

SOME THOUGHTS ON THE INTERRELATION OF ARTICLE 7 TEU WITH THE EU FUNDAMENTAL RIGHTS AGENCY

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Abstract

Much have been written, critically evaluating the sanction mechanism included in article 7 TEU regarding the sanctions to member states for serious and persistent breach of the values of the Union. Although the institutional framework is adequate and its use necessary, the lack of political will has led to inactivity of the provision. On the other hand, the fundamental rights agency was established for monitoring human rights throughout the Union, in order to ensure full respect for fundamental rights across the EU. The aim of this paper is to present an interrelation between the sanction mechanism of article 7 TEU with the monitoring mechanism of the agency, which will enhance the quality of fundamental rights protection in EU and the member states. The paper is based on interim conclusions from the PhD thesis at the National and Kapodistrian University of Athens, entitled “the Treaty of Lisbon and the fundamental rights protection in EU”.

Keywords: article 7 TEU, sanction mechanism, fundamental rights agency

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I. Introduction

Beyond dispute, fundamental rights protection in EU legal order has been a complicated field that touches on sensitive matter of the member states’ national sovereignty. This lack of political consensus has mainly led to the delay in establishing a catalogue of fundamental rights protection in EU and the subsequent grant of legal status (it happened only in 2009 after the enactment of the Lisbon Treaty).

In this institutional environment and under the pressure of demands regarding the level of fundamental rights protection in EU, the sanction mechanism was established with the Treaty of Amsterdam. Article 7 of the Treaty on the European Union (TEU) puts sanctions to member states for serious and persistent breach of the values of the Union, in which fundamental rights protection is included.

At the same time the Fundamental Rights Agency was another instrument for the enhancement of fundamental rights protection. Its tasks are related to monitoring and providing the EU institutions and member states with independent, evidence-based advice on fundamental rights. In that sense the agency’s role is preventative since it provides the Union with the necessary knowledge for taking relevant initiatives.

From the above mentioned, it is clear that in the EU institutional structure, with reference to fundamental rights, a monitoring mechanism exists and a sanction mechanism exists for completing the main texts where fundamental rights under protection in EU legal order may be found.² The question that stands is why those two mechanisms are not interrelated? The aim of this paper is to explain the importance of such possible interrelation. As mentioned in the abstract, the paper is based on interim conclusions from the PhD thesis of the author at the Faculty of Law of the National and Kapodistrian University of Athens, entitled “the Treaty of Lisbon and the fundamental rights protection in EU”.

II. Evaluation of article 7 TEU

Article 7 was first included in the Amsterdam revision of 1997. Initially, it covered the cases of serious and persistent breach of the values refereed in article 6 TEU, which were the fundamental

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² See article 6 TEU.

rights as recognized by the ECHR and the common constitutional traditions of the member states. Where a determination of serious and persistent breach has been made, the Council, acting by a qualified majority, may decide to suspend 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 enactment of such mechanism could be dually interpreted. On one hand it demonstrated a political will to strengthen fundamental rights protection in EU, since the sanctions put in member states are quite important. On the other hand, this action worked as an alternative for the adoption of a catalogue of rights in the Union. Although the debate on the topic tended to be in favor of the Union's special catalogue of fundamental rights, the makers of the Treaty did not add any further value to the approach already adopted in Maastricht. Instead, they decided to work more on negative integration method by adding an obligation of the member states to avoid a (serious and persistent) violation of rights, rather than taking positive actions for further protection in EU level. This would practically imply the full adoption of a fundamental rights catalogue within the Treaties.

The reason for the adoption of the sanction mechanism could be seen also in context with the prospect of EU enlargement. A few years after the fall of communist regimes, the possible enlargement to the east was gaining ground; hence, the Union would accept States that were applying communist form of governance up to a few years ago. In that sense, the fear of non compliance of potential member states with the principles and values of the Union,³ which are based on liberal spirit, the member states decided to secure the maintenance of those principles and at the same time, to assist the process of transition for ex-communist States to democracy.

Five years after the application of the famous "Copenhagen criteria" for respect of fundamental rights and the rule of law on behalf of candidate member states,⁴ article 7 TEU creates a safety lock for the full member states on the same issue. In that way, the result is dual: the EU promotes its principles and values and at the same time, it warns with penalties related to suspension of certain rights deriving from the application of the Treaties, in case of serious and persistent violation of those principles.

The concept of "serious and persistent breach" creates interpretive issues. The seriousness of the violation can be based on its aim and subsequent effects. Regarding the aim, a violation is serious when targeting a particular social group, especially when this group is already in an unfavorable position; for example minorities or immigrants. The effect standard contains a violation of the main EU principles, as refereed in article 7. The formal position for persistency is that the violation should not be of usual type, but acquires a systematic character.⁵ Therefore, the characterization of a breach as persistent is not connected to the violation itself, but this violation should have obtained extensive dimensions being transformed to a systemic problem. In that sense, the application of article 7 is the last solution.

Ironically, the first reasoning for the application of article 7 TEU did not come from an ex-communist State, but from a liberal one, Austria. After the 1999 parliamentary elections, the first in seats Social Democratic Party could not form a coalition government with the People's Party which came third in the electoral process. At the end, an agreement was reached between the People's Party and the extreme right wing Freedom Party with the later taking 6 out of 10 ministries.⁶ After the end of the tremendous World War II, it was the first time that a radical political party was taking positions in the cabinet of an EU member state.

