



to Viviane Reding
European Commission
Vice-President in charge of Justice, Fundamental Rights and Citizenship
BE-1049 Brussels
Belgium

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Meijers Committee
Standing committee of experts
on international immigration,
refugee and criminal law

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Dear Vice-president Reding,

The Meijers Committee has read the Commission Communication “A new EU Framework to strengthen the Rule of Law” with great interest. The Committee welcomes this timely initiative and believes that the proposed structured dialogue procedure between the Commission and a Member State may be useful in solving systemic threats to the rule of law. The Meijers Committee would like to take the opportunity to make a number of recommendations to improve the efficacy of a dialogue procedure. In particular, the threshold for action should be clearly defined and the involvement of other relevant actors should be considered. Moreover, the Committee believes that, apart from the presently proposed framework, a number of other initiatives could be employed to both continuously promote the rule of law in Member States and take action against emerging threats.

Threshold for action

The proposal focuses on systemic threats to the rule of law. The Meijers Committee agrees that individual cases should be dealt with primarily by the national courts and the European Court of Human Rights. However, the Committee wishes to point out that even a small number of isolated but very serious events could expose a systemic threat which might warrant action on the part of the EU. After all, the framework aims to address systemic *threats*, rather than actual systemic *violations* or a complete breakdown of the rule of law. Examples of such incidents which might amount to systemic threats would be the illegitimate dismissal of one or more judges or the illegal arrest of journalists. The Meijers Committee believes that if the European Commission remains passive until a large number of violations have occurred, it will be too late to act upon a *threat*. Accordingly, the Committee urges the European Commission to clearly define the concept of ‘systemic threat’ vis-à-vis both isolated violations on the one end of the scale and systemic violations on the other end, and to be prepared to take action at an early stage.

Expected cooperation of the Member State concerned

If a threat has been identified, the Commission proposes entering into a structured dialogue with the Member State concerned. The Commission indicates that it expects the Member State to cooperate with the initial assessment procedure, in compliance

with the duty of sincere cooperation as set out in Article 4(3) TEU. Further steps in the dialogue as outlined in the proposal – recommendations and follow-up – also appear to be based on the Commission’s expectation of a positive attitude on the part of the Member State concerned.

The Meijers Committee wishes to point out that, almost by definition, a political climate in which one or more systemic threats to the rule of law have emerged may not produce the right attitude towards a dialogue that the Commission appears to hope for. In fact, the Committee is concerned that the Commission’s involvement might prove counterproductive in some cases. Politicians responsible for the (imminent) breakdown of the rule of law might benefit politically from publicly defying the EU, especially if their political agenda promotes national sovereignty. The Meijers Committee is thus wary that the currently envisioned procedure to attempt to enter into a dialogue might have little positive effect on the situation in the Member State and might even delay any meaningful action. The Committee therefore calls upon the Commission to both strengthen the ad hoc dialogue procedure and include other mechanisms within its framework. This should include the involvement of other actors and take the form of continuous assessment of respect for the rule of law in all Member States.

Role of the Council, European Parliament, national parliaments, human rights bodies and civil society

The current proposal envisions a central role for the European Commission, which the Meijers Committee considers appropriate in view of its role as ‘guardian of the treaties’. However, the Committee believes that the role of guardian of the rule of law is the responsibility of many more actors, both at national and European level. Accordingly, they should also be involved in any action undertaken by the Commission. First, because this might enhance the perceived political legitimacy of the Commission’s action. Secondly, because these actors might activate and inform the Commission about systemic threats to the rule of law at an early stage and assist in solving the threat. Elected representatives and public and private organizations tasked with the protection of human rights are especially equipped to support the Commission both politically and practically. Accordingly, the Meijers Committee recommends including the possibility for the Council, the European Parliament and the parliaments of Member States, as well as national human rights bodies, the EU Agency for Fundamental Rights and the Council of Europe Commissioner for Human Rights to formally request the Commission to initiate a dialogue procedure. Moreover the EC could conduct fact-finding missions with regard to systemic threats to the rule of law within a Member State, together with FRA, the CoE Commissioner or national human rights institutions. The Meijers Committee also calls upon the European Commission to explore how non-governmental human rights organizations and the broader civil society might become involved in the activation of a dialogue procedure.

