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## **WORKING DOCUMENT**

on Establishment of an EU mechanism on democracy, the rule of law and fundamental rights

Committee on Civil Liberties, Justice and Home Affairs

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## **The EU is a community of values**

Europe has a long tradition in the area of democracy, the rule of law and citizens' rights. Running from Athenian democracy, Roman Law, the 1215 Magna Carta, the 1789 Déclaration des Droits de l'Homme et du Citoyen, the European Convention on Human Rights, to the Charter of Fundamental Rights.

The European Union has moreover included democracy, rule of law and fundamental rights (DRF) in its core principles and objectives in the first articles of the Treaties, and in the criteria for EU membership. Attempts to include in the Treaties a reference to the Judeo-Christian roots of Europe did not succeed, but they do affirm the European Union is perceived as a community of values. In its external policies the EU emphasises human rights and democratic governance, and immigrants in Europe are expected to respect and adopt our shared values. There is no doubt: the EU is a community of values.

However, there is a strange paradox. The European Union has a wide range of instruments for the enforcement of its laws and Treaties when it comes to material issues. The European Commission can order member states to adjust their budgets, public health schemes or tax rulings to make them compliant with EU law. Member states will usually grumble a bit when they are told to comply with EU rules, but they do not dispute the fact that they are bound to do so by the EU Treaties.

Not so when it comes to enforcement of the Treaty obligations regarding democracy, the rule of law and fundamental rights. Attempts by the European Commission, the guardian of the Treaties, to remind a member state of its commitments, are met with reluctance or a downright refusal to recognise commonly agreed rules and the authority of the EU to enforce those rules. Intervention by the Commission has been timid and arbitrary. The failure of the EU to uphold its own rules, and the perception there are no common European values, are undermining mutual trust and a reliable, stable legal framework, essential for a well-functioning EU in all policy areas.

Therefore it is imperative to adopt a framework that enables the EU to address not only infringements to specific EU laws, but also threats to democracy, the rule of law and fundamental rights.

The framework will have to be **fully transparent and based on evidence**, and apply in an **objective and equal manner** to all member states, to avoid allegations of politically motivated interventions. If enforcement of EU rules is perceived to be uneven and unfair, the EU loses credibility.

## **Democracy, the Rule of Law and Fundamental Rights (DRF) in the Treaties**

The basic values of the EU are laid down in the first articles of the Treaties, before all other chapters on policies. This is a clear indication of the overriding importance of European values.

Article 2: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society

in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Article 3,2 and Article 3,5 state a/o that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers" and "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens".

Article 6 refers to the rights, freedoms and principles set out in the Charter of Fundamental rights and the way it shall be interpreted. It furthermore states that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6 also states that "Fundamental rights [...] shall constitute general principles of the Union's law."

Article 7 sets out the steps to be taken in case of (a risk of) a serious breach by a member state of the values referred to in Article 2. Interestingly the Treaty does not foresee any action in case of a breach of the values by an EU institution.

#### Charter of Fundamental Rights

The Charter of Fundamental Rights was introduced with the aim to bring clarity about the rights of every individual. It was incorporated into the Treaties in 2009.

While the initial goals of the Charter were ambitious, the scope is narrow. The provisions are applicable on the EU institutions and bodies, but with respect to the subsidiarity principle (Art. 5 TEU). In relation to national authorities, the Charter only applies when implementing EU law (Art.51 Charter and 6 TEU). When the case does not fall within the ambit of the Charter, the system relies on the national constitutions or traditions and international mechanisms.

### **Application and Enforcement**

The EU has a very wide range of tools at its disposal to ensure the principles on democracy, the rule of law and fundamental rights are upheld.

If the case of alleged breach with EU law the Commission can launch a formal infringement procedure, starting with a letter of formal notice, accumulating to a referral to the Court of Justice.

Article 7, the "nuclear option" is established in the Amsterdam Treaty, as a sanction mechanism to uphold the common EU values in case of "the existence of a serious and persistent breach" of the Union's values, including the rule of law, which allows for the possibility of suspending EU membership rights. A preventive mechanism has been added with the Treaty of Nice, in case of a "clear risk of a serious breach of the [Union's] values" (Article 7(1) TEU). The preventive nor the sanctioning mechanisms of Article 7 have so far been activated.

The question is whether Article 7 is the only tool available to address breaches of EU values, meaning that the EU institutions cannot have recourse to any other mechanisms in such cases. Conversely, it is noted that while the earlier Treaties kept the EU values out of the jurisdiction

of the Court of Justice, the Lisbon Treaty subjects Article 2 TEU to it, which suggests that a breach of EU values could also be addressed through a legal approach. However, both instruments are largely complementary: while infringement proceedings take place in the case of non-compliance with EU law, the Article 7 mechanisms also apply without direct infringement of EU laws.

Following a proposal by the Dutch, German, Finnish and Danish Governments for a "new, more effective, swift and independent" mechanism to safeguard EU's common values "within the framework of the European semester", the Council agreed upon an annual Rule of Law dialogue. The first dialogue took place under the EU presidency of Luxembourg in November 2015.

