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NOTE

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to: Working Party on fundamental rights, citizens' rights and free movement of persons (FREMP)
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Subject: Draft Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union

I. INTRODUCTION

1. The protection of fundamental rights within a system of government based on the rule of law is a foundational principle in the values that bind members of the European Union and an essential commitment that all Member States sign up to on accession.¹

¹ In this context it is useful to keep in mind the so-called *Copenhagen criteria*, the three political criteria that any new Member State must meet in order to join the EU: 1) political: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; 2) economic: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; 3) acceptance of the Community *acquis*: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

These foundational values are reflected in Article 2 of the Treaty on European Union (TEU), which bases the Union on a community of indivisible and universal values of respect for human dignity, freedom, democracy, gender equality, non-discrimination, solidarity, the rule of law and respect for human rights and civil liberties, for all persons on the territory of the EU. These are the common values of the Member States. They bind all Member States to promote pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. Respecting and promoting these values is an essential element of the European Union's identity. It is worth recalling the precise text of TEU 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.

2. The Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law defines a common EU-wide criminal law and criminal justice approach to combating racism and xenophobia. This Framework Decision aims to ensure that similar outrageous behaviour constitutes an offence across EU Member States and that effective, proportionate and dissuasive criminal penalties are provided.
3. The Union also has strong anti-discrimination legislation in place to prohibit direct or indirect discrimination based on gender, sexual orientation or racial or ethnic origin. The relevant Directives (for example Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin) further mandate the establishment of a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of gender, sexual orientation, racial or ethnic origin.

4. Despite these clear legislative commitments, a worrying incidence of extreme forms of intolerance can still be seen in Europe. Memories fade and each new generation needs to learn afresh the perils and injustice of intolerance and prejudice. At the informal meeting of JHA Ministers held in January 2013, Justice Ministers discussed the issue of fundamental rights and the need to counter intolerance, racism, anti-Semitism, xenophobia and homophobia. The contributions by Ministers at this discussion illustrated a range of issues that can arise in regard to the protection of the fundamental rights of citizens. These include: hate crimes and criminal law interventions to tackle hate crime; xenophobia, anti-Semitism and homophobia as social phenomena, which require interventions other than legislation to promote tolerance and acceptance; discrimination in employment and in provision of goods and services; the effectiveness with which public institutions, particularly in the Justice and Home Affairs area, function; integration measures, particularly for third country nationals; and promotion of universal human rights and equality values.
5. These are key issues for Justice and Home Affairs Ministers, as their fundamental role is to protect the rights of persons and to ensure that the institutions of States, including the courts and law enforcement agencies for which they have specific responsibility, but also public bodies in the wider system of public administration, operate effectively and have the legislative and other tools and resources needed to do the job effectively. There is a clear link between tackling hate crimes on one hand and promoting equality or fighting discrimination on the other.
6. The discussions at the January 2013 meeting showed that the idea of setting up a mechanism to better support protection of fundamental rights and the application of the rule of law to fundamental rights in the Member States could be considered further. Such a mechanism would provide a holistic framework for effective responses to these issues. It could cover sharing of best practices, benchmarking, evaluating outcomes in an objective and non-discriminatory way and formulating appropriate recommendations and guidelines for action.

7. It was agreed at that meeting that the Commission should give further consideration to this matter including initiating a broad public consultation with governments and public institutions in Member States, to include national human rights and equality bodies, civil society etc. so as to raise awareness and understanding of the importance of common values, protection of the fundamental rights of all in Europe and the role of the rule of law, taking into account the Commission's 2012 Report on the Application of the EU Charter of Fundamental Rights.
8. As a contribution to this debate, the Presidency organised a conference on 9-10 May 2013, in Dublin, on the protection of equality, fundamental rights and the rule of law in the EU.

The conference stressed the importance of recalling the values on which the Union is founded and to make them work for all our people. The primary purpose of the original single market was to create a new Europe that, in the words of Jean Monnet, "is indispensable to the preservation of peace."