The Meijers Committee recommends that the European Commission consults with the above-mentioned organizations throughout the dialogue procedure, especially national human rights institutions and civil society organizations, in order to achieve a solution supported by all the parties involved. By involving national actors, the Commission would assume a mediating role, which might enhance the perceived legitimacy of its involvement among the authorities and the broader public in the Member State concerned. In this respect, it should be kept in mind that, even though the EC’s involvement in strengthening the rule of law is warranted as it might affect the entire

Union, a weakened rule of law is, first and foremost, a problem for the society of the Member State and thus warrants its involvement.

Towards a system of continuous review in the Council or Parliament

The European Parliament and various Member States have called upon the Commission to come up with a framework which monitors the rule of law situation in a country on an ongoing basis and before systemic threats become apparent.¹ The Meijers Committee subscribes to this. However, in the current proposal procedures are of an ad hoc nature. Some Member States have called for a system of continued periodic peer review, somewhat similar to that of the UN treaty monitoring bodies, but then through a political dialogue to be held in the Council. The Meijers Committee believes that this could be a valuable addition to the current proposal, especially if rule of law standards are developed through a scoreboard drawn up by the European Commission or FRA. However, the Meijers Committee does believe that in case of a reluctance amongst the Member States to address questions on the rule of law, a Council mechanism would run the risk of being invoked only rarely or selectively. Yet, the fact that a number of Member States have called upon the Commission to propose a monitoring mechanism, signals a commitment to strengthening the rule of law on their part. Therefore, a proposal providing for a Council mechanism merits further development, in parallel with and as a possible preliminary step for the dialogue procedure.

The Committee believes that periodic review could also be conducted by institutions other than the Council. In particular the European Parliament, which is less involved in the political relations between Member States, might take up this task. Equally, the Parliament could be assisted by a scoreboard from the EC or FRA. Moreover, the EU could work towards a model similar to that of the OECD, where reviews are conducted with the involvement of independent experts and not solely by other Member States in specific policy areas and in a much less politicized context. The judiciary, the police, immigration services, etc. could exchange best practice to strengthen their resilience against improper political influence and corruption, before threats emerge. Both possibilities of continuous monitoring by the Parliament and the OECD model should be further explored and discussed.

Other actions for the European Commission

The Meijers Committee further recommends that the European Commission explore other actions it might undertake on an ad hoc basis to strengthen the rule of law in addition to the dialogue procedure. First, subject to the accession of the EU to the European Convention on Human Rights, the Committee would welcome the possibility for the Commission to be able to lodge a complaint against a Member State with the Court. Secondly, national courts, individual lawyers, civil society organizations, activists, the press, and the public at large could play a vital role in addressing systemic rule of law problems within a Member State. Each could exert pressure on the government to comply with the rule of law and could become useful allies to the EU. Often, in politicized situations where the rule of law is under threat, these organizations may come under threat themselves. The EU, especially the Commission, should look for ways to assist them, both politically and practically. The exact form of such assistance is likely

¹ See European Parliament, Report on the situation of fundamental rights in the European Union (2012) (2013/2078(INI))
<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0051&language=EN>.

to be determined on a case-by-case basis and in consultation with the organizations or individuals concerned. However the Meijers Committee invites the European Commission to develop programmes to reach out to them effectively during an emerging rule of law crisis.

Legal basis of the Commission proposal

The Committee believes that Art. 352 TFEU provides the necessary legal basis for the adoption of the proposed framework. The Meijers Committee recalls that the Lisbon Treaty has broadened the scope of the previous Art. 308 TEC, empowering the legislator to adopt any measures necessary to attain, within the framework of the policies defined in the treaties, the objectives of the treaties, which are otherwise not provided for in the material provisions of the treaties. The argument that the protection of the EU's values enshrined in Art. 2 TEU are not the object of a Union policy is untenable in view of the EU's commitment to the promotion of these values both internally and externally. Moreover, the protection of these values forms a prerequisite for the success of all other Union policies. In addition, the Committee recalls that Article 7 EU envisages the protection of Article 2 TEU values through a mechanism. Finally, it must be pointed out that also the EU's FRA was established on the basis of Art. 352 TFEU.

The Meijers Committee invites the Commission, the Council and Parliament to further explore these options. Meanwhile, the European Commission should continue to use its enforcement powers whenever an issue falls within the scope of EU law. The Committee would welcome the opportunity to further discuss its assessment of this proposal with you.

Sincerely,



Kees Groenendijk
Chairman

CC: *Chairman of the LIBE Committee;*
President of the Council of the EU;
Director-General, DG Justice of the EC;
Permanent Representatives of Greece, Italy, the Netherlands, Finland,
Denmark, and Germany.