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From: General Secretariat of the Council
To: Delegations

Subject: Questionnaire for the Member States on the evaluation of the Council's annual rule of law dialogue - Reply from the Hungarian Delegation

Delegations will find below the reply from the Hungarian Delegation to the Presidency questionnaire on the review of the Council's annual rule of law dialogue (document 10905/23).

HUNGARIAN POSITION

in response to the questionnaire sent by the Spanish Presidency on 3 July 2023 concerning the evaluation of the Council's annual rule of law dialogue (10905/23)

In line with the notions expressed in the Spanish-Belgian-Hungarian Trio Programme, Hungary believes that the common values underpinning our democratic and societal models are the foundation of European freedom, security and prosperity. The rule of law, with its crucial role in all our democracies, is a key guarantor that these values are well protected; it must be fully respected by all Member States and the EU.

Therefore, Hungary appreciates that the Spanish Presidency has launched the evaluation of the Council's annual rule of law dialogue, which may play an important role in promoting a culture of respect for the rule of law.

As in the past, Hungary wishes to remain a constructive partner in the process and shares the endeavour of the Spanish Presidency to return to the consensus-based approach with a view to adopting Council Conclusions, which would better serve the basis for and legitimacy of the future handling of the rule of law dialogue.

Based on this concept, below, you will find the detailed Hungarian response to the questions addressed to Member States concerning the evaluation of the Council's annual rule of law dialogue.

- 1. Do you agree that the purpose of the Council's annual rule of law dialogue is to be a useful mechanism, creating a space for structured and constructive discussions among Member States and for sharing best practices and lessons learned? How do you consider that this purpose could be further developed?***
- 2. The principles that have governed the dialogue since the conclusions of 2014 have the objective to make this dialogue stronger, more result-oriented and better structured, its preparations more systematic and its follow-up adequate. Do you consider that those principles have guided the Council well in conducting the dialogue? If not, can you indicate why, and how the implementation of those principles could be improved?***

We address questions 1 and 2 together below.

Hungary agrees that the Council's annual rule of law dialogue, should be a space for structured and constructive discussions among Member States and for sharing best practices and lessons learned.

While we acknowledge that the objective to make the dialogue stronger, more result-oriented and better structured, its preparations more systematic and its follow-up adequate could be further discussed, we recall that first and foremost the core principles on which the process was established in 2014 on a consensual basis should be ensured and reinforced in a meaningful way. The principles laid down in the 2014 Council conclusions, namely the principles of objectivity, non-discrimination and equal treatment of all Member States remain the cornerstone of our position during the evaluation and in the future in relation to the dialogue, as it was agreed by all Member States that they will be the underlying principles of the exercise. Furthermore, as it is stipulated by the 2014 conclusions and (again reaffirmed by the 2019 evaluation) the Member States agreed that the dialogue will be conducted on a non-partisan and evidence-based approach without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States inherent in their fundamental political and constitutional structures.

Hungary believes that the above objectives and principles were respected at a higher degree during the period starting from the inception of the dialogue up until 2019, when Member States had the opportunity to conduct a dialogue among peers within the Council to promote and safeguard the rule of law in the framework of the Treaties. The dialogue was always structured around one particular topic allowing for an in-depth reflection on the chosen issue. It was constructive as it contributed to the creation of an environment for the exchange of best practices without needlessly singling out and stigmatizing Member States. We believe that the future shaping of the dialogue should merit from the positive experiences of its first period.

We deem, though, that the process has seen a setback in effectively promoting the objectives outlined by the Spanish Presidency as well as safeguarding the 2014 principles since it started to be conducted solely on the basis of the Commission's annual rule of law reports. Experience showed that what has been a constructive dialogue among Member States can easily turn into a rather divisive exercise, if it is structured in a way that the discussion relies predominantly on one source, in this case on the evaluation of the Commission. As Hungary expressed its concerns at several occasions and in different fora (within the Network of Contact Points on the Rule of Law, and in Coreper and Council meetings), this approach could lead to a conflict with the core principles (outlined above) on which the dialogue is to be based for several reasons. To highlight only a few examples: conducting the dialogue on the basis of a report that mostly reiterates the opinions of certain NGO's critical to the government, without duly taking into account the information provided by the national constitutional bodies, which indicates a political nature behind the assessment, risks non-compliance with the principle of objectivity and goes against the agreed non-partisan approach. Furthermore, as the Commission's rule of law reports usually lack verifying the claims therein and presenting any justification or proper evidence backing them, using the report as the only source of the dialogue does not conform to the consensually agreed evidence-based approach. In addition, the constructive element relating to the exchange of best practices cannot be realised once a Member State is backed into a corner, forced to defend national measures that the Commission might not even have the competence to properly assess or scrutinize.

