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Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights

Committee Opinion¹

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Rapporteur: Mr Andrej ŠIRCELJ, Slovenia, Group of the European People's Party

A. Conclusions of the committee

1. The Monitoring Committee has been seized for opinion on the report on the establishment of a European Union mechanism for democracy, rule of law and fundamental rights, which Ms Petra De Sutter (Belgium, SOC) has prepared on behalf of the Committee on Rules of Procedure, Immunities and Institutional Affairs.
2. On 25 October 2016, the European Parliament adopted a resolution recommending that the European Commission create a mechanism on democracy, the rule of law and fundamental rights, described at length in the draft interinstitutional agreement annexed to it. Faced with the European Commission's refusal, a position shared by the Council of the European Union, the European Parliament reiterated the need to provide the European Union with a "comprehensive mechanism for the protection of democracy, the rule of law and fundamental rights" in another resolution adopted on 14 November 2018.
3. The Monitoring Committee does not believe that the implementation of the mechanism as presented in the 2016 Resolution will take place in the near future. At the same time, it is well aware that, on the one hand, the European Union has been greatly involved in the field of the three pillars of the action of the Council of Europe, and secondly, that co-operation between the latter and the European Union in the field of monitoring procedures has greatly intensified over the last years, as the report of Ms De Sutter outlines in great detail. In other words, as the Committee on Rules of Procedure has fully understood, the debate on this mechanism is the perfect opportunity to reflect on the future of the Council of Europe's co-operation with the European Union in this area, and in more practical terms, on the place and role that the Parliamentary Assembly would like to, should and could play in it.
4. In this respect, the Monitoring Committee fully shares the conclusions of the Committee on Rules of Procedure, in particular when it recalls that the Council of Europe is the source of reference in the field of human rights and that it must also maintain its primacy when the respect of common fundamental values by the member States of the European Union, as well as non-EU member States, is assessed.
5. It considers that the accession of the European Union to the European Convention on Human Rights (ETS No. 5) would fit perfectly into this perspective.
6. In addition, the Monitoring Committee believes that the proposal that the Parliamentary Assembly hold an annual debate on the rule of law with the participation of representatives of the European institutions is a practically feasible, politically relevant and strategically clever way to foster co-operation between the institutions of the European Union and the Council of Europe, while guaranteeing the Assembly a place within

1. Reference to committee: [Doc. 14317](#). Reference 4308 of 8 October 2018. Reporting committee: Committee on Rules of Procedure, Immunities and Institutional Affairs. See [Doc. 14850](#). Opinion approved by the committee on 8 April 2019.



it. The Monitoring Committee also considers that this place is entirely legitimate, given the nature of the Assembly: a forum for interparliamentary dialogue bringing together elected representatives from national parliaments.

7. The Monitoring Committee also fully subscribes to the recommendations made by the Committee on the Rules of Procedure to the Committee of Ministers, in particular to paragraphs 4 (intensification of political action by the Committee of Ministers), 7 (risks to the coherence of the standard-setting system in Europe) and 9 (recommended measures to maintain the primacy of the Council of Europe) of the draft recommendation.

8. Therefore, the Monitoring Committee has only one amendment to submit. Moreover, it takes this opportunity to draw the attention of the members of the Assembly to a number of points made in the following explanatory memorandum.

B. Proposed amendment to the draft resolution

Amendment A (to the draft resolution)

After paragraph 7, insert the following paragraphs:

“The Assembly recalls that since 1993 it has had a procedure for monitoring the obligations and commitments made by the member States upon their accession to the Council of Europe, the implementation of which is the responsibility of the Monitoring Committee. All Member States can be submitted to this procedure. Furthermore, when closing a monitoring procedure, a post-monitoring dialogue is carried out with the State concerned. This procedure allows for the examination of questions relating to the functioning of democratic institutions in the member States. Lastly, it ensures compliance with the obligations entered into by member States which are not the subject of specific monitoring procedures through periodic review reports carried out on a country-by-country basis.

The Assembly invites the European Union to refer to the work of the Monitoring Committee as necessary.”

Explanatory note:

As the draft resolution does not mention the Assembly's monitoring procedure, which has more than 20 years' experience, the addition of these two paragraphs seems to be amply justified. Ten countries are now under the monitoring procedure, three engaged in a post-monitoring dialogue and the functioning of democratic institutions is currently under consideration in one country.

