine whether “Rule of Law”-related issues arise and, in the affirmative, (ii) they should also guide the EU’s proposals for any action to be taken. Adequate recognition should be given to the work of the Council of Europe body/ies at the origin of the opinions or recommendations.

When promoting the Rule of Law outside its borders, the Commission frequently co-operates with the Council of Europe as far as non-EU member States of the Council of Europe are concerned (i.e. mostly South-East Europe, the South Caucasus, Russia and Turkey). Through “joint programmes”, assistance is being given to those States in order to adapt their legislation, practice and institutions to the European standards which form part of the *acquis communautaire*. These programmes focus notably on the development of the judiciary, on penitentiary reforms, on the effective implementation of human rights standards at the national level, on the fight against various forms of economic and organized crime as well as on international co-operation in criminal matters. In this context, Council of Europe standards already represent the basis on which cooperation activities are built upon.

### **3- Response : enforcement at Union Level when national mechanisms falter**

- **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 strengthening of the EU Rule of Law mechanism should draw inspiration and ideally rely on the Venice Commission Rule of Law Checklist<sup>7</sup> which is intended to provide a tool for assessing the Rule of Law in a given country from the point of view of its constitutional and legal structures, the legislation in force and the existing case law, against the background of the existing European and universal standards. The checklist aims at enabling an objective, thorough, transparent and equal assessment. It is meant as a tool for a variety of actors who may decide to carry out such an assessment: These may include Parliaments and other State authorities when addressing the need and content of legislative reform, civil society and international organisations, including regional ones – notably the Council of Europe and the EU.

When triggering its Rule of Law mechanism, the EU should also count on the available advisory opinions and monitoring recommendations of the Council of Europe bodies, either through EU participation in the Council of Europe bodies, or through responsiveness of the Council of Europe bodies to EU requests pursuant to the modalities foreseen by and the relevant rules of the bodies concerned.

Indeed, in the absence of a recommendation or report on a given issue or topic by a Council of Europe monitoring body, ways can be explored to allow the competent Council of Europe body to deal with the issue at stake in accordance with modalities that need to be defined and pursuant to its procedural rules and terms of reference. While these modalities may vary depending on the body concerned, due account should always be taken of the need to preserve its independence and its legal and capacity constraints. Moreover, it should be stressed that the legal and technical assessments made by Council of Europe bodies as to the compliance with its norms, standards and recommendations should be distinguished from any decision as to whether and what action should be taken in the framework of any mechanism for strengthening the Rule of Law within the European Union. While the former assessment is within the monitoring and advisory bodies' role, the latter should not be bestowed on them and should be entirely left to the political decision-making bodies of the EU.

\* \*

\*

---

<sup>7</sup> [https://www.venice.Council of Europe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.Council of Europe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)