

COMMISSION COMMUNICATION 3 APRIL 2019 - RULE OF LAW

INPUT FROM THE NETHERLANDS

The Netherlands' policy regarding the rule of law in the European Union

The constitutional responsibility of the Government of The Netherlands for the promotion of the development of the international legal order, both inside and outside of the European Union, demands an active attitude and policy regarding the rule of law, as part of the fundamental values of the EU. The EU is a community of values: a legal community which according to Article 2 of the Treaty on European Union has its foundation in shared values like the rule of law, democracy and fundamental rights. As a community of values the EU and its Member States are obliged to make sure that the rule of law and democracy within the Union are being respected and strengthened. If that is not the case, the EU can no longer credibly act as a community of values in its foreign policy.

Respect for the rule of law in the Member States is also essential for a well-functioning Union. Effectiveness of agreements depends on uniform and concrete application and enforcement by independently operating judges in the Member States. Moreover, for EU cooperation in the field of judicial and police cooperation as well as in the field of the internal market, *mutual trust* between Member States and their respective legal orders is crucial. If this trust disappears, this cooperation is put at risk.

Respect for the rule of law and democracy is also important from the point of view of trust of the citizens in the Union and the implementation of its policy. Democratic, fair and effective governance creates societal trust in public institutions. This is essential for the well-functioning of the Union and society as a whole. Through respecting the rule of law, Member States ensure that citizens and businesses can count on a framework of predictable and fair rules and a system of effective legal remedies. Moreover, effective legal systems are an important element for a well-functioning business climate, healthy public finances and as a result for the economy as a whole. Thus The Netherlands, in close cooperation with other EU Member States, will focus in its efforts on respect for the principles of the rule of law and the promotion of its practical implementation, and consequently on upholding the EU values.

Dutch contribution to the debate initiated by the Commission

In light of the problems regarding the rule of law in a number of Member States that have surfaced in recent times, The Netherlands is in favour of strengthening the EU rule of law toolbox. The Netherlands welcomes the Communication and the start of a further discussion about possible options for the future by means of several debate questions and some concrete suggestions. The discussion about strengthening the EU toolbox focuses on three elements: *promotion, prevention and response*. According to The Netherlands, the instruments regarding the three elements of the rule of law could be further developed as indicated below.

Promotion

Regarding promotion of a rule of law culture and knowledge building within the Union, The Netherlands considers it important that the prevailing legal requirements, standards and rule of law case law are known in all Member States. The future information system of the EU Fundamental Rights Agency (European Fundamental Rights Information System, EFRIS), but also a dedicated rule of law chapter on the Commission's website, could concretely contribute to this. Apart from that,

knowledge building at the national level could be enhanced by the Commission issuing practical guidelines in which it gives an overview of the most important requirements and norms developed in the case law of the Court of Justice which the EU and its Member States need to abide by in order to uphold the rule of law. In addition, networks like the European Network of Councils of the Judiciary (ENCJ) and relevant civil society organisations should be enabled to fulfil their role, including through adequate support from the Justice and Rights & Values programmes under the new Multiannual Financial Framework.

Moreover, it is important that the general public is made aware of the rule of law, so that a culture of rule of law enjoys broad support. In its activities in the field of the rule of law, the Commission uses the expertise of the Council of Europe (e.g. the Venice Commission and the Group of States against Corruption), the OSCE or other relevant international organisations that play an important role when it comes to the development of recommendations, definitions and norms that are of importance to the rule of law. It is important that the awareness of these norms is increased, that unnecessary confusion is prevented regarding definitions, and that the coordination and the relations with (the activities of) the Council of Europe are enhanced. In light of the latter, it could be considered to integrate and enshrine the definitions that are developed by the relevant bodies of the Council of Europe as much as possible into the relevant EU instruments, for example into the 2014 Communication on a new EU Framework to strengthen the Rule of Law.

The Commission rightly underlines that recent case law from the Court of Justice has undeniably contributed to strengthening and promoting the rule of law, especially in the field of the independence of judges, a requirement that is inherent to the principle of the effective judicial protection of individuals' rights under EU law (Article 47 of the Charter of Fundamental Rights of the EU and Article 19 of the Treaty on European Union). This regards cases in which the Commission has launched an infringement procedure because of the situation of the values of the Union in a Member States (see further under *response*), but also cases in which preliminary questions have been asked about the interpretation of provisions of Union law which are essential to the rule of law.