C. Explanatory memorandum by Mr Andrej Šircelj, rapporteur for opinion

1. The work on the European mechanism conducted by the Committee on Rules of Procedure and the Monitoring Committee, in which I took part,² and the various exchanges I have had have helped me to come to the following conclusions.

2. In 2000, even though the European Union already had at its disposal Article 7 of the Treaty on European Union (TEU), which is sometimes referred to as a “procedure of political infringement”, it chose to ask the President of the European Court of Human Rights to appoint three “wise men” to solve a crisis related to a possible violation of “common European values” in Austria.³ It is clear that this era is completely over. The list of instruments put in place by the European Union to monitor the rule of law, as described in Ms De Sutter's report, speaks for itself. It makes it possible to measure the progress made since the Copenhagen Declaration of 1993, which laid down the political criteria to be fulfilled by any State wishing to join the Union: stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.

2. In particular the hearings held respectively by the Committee on Rules of Procedure on 8 January 2019 in Brussels and by the Monitoring Committee on 6 March 2019 in Paris, where representatives of all the European institutions were present, in particular Ms Judith Sargentini, the Vice-President of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament.

3. The 14 member States of the European Union at that time implemented measures against the Austrian Government following the formation of a government in which the Freedom Party of Austria (FPÖ) took part and subsequently lifted them following the conclusions of the three “wise men”.

3. At the same time, the use of the work of the Council of Europe by the European Parliament and the European Commission has increased. Today it takes two main forms. Either the work of the Council of Europe is directly integrated into the European Union's monitoring activities,⁴ or the standards produced by the different Council of Europe entities serve as an explicit reference base for the decisions taken by the European institutions in terms of monitoring.⁵ As Ms De Sutter's report rightly notes, this concerns in particular the Committee of Ministers, the European Commission for Democracy through Law (Venice Commission), CEPEJ, the Group of States against Corruption (GRECO) and the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).

4. My conviction is that this expansion of the European Union into the field of the Council of Europe is not about to stop, whether we like it or not. Paradoxically, the cumbersome nature of Article 7 of the Treaty on European Union and its eminently political nature have led the European Commission and the European Parliament to develop other monitoring tools and I do not see what could deter them from doing so in the future. The founding purpose of European construction remains, according to its Preamble, "an ever-closer union". Moreover, the movement in this direction is continuing as the European Parliament's Committee on Civil Liberties, Justice and Home Affairs established a Rule of Law Monitoring Group on Corruption and Freedom of the Press focused on Malta and Slovakia in December 2017 and that the European Commission announced in October 2018 that it intended to strengthen its rule of law framework.

5. The mechanism proposed by the European Parliament in its 2016 resolution has, in my view, no chance of being adopted as it stands. The European Commission and the Council of the European Union have explained their opposition: the proposed mechanism would be seen by the EU member States as encroaching on their sovereignty. In my view, this reason is more damning than the question of whether or not the European Treaties provide a legal basis for implementing it. This position means *a contrario* that the day a similar mechanism is seen as necessary and not as intrusive, it will be adopted. The Parliamentary Assembly must be prepared for it.

6. Faced with this situation, I see three possible reactions for the Assembly and its Monitoring Committee.

7. The first would be that of a "complaint" on the grounds that the Council of Europe and the Assembly would have precedence in the implementation of the monitoring procedures, the expertise that accompanies it, the primacy in this area recognised by the 2007 Memorandum of Understanding signed with the European Union, and that ultimately the European Union is involving itself in something that is not of its concern. This position, whatever the legitimacy of its arguments, seems to me unrealistic, outdated and in any case not likely to affect the dynamics of the European Union.