9. It was clear from the contributions and discussions at the conference that there is not yet a clearly agreed common understanding of the concept of the rule of law and of the extent of its coverage within the systems of governance in Member States. The development of such a common understanding is a prerequisite to the development in the future of effective responses and of systems of measurement in this area. The essential differences in different academic and legal understandings of the definitional question relate to the extent to which the rule of law as a concept should be understood in a 'thin', formalist, way or in a 'thick', substantive, way. The formalist understanding relates solely to procedural attributes such as that the law should be prospective, general, and certain, the existence of limitations on the power of state institutions and that the functioning of public institutions should be in formal compliance with law. This definition allows for recognition of the rule of law as existing even in countries that are not democracies and that do not recognise individual rights. The substantive definition stresses the importance of the content and not just the form of law and is concerned about the rights and protection of the citizen in practice and as essential outcomes. It is inseparable from democracy, respect of fundamental rights and equal treatment. The Presidency suggests that this second, substantive, definition is inherent in TEU Article 2 and is the understanding that has guided the Union's historic mission.

10. The conference deliberations show that there is a requirement, in furthering work in this area, to treat the rule of law and protection of fundamental rights not only in terms of stronger and more consistent enforcement across the Union of what is already an extensive corpus of equality, anti-hate and discrimination legislation, but also - with a view to minimising the incidence of discrimination and hate crime at source - to find effective ways of bringing about greater internalisation of key human rights and equality values at the citizen and public institution level across the Union.
11. It is important to build consensus on what needs to be done in a systematic way to protect fundamental rights even at a time of severe economic crisis and to promote the rule of law, while also respecting the national constitutional traditions of the Member States.
12. The debate that is necessary needs to be conducted in consultation with a wide range of stakeholders, including Member States, national equality bodies, national human rights institutions and civil society. A collaborative approach would enhance the legitimacy of the Union internally by helping to address real issues for the citizens. It would also enhance the Union's credibility in the external dimension.
13. The conference endorsed the idea of launching discussions on possible approaches that could be acceptable to all Member States and that could have a real positive impact on the lives of ordinary citizens over the medium term.
14. The Fundamental Rights Agency will continue the debate at an expert seminar to be held on 7 June 2013 on the development of rule of law and fundamental rights indicators.
15. The Council of Europe has a specific role in contributing to the establishment of shared standards in the field of human rights and to strengthening the effectiveness of the supervisory mechanisms set up by the European Convention on Human Rights and other relevant treaties. In parallel, the CoE has an important role in co-ordinating and developing synergies with other national and international organisations or institutions working in the same field – the United Nations, OSCE and the European Union, including the Fundamental Rights Agency.

16. In looking at how the European Union can protect fundamental rights and promote the rule of law within its sphere of responsibility, two important considerations arise. The first is to ensure the avoidance of duplication and the achievement of synergies with the work of the CoE in any approach to these issues the EU might adopt. The second is the very real value to the CoE and to the other international bodies concerned in their work of promoting universal human rights values of a collaborative and systematic method by which the European Union addresses the issues that arise for it.
17. The Presidency would like to remind delegations that the Foreign Affairs Ministers of Denmark, Finland, Germany and the Netherlands sent a letter to the President of the Commission raising with the Commission the need to develop a new and more effective mechanism to safeguard fundamental values in the Member States which was discussed at the General Affairs Council on 22 April 2013. The letter called for greater emphasis on promoting a general culture of respect for the rule of law in the Member States. The four Foreign Affairs Ministers point also to the important issue of ensuring coherence as between the internal and external dimensions of the EU action on human and fundamental rights issues, as stressed by the External Action Service, in highlighting the importance of the Union living up to our common values in practice as this fundamentally shapes Europe's image and credibility around the world.
18. The Presidency also welcomes the attention paid by the European Parliament to the fight against racism, xenophobia, homophobia and hate crime. The Parliament's resolution adopted on 14 March 2013 calls for a comprehensive strategy for fighting hate crime, bias violence and discrimination and for strengthening of efforts at European and national level in that regard, particularly in relation to better collection of data, support for victims and encouragement for victims to report incidences. The Parliament also reiterates its call for a stronger framework for protection of LGBT people and better implementation of national Roma integration strategies.

