



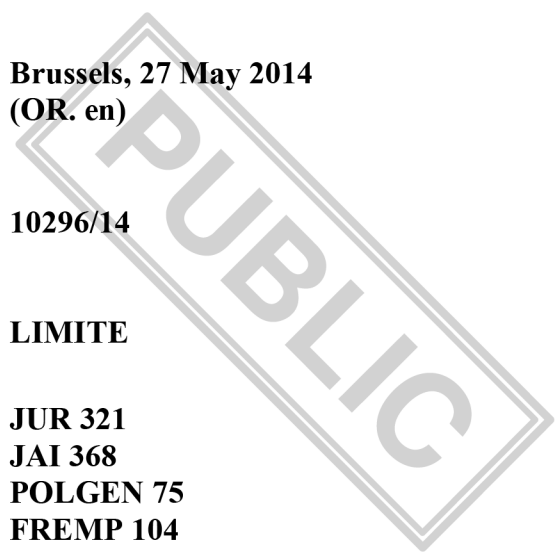
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OPINION OF THE LEGAL SERVICE¹

Subject: Commission's Communication on a new EU Framework to strengthen the Rule of Law:
- compatibility with the Treaties

I. INTRODUCTION

1. The above communication was presented at the Council (General Affairs) on 18 March 2014. The support of the Council Legal Service was sought to clarify the institutional and procedural issues of relevance concerning the new mechanism suggested in the communication, before further consideration of the matter by the Council.

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

II. THE NEW FRAMEWORK FOR THE RULE OF LAW

2. The Communication sets out a new EU Framework for the rule of law to strengthen the capacity of the Union to ensure effective and equal protection of the rule of law in all Member States.

a) The Rule of Law in the Treaties

3. The rule of law is referred to in Article 2 TEU as one of the values on which the Union is founded, along with respect for human dignity, freedom, democracy, equality and respect for human rights, including the rights of persons belonging to minorities. The rule of law is also mentioned in the preambles to the TEU and to the Charter of Fundamental Rights of the European Union.
4. Indirectly, the rule of law is referred to in Article 7 TEU, which lays down a procedure to ensure respect by the Member States of the values referred to in Article 2 TEU.
5. Article 7 TEU lays down a procedure which may lead to a Member State being suspended of certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. The procedure has three stages. At the first one, the Council, acting by a majority of at least four fifths of its members,² and on the basis of a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, may determine that there is "a clear risk of a serious breach by a Member State of the values referred to in Article 2". The Council may address recommendations to the Member State in question, acting in accordance with the same procedure.

² Pursuant to Article 354 TFEU, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the evaluation of the four fifths of the Member States.

6. At the second stage, which does not require the completion of the first stage, the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 (TEU), after inviting the Member State in question to submit its observations".
7. After this determination, the Council, acting by a qualified majority, may decide to suspend certain of the rights of the Member State in question.

b) The debate prior to the Commission's communication

8. In March 2013, the Foreign Ministers of Denmark, Finland, Germany and the Netherlands sent a letter to the President of the Commission arguing that fundamental values of the EU - democracy, the rule of law and human rights - must be vigorously protected. In their view, a new mechanism was called for to safeguard fundamental values in the Member States. The Council examined these ideas on its meeting of 18 March 2014, where several legal questions, to which this opinion aims at answering, were raised by the members of the Council.
9. In his State of the Union address in 2012, the President of the European Commission expressed the view that the Union needed a better developed set of instruments as concerns the rule of law, not just the alternative between the "soft power" of political persuasion and the "nuclear option" of Article 7 TEU.
10. In March 2013, the Commission presented the EU Justice Scoreboard, which includes statistics on the justice systems in all the Member States and refers to the relevance of the functioning of the rule of law to the internal market.
11. In June 2013, the Council (Justice and Home Affairs) stated that "respecting the rule of law is a prerequisite for the protection of fundamental rights" and called on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle issues.

c) The Commission's communication

12. The Commission aims at setting out a new EU Framework to strengthen the rule of law. The new mechanism is intended "to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU". The new mechanism would be additional to existing procedures, such as infringement procedures and Article 7 TEU.
13. The new EU Framework lays down a procedure which begins if the Commission assesses that there is "a situation of systemic threat to the rule of law". Such an assessment, which will be made public by the Commission, will prompt a dialogue with the Member State concerned to try to resolve the matter satisfactorily. If there is objective evidence of a systemic threat and the situation is not resolved, the Commission will issue a "rule of law recommendation" addressed to the Member State concerned setting a fixed time limit to solve the problems identified.
14. The sending of the recommendation and its main content will be made public by the Commission. If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, "the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU".

III. LEGAL ANALYSIS

15. According to Article 5 TEU, "the limits of Union competences are governed by the principle of conferral". Its consequence is that "competences not conferred upon the Union in the Treaties remain within the Member States".