Consequently, Hungary believes that the Council should regain ownership of the exercise, moving away from the current practice of simply following up the Commission's annual rule of law reports. On the contrary, first and foremost, it should be the Council, which, with the common understanding of all Member States, agrees on the agenda and topics it intends to discuss in the course of the dialogue, possibly reflecting on current challenges, affecting all Member States. While acknowledging that the Commission's rule of law report could serve as one of the important sources of information and inspiration that feeds into the debate on a voluntary and ad-hoc basis, members of the Council should remain free to use different sources of information as a point of reference.

We recall that the rule of law dialogue is the Council's own exercise, which cannot be equated with the Commission's rule of law cycle. Despite that the Commission initially planned to cover various topics in its rule of law reports, it has stuck to the same four pillars – and predominantly to the same sources – since the beginning throughout already four editions so far. We believe that the Council should not remain in that closed cycle by simply following the Commission's agenda, but should open its dialogue to other rule-of-law-related topics of common interest based on its actual challenges and priorities. Furthermore, we should not forget that we are not in a legislative dimension, where institutions have a pre-established role and order in the procedure, but in a field, where the majority of topics subject to the dialogue falls outside of the EU's legislative competence, and the EU institutions and Member States may equally reflect and influence each other. Therefore, also in the opposite direction as it has been the practice so far, the Council, without prejudicing institutional prerogatives and autonomy, should be able to guide the Commission as regards the topics it includes in its rule of law reports and the methodology used for its preparation.

Possible further development of the annual rule of law dialogue

Furthermore, the European Union is well equipped to scrutinize the Member States, should concerns arise with regard to their respective rule of law situation, but the current toolbox is very limited when it comes to monitoring the same in the institutions of the European Union. Having in mind the irregularities disclosed also recently that decreased trust in the EU institutions, in order to rebuild that trust, Hungary finds that the current practice should not let us refrain from broadening also the personal scope of this exercise to discuss rule of law situations not only in Member States, but also as regards EU institutions, bodies, offices and agencies (hereinafter referred to as the 'EU institutions'). In this regard Hungary recalls the case law of the Court of Justice of the European Union (CJEU). In the *Les Verts* judgement (Case 294/83 *Parti écologiste "Les Verts" v European Parliament*) the Court of Justice stated that the rule of law equally applies to Member States and European institutions. EU institutions cannot be disregarded in this context. Hungary underlines that showcasing this proposed new aspect (discussion of the rule of law situations as regards EU institutions) could give a real added value to this process. In our understanding, focusing on this latter aspect would constitute the only tangible way to achieve the objectives, outlined by the Spanish Presidency, to make the dialogue stronger and more result-oriented, considering that 'strengthening' the dialogue vis-à-vis Member States would necessarily contradict another important and mutually agreed objective of avoiding duplications, given the wide range of procedures available concerning Member States in this regard. However, in case of EU institutions, the room for manoeuvre to turn the rule of law dialogue into a more result-oriented mechanism is evidently wider. Hungary believes that this proposed new aspect could significantly contribute to strengthening the Union's citizens' confidence in the EU institutions.

3. In your opinion, has the dialogue been carried out in a coherent way that avoids duplication, while taking into account the scope and objective of the dialogue vis-à-vis other existing rule of law instruments?

Based on our past experience, there is a room for improvement concerning the fulfilment of the objective to avoid duplications.

The Hungarian country chapter of the Commission's 2021 Rule of Law Report was discussed in the Council in April 2022. As Hungary pointed out during the meeting of the General Affairs Council, instead of a frank and constructive dialogue, what took place was effectively a hearing under the Article 7 TEU procedure, in which several questions seemed rather as accusations than mutually respectful inquiries in a good faith. In the following month, on 23 May and on 18 November the fourth and the fifth hearings took place in the Article 7 TEU procedure launched against Hungary. During both hearings, Hungary received questions invoking the Commission's annual rule of law report, on which the rule of law dialogue is currently based in practice.

Furthermore, in case of Hungary, by invoking the Commission's rule of law report in the Council's dialogue has thus lead not only to a duplication (through its interconnection with the Article 7 TEU procedure), but even to a 'multiplication' of instruments, given the clear overlap between the Commission's recommendations made in its rule of law report, on the one hand, and the remedial measures undertaken in the conditionality procedure, the judicial and conditionality-related milestones of the Hungary's RRP, as well as the horizontal enabling conditions applicable with regard to the cohesion funds, on the other hand. The comments of Vice-President Vera Jourová upon the release of the 2023 Rule of Law Report also highlighted the existence of the duplication in this regard, when she stated that the recommendations *"are an addition to the report and to the debate, but should not be looked in isolation from e.g. infringement procedures or recovery plans. This is particularly important when you look at the Polish and Hungarian reports."* This clearly indicates an overlap in the procedures, making them more tangled and confusing instead of structured and constructive.