19. The Commission's initiative to present a Justice Scoreboard² is an interesting concept which makes a welcome contribution to the debate. It also highlights the economic importance of justice institutions that work effectively in protecting rights of citizens and businesses.
20. To that end the Presidency stresses the importance of a two-stage process. This process of debate, discussion and raising awareness is very important before particular models or particular approaches are developed and presented. This consultation process should be given sufficient time to allow development of a consensus around a clear definition of the problems we are seeking to address and possible solutions, including the value of action at EU level. At a very broad level, two overarching and related themes emerging in the discussions to date are a) the importance of effective functioning of institutions in the JHA area and b) the protection of the fundamental rights, including economic freedoms, of all, as a common value.
21. This process of engagement with Member States, civil society and dialogue with citizens around these themes could be very fruitful. Very clearly, the questions at the heart of this debate need to be carefully considered and any agreed initiative should be crafted sensitively and in a way that is respectful of the different legal traditions of member states and of the division of competencies between the Union and Member States.

III. CONCLUSION

22. In the light of the above, FREMP is invited to:
- a) consider the draft Council conclusions as set out in the Annex to this note; and
 - b) agree to the text of these draft Council conclusions with a view to submitting these to Coreper/JHA Council for adoption.

² 8201/13 JAI 255 POLGEN 42 FREMP 37 COHOM 55 COMPET 189 CONSOM 60 DRS 63 EJUSTICE
26 ENV 274 FISC 67 MAP 25 MI 263

DRAFT COUNCIL CONCLUSIONS of 6 June 2013
on fundamental rights and rule of law and on the Commission 2012 report on the application
of the Charter of Fundamental Rights of the European Union

RECALLING that in accordance with TEU 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;

CONSIDERING existing Union legislation in the field of racism, xenophobia as well as anti-discrimination and COMMITTING to fully implement existing law;

RECALLING the discussions at the informal meeting of JHA Ministers in January 2013 on fundamental rights and on the need to counter intolerance, racism, anti-Semitism, xenophobia and homophobia by fully implementing existing legislation and possibly by way of a holistic framework to better support protection of fundamental rights and the rule of law in Member States, including via sharing of best practices, benchmarking, evaluating outcomes in an objective way and formulating appropriate recommendations and guidelines for action;

TAKING NOTE OF the letter of Foreign Affairs Ministers of four Member States raising with the President of the Commission the need to develop a new and more effective method of safeguarding fundamental values in order to place greater emphasis on promoting a culture of respect for the rule of law while fully respecting national constitutional traditions and noting the outcome of the ensuing debate in the General Affairs Council of 22 April 2013.

NOTING the tools that exist at EU level to assist in the promotion of effective functioning of public institutions, particularly justice institutions, and in the achievement of the highest standards of protection of fundamental values, including the rule of law, such as the country specific recommendations in the framework of the European semester, and the Commission communication - the EU Justice Scoreboard, a tool to promote effective justice and growth.

VALUING the central role of the Council of Europe in the promotion and development of human rights, democracy and rule of law and EMPHASIZING the importance of simultaneously creating synergies and avoiding duplication with the work of the Council of Europe;

CONSIDERING the discussions at the Presidency conference of 9-10 May 2013 on the protection of equality, fundamental rights and the rule of law in the EU

WELCOMING the important role the Fundamental Rights Agency of the European Union has in providing expert and independent analysis relating to fundamental rights within the remit of its mandate in this area.

the Council adopts the following conclusions:

1. The Council takes note of the 2012 report of the Commission on the Application of the EU Charter of Fundamental Rights and considers the proper application of the Charter an important priority. The Charter is a key element in the fundamental rights protection architecture in the European Union and is binding on the EU institutions and the Member States when implementing EU law.
2. The Council emphasizes the importance of EU institutions and bodies as well as Member States, when implementing EU law, fully implementing the Charter.