Through its rulings, the Court of Justice is an important engine for the legal developments regarding the rule of law in the Union. It is important that this is being recognised and supported by the Member States at national level. A more active attitude from Member States when it comes to participation in court cases could be a way to underline the importance of the rulings.

Prevention

Regarding the prevention of erosion of the rule of law, The Netherlands welcomes the idea of the Commission to investigate whether (the use of) the EU Justice Scoreboard (EJS) could be developed to better tackle rule of law problems. For example, the importance of the EJS as framework for the development of country knowledge regarding the rule of law could be enhanced if it were expanded from the field of civil law to the field of criminal and administrative law. Currently the scoreboard mainly deals with civil and commercial law. Moreover, the effectiveness of the used indicators, the number of indicators and more qualitative aspects could be looked at. The EJS could also be expanded with the country-specific analyses drawn up by the Commission annually in the country reports under the European Semester. These country-specific analyses may also include rule of law aspects, e.g. regarding the functioning of the judicial system, and can sometimes also lead to recommendations to the countries involved. By including the analyses and recommendations to the EJS, they would gain in visibility. They subsequently could be discussed in the JHA or General Affairs Council.

During the term of office of the Commission, the responsible Commissioner for the rule of law could pay special rule of law visits to each Member State. These visits could then be reported to the General Affairs Council during its annual rule of law

dialogue focusing on the general rule of law trends in the Union based on the visits, and in the Justice and Home Affairs Council with the respective ministers responsible for the rule of law, the judiciary and legal protection.

From this same responsibility, the JHA Council could discuss general developments and concrete topics in the field of justice and the rule of law which follow from the case of law of the EU Court of Justice and the EJS.

In the case of specific situations in Member States the Commission could consider to (let) monitor how the country in question deals with the points of concern in the field of rule of law and other topics that are to be specified. Subsequently it would be up to the Commission to decide whether to enter into the dialogue as foreseen in the 2014 Communication with the Member State concerned. If it enjoys support, the (legal) modalities of this more systematic monitoring could be developed at a later stage, within the legal framework of the Treaties. In that regard one could think of embedding this in the mentioned 2014 Communication. Furthermore it is important to underline that the desirability of new initiatives should be seen in conjunction with other ongoing initiatives.

In order to conduct the rule of law dialogue more efficiently, the Commission could, as it proposes itself, refine the contents of its 2014 Communication by adding that recommendations to Member States should be accompanied by specific action plans and technical support programmes, and linking them to specific time paths. If a Member State doesn't comply with the recommendations within the given time limit, a possibility would be to ask a statement of the Council whether or not to extend the term of dialogue. To make it possible that the Commission could use this instrument of dialogue also in case of concerns in specific Member States regarding respect for human rights and democratic principles, it could be considered to expand the scope of the 2014 Communication to fundamental rights and democracy.

The Netherlands furthermore supports the Belgian-German initiative to set up a peer review mechanism in the margins of the General Affairs Council, in order to create a structural dialogue between Member States on the rule of law, in conformity with the conditions laid out in the Letter to Dutch Parliament from 12 March 2019.

Response

Regarding response to rule of law challenges, The Netherlands thinks that it is important that the Council takes its responsibility timely and adequately once an article 7 procedure has been initiated. The Netherlands is already aiming for that, together with like-minded Member States, but until now there is not always a majority for putting it on the agenda for discussion in the General Affairs Council. Besides, The Netherlands would like to stress the importance of enforcement of the rule of law through infringement procedures. In the past years this has proved to be an effective instrument to address deficiencies regarding the rule of law in the Member States, particularly when it comes to the independence of judges as an essential element of the rule of law. The Netherlands supports the Commission in its intention to, if needed, continue to ensure that Union law is applied and enforced correctly by means of infringement procedures in the field of the rule of law.

The Government of The Netherlands also supports protection of the EU budget against generalised deficiencies regarding the rule of law which are a risk to the financial interests of the Union, as proposed by the Commission in the new Multiannual Financial Framework.