

Preliminary elements of analysis of the responses to the questionnaire

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Purpose of the intervention :

- Provide information on the progress of the work and, more specifically, on the in-depth reflection carried out by the working group;
- Give a general overview of the replies that have been sent by States to the preliminary questionnaire, the content of which is very useful for a better knowledge of State practices and for defining the frameworks of your future recommendation.

I. Remarks on the questionnaire and on the answers themselves

- We received **23 responses** to the questionnaire.
- The number makes it possible to give an **interesting panorama**, to highlight some **constants** between countries and to locate the points of real **divergence** of systems.
- **Main advantage of the questionnaire**: The feedback on the questionnaire made it possible to test the first working definitions developed by the working group and to measure their relevance or the need to adapt them for further work.
- The questionnaire also made it possible to highlight the fact that **States all make the question of the accountability of elected representatives a real object of attention**. Admittedly, the solutions are often different, as are the traditions, but I would like to stress here the fact that, in most cases and leaving aside the sensitive issue of political accountability and democratic accountability, states often adopt very compatible approaches.

II. Fundamental questions on the subject, purpose and structure of the recommendation

a) First constituency element - the general scope of the recommendation: accountability

- In French, the term *responsabilité* is used in a very transversal way to designate both the accountability mechanism leading to the resignation of a political body and that leading to forms of criminal or pecuniary sanctions for acts of a varied nature.
- The English language has more varied terms (*accountability, liability, responsibility, answerability...*) to designate realities that do not all have the same purpose, the same objective.
- There will be a major translation issue for the work and in this respect I have proposed to the working group to retain [in French] the term "*redevabilité*" rather than "*responsabilité*" to circumscribe the general scope of the work. It will indeed be a question of defining and circumscribing the democratic tools of accountability of elected representatives and communities, some of which may lead to genuine forms of legal responsibility, while others

are of a different nature and are limited to ensuring some form of accountability of elected representatives and bodies towards the population or other bodies.

- With such a definition, it will be possible to bring together in a single text all the systems presented by the States in the questionnaire and to base a recommendation whose objective is less accountability as such than the ability to verify compliance with certain standards by elected representatives, by various means summarised under the term "accountability".
- We may also include within the scope of accountability arrangements to ensure some form of management accountability linked to the application of good governance principles.

b) Second constituency element – accountability of the individual elected official, accountability of the body and accountability of the community

- Responses to the questionnaire often show hesitation as to who should be held accountable: the elected official, individually and personally, the body (which may be individual), or the community itself?
- In this regard, we faced an important scope issue for the recommendation: by focusing on the individual elected official, it risks giving the impression of a somewhat unfair focus and missing out on many of the possible mechanisms for more collective accountability. By focusing on the community, it risks the same pitfall, this time depriving itself of considering possible avenues with regard to the individual in certain cases, particularly in criminal matters. Finally, by focusing on the organs, it also risks reducing questions of accountability to mere intra-institutional games, to the simple game of the separation of powers.
- The work noted that it is useful to look at the three possible courses of action through which these forms of accountability can be imputed.
- In which cases do we want to target the elected representative in a personal capacity? In what cases do we want to designate intra-institutional mechanisms, forms of political accountability? In which cases, finally, do we want to target the community itself? These are three major questions that will need to be clarified in the framework of the recommendation, specifying each case in the different types of accountability and making the useful distinctions, particularly in the field of criminal and pecuniary liability.

c) Third constituency element - no differentiation between local and regional level, apart from the State's trusteeship

- Another question is: on which recipients do we want the recommendations to have an impact?
- In this respect, the responses to the questionnaire sometimes show variability between local and regional levels. These are most often differences in procedures or, in some rarer cases, mechanisms that exist at one level but not at another. But more often than not, the system is the same at local and regional level.
- It seems, however, that if one intends to focus the work of the recommendation on the construction of accountability mechanisms to disseminate and verify the monitoring of certain standards of a democratic nature, it makes little sense to differentiate between the local and regional levels: the recommendation should treat them uniformly, as far as possible.

- Finally, while mechanisms to ensure some form of accountability of elected officials for their management are intended to be included in the framework of the recommendation, it will not be up to the recommendation to develop the forms of legality control already defined by the recommendation of 4 April 2019. At most, they will be mentioned as a possible tool, among others that we will draw from the experiences of States: audit, financial control, warning mechanisms, etc.

III. Remarks on each form of accountability and a few points for reflection

- I would now like to come to a quick overview of the different types of accountability/responsibility defined by the questionnaire in order to draw up a first progress report.

a) Generally recognised forms of liability

- First of all, there are the forms of accountability which can be considered to be a fairly well-distributed standard in Europe: the criminal liability of elected representatives and pecuniary liability are good examples of this.

Criminal liability

- There are certainly disparities, but the immunity of elected representatives has generally lived and their criminal responsibility, often reinforced by specific offences against public action (corruption, abuse of power, prevarication...) is generally accepted: all the States that replied to the questionnaire practise it.
- It is true that it constitutes a predictable democratic standard which the recommendation could seek to strengthen by circumscribing, for example, as the very large majority of the respondent States do (17), a specific field of offences to be covered in addition to reminding elected representatives of the application of ordinary law offences.
- On the other hand, and as some States have mentioned, we should ask ourselves whether it is not relevant to say a few words about the protection regime for elected representatives in the context of their functions, because functions create obligations as well as rights, and the respect of these rights certainly contributes to the dissemination of standards of good governance.

Pecuniary liability

- The States also clearly agree on the establishment of a form of pecuniary liability whereby elected representatives or the community take responsibility for compensating the damage they have caused. Out of 23 respondents, 22 indicated that they practice this in some form. The missing answer probably corresponds to a misinterpretation that we will analyse shortly.