In March 2014 the European Commission responded by launching a Communication called "A new EU Framework to strengthen the Rule of Law", the non-binding pre-Article 7 procedure to prevent the escalation of a "systemic threat to the rule of law" into a "clear risk of a serious breach" which would potentially trigger Article 7. The framework consists of 3 stages (assessment, recommendation, follow up to the recommendation).

However, the Communication has no binding or legal value and does not set any obligation or transparent criteria for the activation of this mechanism.

The accession of the EU to the European Convention of Human Rights (ECHR), which is a treaty obligation, is an essential step in ensuring individuals have access to proper protection of their human rights in relation to the acts and omissions of the EU. The ECHR would also apply to EU acts and the implementation by the EU Member States. Second, the protection of human rights in the EU would be strengthened due to the independent and external control of the EU acquis by the Strasbourg Court.

The new mechanism can build on various existing EU mechanisms for the regular assessment of DRF: the Justice Scoreboard, the Cooperation and Verification Mechanism for Romania and Bulgaria, and the Media Pluralism Monitor, and the Copenhagen criteria.

The main body for the application and enforcement of European law and Treaties is the Court of Justice of the European Union (CJEU). The CJEU has interpreted the scope of fundamental rights differently over the years. The Charter provisions cannot in themselves form the basis for the Court's jurisdiction nor for the extension of EU powers. In the most recent cases, the CJEU applies a stricter interpretation: "the Charter is applicable when the situation is governed by European Union law", but it does not require the implementation of EU legislation. The Court also finds that: "Rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State", even if the national standard of protection is higher.

The European Commission also refers to the Charter in infringement procedures, but interprets the scope strictly: "the Charter is addressed to Member States only when they are implementing Union law. Therefore, infringement proceedings concerning the Charter must relate to the provision of Union law".

Although the ECtHR does not interpret the Charter, it does refer to the Charter and CJEU judgements to support its arguments.

Litigation by citizens or companies is a form of private enforcement. Over the years, much important case law has been generated by litigation, but it is highly cumbersome.

Other bodies for monitoring and enforcement include The Fundamental Rights Agency, the European Data Protection Supervisor (and shortly the European Data Protection Board), the European Institute for Gender Equality and the European Foundation for the Improvement of Living and Working Conditions. Finally, Eurostat gathers information on attitudes and perceptions, also in areas relevant for DRF.

Although the toolkit for the enforcement of DRF is extensive, there are substantial gaps, and there is no mechanism for the systematic and complete monitoring throughout the EU. The DRF Pact, including a scoreboard, will have to fill the gaps and ensure integration and synergy between instruments.

### **Democracy, Rule of Law and Fundamental Rights Pact (DRF Pact)**

Your rapporteur proposes a Democracy, Rule of Law and Fundamental Rights Pact between citizens, governments, and EU institutions. A Pact will give ownership to all, making everyone responsible for a robust democracy, rule of law and fundamental rights throughout the Union, rather than just a legal tool for top down enforcement.

The DRF Pact will be composed of several elements, to be elaborated in the working documents:

- Annual DRF Scoreboard
- Annual pan-European Parliamentary DRF dialogue on the basis of the Scoreboard, in national parliaments, the European Parliament and the Council
- DRF in Impact Assessments and screening procedures
- Article 2 and the Charter of Fundamental Rights as a legal base for infringement procedures

Other topics to be addressed in the working documents:

- Litigation by citizens as a tool for private enforcement
- Methods and existing mechanisms for assessing the state of democracy, the rule of law and fundamental rights
- The logic of governance: what are common yardsticks for a "healthy" democracy

The mechanism of the DRF Pact shall be modelled after the economic governance pact, containing a preventative and a corrective arm in an annual "DRF Semester", including an annual parliamentary debate on the Scoreboard and recommendations. This will allow for a graduated response, based on evidence gathered for the annual Scoreboard, and assessing all countries and EU institutions equally on the basis of transparent and objective criteria. It will build on existing mechanisms, notably the Rule of Law mechanism of the European Commission, expanding it with a reporting mechanism (Scoreboard), notification, and sanctions (infringement procedures or ultimately the activation of Article 7). The mechanism will contain elements requiring only a political decision, some requiring legislation, and some requiring Treaty change.

A set of indicators should be developed for country by country reporting in an annual Scoreboard.

Indicators should be defined on the basis of existing and recognised fundamental rights standards - such as those of the Council of Europe and its bodies, notably the Venice Commission, the UN or the OECD - taking into account input from the EU Fundamental Rights Agency, civil society and associations of professionals, such as journalists, judges or lawyers. EFRIS (European Fundamental Rights Information System), the new FRA tool will be very useful for developing indicators.

Indicators should cover the values enshrined in Article 2 TEU, the Charter of Fundamental Rights and the political criteria of the Copenhagen criteria, such as: freedom of speech, freedom of the press and media pluralism, equality and non-discrimination, freedom of religion, belief and conscience, independence of the judiciary, access to justice, freedom of assembly, separation of powers, development of civil society, transparency, privacy and data protection.

Methodology for the definition and assessment of these criteria should build upon the above mentioned existing monitoring instruments