8. The second reaction would be a form of "splendid isolation", the European Union going about its procedures, while the Assembly would take care of its own, arguing for example that they differ in their objectives and in their means. I do not think this position is sustainable in the long run in terms of the Assembly's monitoring procedure. The European Commission is already implementing its rule of law framework for country-by-country monitoring, using the recommendations and opinions of Council of Europe monitoring entities, as the Monitoring Committee of the Assembly does. Geographically, the number of countries for which there is no risk that any EU monitoring mechanism applies concurrently with that of the Monitoring Committee is quite limited. Legally, the Monitoring Committee may initiate a monitoring procedure for all member States of the Council of Europe, that is to say possibly in respect of all the member States of the European Union. Bulgaria is still engaged in a post-monitoring dialogue. In addition, among non-EU member States, Albania, North Macedonia, Montenegro, Serbia, Turkey and Bosnia and Herzegovina are either candidates for accession to the European Union or potential candidates and therefore subject to strict control of compliance with the political criterion defined by the Copenhagen Declaration. Therefore, the risks, as listed in Ms De Sutter's report (duplication of standards, contradiction between them or divergent interpretations of the same standards, "forum shopping", etc.), ultimately exist for three quarters of the member States of the Council of Europe.⁶

9. The third attitude, which seems to be the right one, is to promote the Assembly's monitoring procedure by accentuating the latter's co-operation with the European Union.

4. As is the case, for example, with the Justice Scoreboard developed by the European Commission on the basis of data provided by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe.

5. Including when triggering Article 7 (TEU) against a member State of the European Union.

6. Furthermore, the European Commission is even monitoring – in the framework of co-operation agreements – countries which the Parliamentary Assembly, through its Committee on Political Affairs and Democracy, is "monitoring" in the context of partnership for democracy.

10. Two conditions seem to me essential for such co-operation to be successful. First of all, in order to ensure an effective way of guaranteeing the primacy of the Council of Europe in setting the standards for the three pillars, namely democracy, the rule of law and human rights, it seems to me that the accession of the European Union to the European Convention on Human Rights is necessary. This accession would subject the legal corpus of the European Union to the respect of the provisions of the Convention as interpreted by the European Court of Human Rights and should normally lead to limiting, if not eliminating, the few divergences of case law existing between the latter and the Court of Justice of the European Union. The European Commission has stated that accession remains a priority and I can only hope that it will come to fruition.

11. The second measure which seems to me to be important is the proposition set out in Ms De Sutter's report. The Assembly could organise a parliamentary annual debate on the rule of law with the participation of representatives of the European institutions. The concern of both the Commission and the European Parliament is to involve national parliaments in rule of law debates and their monitoring mechanism. What better forum to do it than the Parliamentary Assembly, composed of members of national parliaments?

12. I fully support this proposal as it also emphasises the complete lack of visibility of the Assembly in general, and the procedure of the Monitoring Committee in particular, in the monitoring mechanisms of the European institutions. When the European Parliament is considering a mechanism, the Assembly is regrettably nowhere to be found. When the European Commission refers to the opinions of the Venice Commission on the judicial reforms of Poland in its rule of law framework, it is not at any time aware that some of these opinions were requested by the Monitoring Committee. When the European Union Agency for Fundamental Rights lists, in its EFRIS tool, all entities with monitoring procedures relating to the rule of law, those of the Council of Europe are all included in the list, excepting the Assembly.⁷ Finally, when the Committee on Foreign Affairs and the Committee on Civil Liberties of the European Parliament hold a joint hearing⁸ on the rule of law and the accession process, which concerns countries either under the monitoring procedure or engaged in a post-monitoring dialogue, while the President of the Venice Commission takes part, which I welcome, no member of the Assembly is present, which I deplore. I therefore call for an end to this invisibility, at a time when the Monitoring Committee has reformed its procedure to give more impact to reports on countries not subject to a monitoring procedure or engaged in a post-monitoring dialogue⁹ and when it looks at the functioning of democratic institutions in member States. If the Monitoring Committee and, more broadly, the Assembly, wish their work to become a reference source for the European Union's monitoring mechanisms, along with those of the Venice Commission, GRECO or CEPEJ, it is up to them to multiply the opportunities to present them to the European institutions by setting up an informal but regular dialogue with them. Rapporteurs and chairpersons of committees could be the spearhead of it, especially with regard to their counterparts in the European Parliament, whose seat is not too far from that of the Assembly.

7. <https://fra.europa.eu/en/project/2018/eu-fundamental-rights-information-system-efris/monitoring-mechanisms>.

8. www.europarl.europa.eu/committees/fr/events-hearings.html?id=20190312CHE06121.

9. At its meeting on 6 March 2019, the Monitoring Committee decided to ask the Bureau of the Assembly to be seized for report on the honouring of membership obligations to the Council of Europe by France, Hungary, Malta and Romania.