In addition, Hungary finds the organization of Article 7 procedures and country specific discussions on the same Member States during one semester rather unfortunate as it does not only decrease the value of both procedures, but – contrary to what was laid down in the establishing conclusions in 2014 and reiterated during the subsequent evaluations – automatically creates an unnecessary duplication.

Based on the above, we are of the view that separating the Council's rule of law dialogue from the Commission's rule of law cycle would serve most efficiently also the purpose of avoiding duplications and ensuring a clear and coherent scope and objective of the former process.

4. Every autumn the dialogue has devoted one session to a horizontal debate on the state of play of the rule of law in the Member States.

- a. How do you evaluate the way that these sessions have developed since 2020?**
- b. Would it be useful if in each yearly cycle – from July to June – successive presidencies coordinated thematic debates at the General Affairs Council, based on the content from the corresponding Commission annual rule of law report?**

Hungary would like to note that the 2019 evaluation only provided for *the possibility* of relying on the Commission's annual rule of law reports, while currently these reports constitute the sole basis for the dialogue resulting in the lack of diversity of positions (other than that of the Commission's) in the discussions on the individual Member States.

If the aim is to organize thematic debates, the first step is to expand upon the sources beyond the Commission's rule of law reports in order to avoid the repetition of arguments and then seek horizontal issues affecting every Member State on which a meaningful dialogue could develop.

As a forward-looking approach, Hungary would also like to raise the possibility to conduct peer review processes similarly to the ones used in international organizations. This would enable the Member States to engage in a much more in-depth dialogue with each other, thereby strengthening mutual respect and trust.

Hungary believes that building mutual trust should be the driving force in all rule of law dialogues which must always respect the principle of equal treatment of Member States. In this respect, we are of the opinion that the thematic dialogues held before 2019 and the subsequent annual horizontal debates and thematic debates held in the framework of the Justice and Home Affairs Council could serve as good examples.

Furthermore, bearing in mind the aim not to place a disproportionate burden on the agenda of the General Affairs Council at a time when there are a number of important challenges to be faced, Hungary would support a more focused and time-effective approach, with a strengthened focus on sharing of relevant rule of law developments and best practices in the Member States and discussions of the rule of law situations as regards EU institutions.

5. Over the past four years, in addition to that horizontal debate, a steady pace has been maintained in the country-specific discussions. Every Council presidency has decided to keep discussing the development in five Member States, up until the current country cycle restarted during the Swedish Presidency in the first semester of 2023.

- a. How has this part of the dialogue, in which all Member States can share their rule of law challenges and exchange good practices, helped you with discussing potential solutions?**
- b. In order to achieve deeper reflection and better preparation of the exercise by the other Member States, would reducing the number of Member States that undergo the dialogue in each country-specific discussion to four be helpful? Could this help make the discussion more focused?**

As elaborated in more detail above, Hungary believes that in case of certain Member States the exercise shifted away from the originally intended exchange of good practices. Nevertheless in the spirit of sincere cooperation Hungary remained and remains constructive while taking part in the discussions.

As previously stated, Hungary would see more added value in focusing on and discussing certain specific topics that are relevant to all Member States than to superficially touch upon a plethora of issues a certain number of Member States may experience.

Hungary does not oppose to a possible reduction of the number of countries taking part in the discussion, while stressing that in order to achieve a more focused discussion, returning to the thematic approach would be more beneficial.

6. The dialogue has used the Commission's annual rule of law report in this yearly stocktaking exercise. The Commission has improved the exchange with Member States used to draw up the report. What further improvements in terms of Member States' involvement, or other, would be useful?

As outlined above, in our view the Council, without prejudicing institutional prerogatives and autonomy, should be able to guide the Commission as regards the topics it includes in its rule of law reports and the methodology used for its preparation. Therefore, we welcome the Spanish Presidency's idea to include this 'reversed' reflection in the scope of the dialogue.

Concerning possible improvements of the Commission's annual rule of law reports, Hungary suggests that it should be in accordance with the principles of equal treatment of Member States and objectivity. In this respect, it is of utmost importance that the areas examined by the Commission in the rule of law review cycle could be more consistent with regard to each Member State thus reinforcing objective assessment. Furthermore, the Commission should take into account with more weight during the finalization of its report the information provided by national constitutional authorities who are in possession of the widest range of relevant data on the given topics, without relativizing the information received and often merely referring to them in footnotes.