3. The Council welcomes the systematic and frequent application of the Charter by the Court of Justice of the European Union as well as by national courts. The increased application of the Charter by national courts reflects the importance of the Charter in the implementation of Union law and underlines the importance of having due regard to the Charter when transposing Union law. The Council considers it important to keep the evolving case-law on the application of the Charter at Union and at national level under review and requests the Fundamental Rights Agency to publish regular updates in this regard.
4. The Council highlights the importance of European Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in that context. The Council underlines its dedication to take this process forward and welcomes the agreement at negotiators' level from 5 April 2013, subject to the completion of internal procedures in all contracting parties. The Council emphasises that EU accession to ECHR will further enhance coherence in human rights protection in Europe, increase judicial dialogue and improve the consistency of case-law.
5. The Council welcomes further debate on the Charter and its application and renews its commitment to have every year an exchange of views on the Commission's annual report on the application of the Charter. In this context, the Council recalls its conclusions of 25 February 2011 on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union,³ its conclusions of 23 May 2011 on the Council's actions and initiatives for the implementation of the Charter of Fundamental Rights of the European Union,⁴ as well as the guidelines on methodological steps to be taken to check fundamental rights compatibility in the Council's preparatory bodies.⁵ The efforts should be enhanced to put in practice the principles and working methods contained in these tools, which are aimed at ensuring that practical steps are taken at any level of the legislative process to ensure compatibility with the Charter rights throughout the Council's internal decision-making procedures and to raise awareness of the Charter within the Council.

³ 6387/11 FREMP 13 JAI 101 COHOM 44 JUSTCIV 19 JURINFO 5
⁴ 10139/1/11 FREMP 53 JAI 318 COHOM 131 JUSTCIV 128 JURINFO 30
⁵ 10140/11 FREMP 54 JAI 319 COHOM 132 JURINFO 31 JUSTCIV 129

6. The Council recalls the completion of procedures for the adoption of the 2013-2017 Multi-annual Framework of the European Union Agency for Fundamental Rights⁶ and looks forward to receiving the evaluation report and recommendations of the Management Board of the Agency referred to in Article 31(1) of Regulation 168/2007 on establishing a European Union Agency for Fundamental Rights.
7. The Council notes that following completion of an extensive consultation process, the Commission on 25 January 2012 adopted proposals for both a General Data Protection Regulation to replace the 1995 Data Protection Directive, and a Directive to replace the 2008 Framework Decision on data protection in the context of cross-border cooperation by police and judicial authorities in criminal matters. The Council welcomes the intensive discussions which are currently taking place on key aspects of this reform package.
8. The Council notes with interest the discussions at the Presidency conference on equality, fundamental rights and the rule of law on 9-10 May 2013, in Dublin, which stressed the need to give further consideration to raising awareness and understanding the importance of fundamental values, in particular the rule of law, in ensuring the protection of fundamental rights of all in Europe through broad, appropriate debate and dialogue with all interested parties, including with the Member States, national human rights and equality bodies as well as civil society.
9. Considering that respecting the rule of law is a pre-requisite for the protection of fundamental rights, the Council calls on the Commission to take forward the debate on the possible need for and shape of a collaborative and systematic method to tackle these issues. Therefore it is of critical importance to:
 - i. ensure that EU institutions, and relevant institutions at national level, including judicial authorities, human rights institutions, equality bodies, Ombudsmen and civil society can contribute to the public debate;
 - ii. develop an agreed understanding of what any future rule of law initiative would entail, including of the problems to be addressed, as well as questions of methodology and indicators;

⁶ 10449/12 FREMP 81 JAI 366 COSCE 17 COHOM 122 OC 292

- iii. make full use of existing initiatives, such as the on-going peer evaluations in the JHA area, and cooperate with other relevant EU and international bodies (particularly with the Council of Europe, in view of its key role in relation to promotion of human rights, democracy and the rule of law) in order to avoid overlaps;
- iv. focus on shared universal values and identify the added value of EU action and coordination;
- v. consider the full range of possible models, including reflecting on approaches that could be accepted by all Member States by consensus;
- vi. ensure that any future rule of law initiative would apply in a transparent manner, on the basis of evidence objectively compiled and analysed and on the basis of equality of treatment as between all Member States; and
- vii. ensure that any initiative in this area would have a real positive impact on the lives of ordinary citizens over the medium term.

10. The Council calls on the Commission to take forward in 2013 a process of inclusive dialogue and debate and engagement with all relevant stakeholders on the basis of the considerations and suggested approach set out in these Conclusions, following the previous discussions by JHA Ministers and General Affairs Ministers.

11. The Council looks forward to receiving the Commission's assessment and recommendation in due course on the completion of this process of dialogue and to giving further consideration at its forthcoming meetings to the need for and possible shape of methods or initiatives to better safeguard fundamental values, in particular the rule of law and the fundamental rights of persons in the Union and to counter extreme forms of intolerance, such as racism, xenophobia and homophobia.