- In the answers given, pecuniary liability regularly takes two distinct forms: a form of pecuniary liability of the community itself and a form of liability of the elected official in an individual capacity. The recommendation should be able to find a criterion for distinguishing between them and make useful general observations. Almost all States are in fact endeavouring to recognise that the individual liability of elected representatives must be conditional on certain situations: serious misconduct, serious breach of duty, intention, personal fault, flagrant violation of the law, criminal offence, etc. We shall therefore find the keys to distinguishing levels of liability in this area, in order to distinguish between the personal fault of the elected representative and the fault of service.
- It will also be necessary to define the role of the judge as arbitrator in this area, bearing in mind, for example, that some States, such as Spain, opt for administrative mechanisms for the distribution of debt that are only checked after the event by the judge, while other States have recourse to the judge to distinguish between personal fault and service fault.

b) Forms of accountability more open to debate

- Among the forms of accountability frequently encountered, but more subject to variations between systems, is of course *political accountability*, hitherto understood as the accountability of one body or elected official to another body, which can lead to genuine political accountability implemented by a vote of no confidence. Traditions in this respect vary: 5 respondent countries do not know about it, not to mention those, such as France, which are not among the respondents but do not practise it either. On the other hand, 18 countries are more willing to practise it and form a fairly clear majority. The forms taken vary from country to country, ranging from simple questioning to actual censorship of the body. In this respect, the Recommendation may provide a useful compendium of possible measures, based on the analyses carried out in the framework of the questionnaire.
- The most common mechanism is the motion of censure. It should be noted, however, that the mechanisms chosen and their purposes vary greatly. While the motion of distrust (or censure) is well known and practised, its conditions and purposes vary. In some States, the tool seeks to put an end to a situation of ungovernability (e.g. Belgium). In others, as in Hungary, it seeks to sanction illegality by drawing the political consequences. In others, its purpose is much broader, and it serves as a mechanism for more general political adjustment, anticipating the return to the ballot box and indirect voting. In this regard, further reflection will be needed on the framework to be adopted by the Recommendation.
- The conditions of initiative, majority and deadlines very often vary between States, which will not make the task of recommendation easy. Some states, such as Hungary, mediate through the judge, but most make this option a purely political matter.
- To solve the problem, it will therefore be necessary here to define the objectives expected for this form of accountability, and to define the safeguards to ensure that the tool will not exceed these objectives.
- Other more debatable forms are *administrative liability and financial liability*. The answers given in this area are certainly the least framed and those requiring the most analytical work. The States have often replied here by indicating the administrative or jurisdictional mechanisms provided for by the State in terms of audit and management control. It will be

necessary to define whether these tools come under the supervision of the State, as this is sometimes the case, or under real accountability, particularly in the light of the 2019 recommendation. In any event, the information provided by the States shows the vitality of the mechanisms for creating transparency in the administrative and financial management of local authorities. However, they are only indirectly linked to political accountability procedures or legal accountability mechanisms.

- Since the last meeting of the working group, and because I am convinced that these various elements will be a very strong added value for your work, I have made progress in the reflection and will soon propose to the working group a new typology and new bases of definition. These will include in an organised whole, linked to the managerial accountability of elected representatives, the aspects related to good administrative and financial management, as well as the tools for establishing forms of accountability of elected representatives in this field. In many cases, these tools serve as useful revealing and transparency tools, which can then motivate the initiation of political or legal accountability procedures by elected officials.

c) Democratic accountability as a source of real divergences between states

- This will come as no surprise to you: the field of what we have so far called democratic accountability is the subject of extremely varied practices on the part of States. These are arrangements that provide for some form of direct control of accountability by the electorate, as opposed to mechanisms of mere democratic participation.
- On practice, there are first those who do *not practice it*, because their system is based on a strict separation of powers and a very powerful representative logic. My country is one of them and is followed in this respect by almost 12 respondents.
- Then there are States that practice democratic accountability by providing for petition, interpellation and, often, revocation mechanisms: 9 of the responding States.
- Finally, there are those (of federal or regional organisation) which practise it variably or know only limited examples: 2 respondent States.
- In States with these systems, the practice varies in terms of the forms adopted, from interpellation to revocation and petition. The effect is therefore not always the same and is thus, in its maximum version, similar to a real accountability with powerful political and legal effects. In this respect, the recommendation will certainly have to provide a sufficiently flexible statement of practices, showing a possible gradation so that States with a very strongly representative legal tradition are not singled out. If the interpellation of bodies can become consensual, revocation will probably be much less so!
- Similarly, the recommendation will address here the important procedural divergences that exist among states that recognise some form of democratic accountability.
- The key to a good recommendation in this area is surely the elasticity of the term "democratic accountability" and the gradation you may wish to use to characterise its different forms, from simple questioning or questioning to *recall*... It also lies in a careful study of the degree of acceptance by States, which, particularly in this area, may vary.

In conclusion, and without taking up any more time, I should like to point out that, following the latest work of the working group and a more detailed study of the replies given by the States, I thought that the scope of the recommendation could cover three main areas:

- The forms of political accountability of elected representatives, whether this is achieved among the people or through the operation of procedures between internal bodies of a community;
- The forms of legal accountability of elected representatives, whether this takes the form of individual liability of the elected representatives or liability of the community itself, both in criminal and monetary terms;
- The forms of managerial accountability of elected representatives, both in terms of administrative management and financial management, areas in which the mechanisms for a form of transparency must be presented, without which there can be no political or legal accountability / liability.

Each of these areas will be studied and fine-tuned to take into account the different possible situations.