The country chapters of the rule of law report also include recommendations to Member States from 2022 onwards. In this regard, Hungary believes that – similarly to the preparation of country-specific recommendations in the European Semester – the possibility for Member States to comment on the proposed recommendations prior to their adoption could have a real added value, also strengthening the mutual confidence. On the one hand, it could contribute to better understand the concerns of the Commission expressed in a rather general manner, on the other hand, such a dialogue could strengthen political ownership.

7. *What role should the recommendations of the Commission’s annual rule of law report play in the dialogue?*

While maintaining our concern expressed previously on the lack of a proper legal basis for the introduction of the recommendations, Hungary believes that the Council’s rule of law dialogue, as an institutional process, should not reflect directly on the Commission’s recommendations, which are addressed to individual Member States and may be followed up on a strictly voluntary basis.

In this regard we would like to point out that, in our assessment, the 2023 Rule of Law Report proves that, against what is stated by the Commission, the report does not rest on a transparent and objective methodology, and does not ensure equal treatment of all Member States. To give a concrete example, we would like to point out that in the Hungarian chapter of the 2022 Rule of Law Report the Commission addressed two complex recommendations to Hungary as regards our justice system. As the Commission has acknowledged in this year’s report, Hungary has fully implemented both recommendations. In its 2023 Rule of Law Report the Commission addressed a completely new recommendation to Hungary, with regard to the case allocation systems of courts other than the Supreme Court. We note that it is the first time when the Commission raised any concern in this regard since the launch of its rule of law review cycle. According to the 2023 EU Justice Scoreboard (Figure 42), there are 10 Member States where there is no ‘electronic case allocation system in place, with automatic distribution based on objective criteria’ in courts at all. Hungary is not among these Member States. Still, only two Member States received a recommendation in this field and interestingly enough both of them have electronic case allocation system already in place in the courts.

8. *Are there any other international sources whose methodology is reliable and fact-checking process rigorous, the use of which you would consider appropriate to complement the dialogue?*

As expressed above under Question 4, Hungary would be open to discuss the possibility of a proper peer review mechanism among Member States strengthening mutual respect and the principle of equal treatment.

We are open to enrich the rule of law dialogue with other international sources, including the findings of the Venice Commission and the OECD.

9. How could we further involve civil society in the dialogue? Would you be willing to invite experts on rule of law issues to participate in the dialogue? Would it be appropriate to present the main conclusions of the discussion to a group of civil society representatives?

Hungary would like to note that certain representatives of the civil society are already well involved (their opinions might even be over-represented) in the dialogue via the preparation of the annual rule of law reports. While acknowledging that civil society can play an important role in the promotion of rule of law culture, Hungary regards it problematic to invite external parties to the discussion in the Council, which was designed to be held among peers and should be conducted in a confidential manner with a view to its sensitive nature and the objective of reinforcing mutual trust. Moreover, the idea of direct involvement of civil society organisations would raise several further crucial questions and concerns with regard to their selection process, discrimination between represented and non-represented organisations, democratic deficit and the extent of their role for instance. The same concerns and questions arise regarding the presentation of the main conclusions of the discussion to a group of civil society representatives that would necessarily lead to a lack of equal footing of different organisations.

However, Hungary would be willing to consider the involvement of independent and objective expertise into the dialogue which could provide additional materials on specific rule of law topics, in order to diversify the sources for discussion. This expertise should preferably come from a body or organization that has extensive and in-depth knowledge about the given issue to be discussed in the Council with regard to all 27 Member States (like the Fundamental Rights Agency). Nevertheless, in order to ensure objectivity, the selection of those independent expert(s) should be decided by consensus.

10. How do you view the relationship between the dialogue that takes place in the General Affairs Council, which tends to be general, and more specific discussions taking place each semester in the Justice and Home Affairs Council, which tend to be focused on a specific area of its competence? Do you see added value in discussing certain technical issues related to rule of law challenges, as identified by the General Affairs Council, in other formations of the Council?

As mentioned above, Hungary sees the merits of the thematic debates held in the framework of the Justice and Home Affairs Council. With a view to avoiding further overpolitisation of the process and ensuring respect and mutual understanding of the national identities inherent in the constitutional and legal order of Member States, justice ministers are best placed to discuss technical issues related to rule of law challenges on a legally sound and evidence-based manner.

As previously mentioned, Hungary suggests that the rule of law dialogue should be complemented by discussions of the rule of law situations as regards EU institutions to be held in the General Affairs Council.