16. Article 2 TEU does not confer any material competence upon the Union but, similarly to the Charter provisions,³ it lists certain values that ought to be respected by the institutions of the Union and by its Member States when they act within the limits of the powers conferred on the Union in the treaties, and without affecting their limits. Therefore, a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions.
17. Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU. Only this legal basis provides for a Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope.
18. Article 7 TEU deliberately establishes a precise supervision framework with different phases, a high notional threshold to start the procedures, reinforced majorities within the Council and the European Council and a set of procedural guarantees for the Member State concerned, including the possibility of access to the Court of justice. However, that Article does not set a basis to further develop or amend that procedure.
19. Having recourse to recommendations as a form of action does not make it possible to disregard the limitation just described. Two important qualifications must be made. The first one is that the non-binding nature of a recommendation does not allow the institutions to act by issuing such type of acts in matters or subjects on which the Treaties have not vested powers on them.⁴ The second is that even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect.⁵ As a consequence the legality and interpretation of recommendations may be the object of proceedings before the Court of Justice, via preliminary rulings or actions for damages.

³ Article 51 of the Charter specifies that its provisions do *"not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union [...]"*.

⁴ See Case C-233/02, *France v. Commission*, ECR [2004] p. I-2781, paragraph 40.

⁵ See Case C-207/01, *Altair*, ECR [2003] p. I-8894, paragraph 41.

20. Article 70 TFEU could be mentioned as a relevant reference. This provision allows the Council to lay down arrangements to conduct objective and impartial evaluation of the implementation of the Union policies referred to in Title V of part three of the TFEU by the Member States' authorities. However, such arrangements could not cover the examination of Member States' actions or omissions in matters not covered by the provisions of Title V or by the acts of the institutions adopted pursuant to these provisions.
21. Article 241 TFEU empowers the Council to request the Commission to undertake studies and to submit proposals. Of course, such studies and proposals cannot exceed the scope of Union competences. Therefore, any request by the Council for a rule of law study and proposal by the Commission in the meaning of Article 241 TFEU could only be grounded in Article 7 TEU - which means that it could only lead to a reasoned proposal by the Commission, leaving the determination of a clear risk of a serious breach of the values to the Council, having obtained the consent of the European Parliament. It is not to be excluded that the Council may wish to make use of this possibility in specific circumstances. But to build a permanent mechanism for a rule of law study and proposal facility operated by the Commission on the combined bases of Article 7 TEU and Article 241 TFEU would undermine the specific character of the procedure of Article 7(1) - particularly concerning the way it can be initiated.
22. Article 337 empowers the Commission to collect information and carry out checks required for the performance of the tasks entrusted to it (of which issuing reasoned opinions as foreseen by Article 7(1) TEU forms part) but this does not offer a legal basis for a new framework independent from Article 7.
23. The same difficulty applies to Article 352 TFEU, which grants powers of action when no other basis is available to attain objectives of the Treaties, but which may only be invoked within the framework of the policies defined in the Treaties. It is apparent that respect of the values of the Union, including the rule of law, does not as such constitute a Union policy as foreseen by the Treaties.

24. It follows that there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis.
25. A solution compatible with the Treaties aimed at reinforcing the supervision of the respect of the rule of law, as such, by the Member States, however exists in the opinion of the Council Legal Service.
26. This solution is that Member States - and not the Council - agree on a review system of the functioning of the rule of law in the Member States, which may allow for the participation of the Commission⁶ and of other institutions if necessary, and on the consequences that Member States might engage to draw from such review. The possibility for the Union to use the powers provided for in Article 7 TEU and Articles 258, 259 and 260 TFEU must be unaffected by such agreement among the Member States.
27. Such a peer review approach, with a possible involvement of the institutions if so decided, could find its legal basis in an intergovernmental agreement designed to supplement the law of the Union and to ensure effective respect of the values on which the Member States have founded the Union, without by doing so conferring on the Union competences whose transfer the Treaties have not foreseen.

⁶ *"It is apparent from the case-law of the Court that the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States", Case C-370/12, Pringle, ECR [2012] not yet published, paragraph 158.*

There are precedents of combining EU law with international law instruments to achieve a common goal, which the Court has found to be in accordance with Union law, as long as Union principles, rules and institutions are respected, including the Union's exclusive competences.⁷ The present case, which deals with sensitive issues concerning the Member States at least as much as the Union and in which the Union institutions have only marginal power to act under the Treaties (which cannot be corrected by secondary law), is an obvious candidate for the *modus operandi* of an agreement concluded outside the EU treaties but in compliance with them, implying the faculty to make use to the extent necessary of the EU institutions, including the Commission.

IV. CONCLUSION

28. The Council Legal Service is of the opinion that the new EU Framework for the Rule of Law as set out in the Commission's communication is not compatible with the principle of conferral which governs the competences of the institutions of the Union. The possibility exists, however, for the Member States to agree among them on a review system of the functioning of the rule of law in the Member States and on the possible consequences to draw from that review. Such a review system as agreed by the Member States may foresee certain tasks to be carried out by the institutions of the Union.

⁷ See, regarding the ESM Treaty, the *Pringle* Case referred to at note 6 above.