³ Bruno de Witte, Gabriel Toggenburg, *Human Rights and Membership of the European Union* in Steve Peers, Angela Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford, Portland, 2004, p. 59.

⁴ Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, the document is available online at http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf.

⁵ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, Brussels, 15.10.2003, COM (2003) 606 final, par. 7, the document is available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0606:FIN:EN:PDF>.

⁶ Heather Berit Freeman, *Austria: The 1999 Parliamentary Elections and the European Union Members' Sanctions*, "Boston College International and Comparative Law Review", Boston, vol. 25, 2002, pp. 109-124, the document is available online at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1162&context=iclr>.

As expected, the other 14 member states of the time reacted. The result was the imposition of diplomatic sanctions to Austria, without having a concrete plan to deal with the issue in EU level. Article 7 demanded a serious and persistent breach of rights and although the danger of such an action was highly visible, this action of violation of the Union's values of democracy and rule of law was not externalized yet.⁷ In order to avoid any conditions that could shake the foundations of the Union, it was agreed that the sanction mechanism of article 7 would be extended to cases of "clear risk of a serious breach" by a member state.

This addendum was included in the Nice Treaty which came into force in 2003.⁸ Hence, a new paragraph was added in article 7; it stated that the Council, acting by a majority of four-fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a member state of principles mentioned in article 6, par. 1 TEU and address appropriate recommendations to that State. This new paragraph constituted a first level of action for recognizing the danger and warning the member state.

The subsequent major issue was the bounding of the notion of "clear risk". It is a totally subjective notion, especially when taking into account that, by the time of its establishment, there was no Union catalogue of rights with legal status so that specific rights would be protected. A clear example of what could be named as a "clear risk" can be the participation of extreme parties in the government of a member state, like the Freedom Party in Austria. When the rhetoric of the party would be expressed in political activism, there would surely be a serious and persistent breach of EU values, on the basis of the criteria set above. For instance the party would apply discriminatory policies against Muslims.⁹

Minor changes to article 7 have been forwarded with the Lisbon Treaty. The values that should not be violated by member states are referred in article 2 TEU and not 6, par. 1. Article 2 virtually describes the values where the Union is founded on. These are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

To sum up, if we exclude the crystal clear cases, the process of identification of a "clear risk" is proved to be extremely difficult in practice. In conjunction with the lack of political will on behalf of the institutions of the Union for initiating the process of sanction mechanism,¹⁰ the result is that the mechanism is becoming practically inactive.

III. The Fundamental Rights Agency

For the better monitoring of serious and persistent breach (or clear risk) of the values and principles of the Union from the member states, the establishment of a network of independent experts was proposed.¹¹ The main argument was based on the choice of a preventive policy in the field of fundamental rights,¹² so that issues of violation would be fought in the source. Under

⁷ Grainne de Burca, *Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union*, "Fordham International Law Journal", New York, vol. 27, 2003, p. 697, the document is available online at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1927&context=ilj>.

⁸ For the amending process of article 7 TEU see Wojciech Sadurski, *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jorg Haider*, "Sydney Law School, Legal Studies Research Paper No. 10/01", Sydney, 2001, the document is available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531393.

⁹ At that time, the leader of the Freedom Party, Jorg Haider, stated that "the social order of Islam is opposed to our Western values. Human rights and democracy are as incompatible with the Muslim religious doctrine as is the equality of women. In Islam, the individual and his free will count for nothing, faith and religious struggle, *jihad*, the holy war, for everything".

¹⁰ Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge University Press, Cambridge, 2010, p. 93, Cesare Pinelli, *Protecting the Fundamentals: Article 7 of the Treaty on the European Union and Beyond*, "Foundation for European Progressive Studies", Brussels, 2012, pp. 5-7, the document is available online at <http://www.feps-europe.eu/assets/9a4619cf-1a01-4f96-8e27-f33b65337a9b/protecting%20the%20fundamentals.pdf>.

¹¹ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, Brussels, 15.10.2003, COM (2003) 606 final, par. 9, the document is available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0606:FIN:EN:PDF>.

¹² Philip Alston, Joseph Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, "European Journal of International Law", Oxford, vol. 9, 1998, p. 711, the document is available online at <http://www.ejil.org/pdfs/9/4/693.pdf>.

complete and concrete information, the Union could take initiatives under its Treaty competences and in situations that member states cannot deal with.

As a result, the expansion of the competences of the European Monitoring Centre on Racism and Xenophobia was decided and its subsequent replacement by the Fundamental Rights Agency which was formally established in 2007. As an agency, it is a body that consists of experts, specialists in technical and scientific matters that deal with, most of the times, complicated issues that arise and in that way they contribute to the accomplishment of the best possible result. Therefore, a high organizational level must be secured for the achievement of co-operation between the member of the agencies themselves and between the agencies and the European institutions. Institutional independence is enjoyed up to a certain degree.¹³ The aim of the FRA is the data collection and analysis in the field of fundamental rights with an emphasis on the rights included in the EU Charter of Fundamental Rights and providing expertise.¹⁴

The Agency's tasks are strictly advisory; therefore FRA is not in any way involved in the application of the sanction mechanism against a member state. For example, the Agency has repeatedly highlighted the unequal treatment that the Roma incur in certain EU member states, without any further reaction from the formal institutions. As appears in its reports,¹⁵ the socioeconomic conditions of the Roma in four basic fields (employment, education, housing and health) are not satisfactory; on the contrary, it is much less favorable compared to the average of the non-Roma living in close proximity. Moreover, it was also revealed that the Roma are facing discriminatory behavior and do not have adequate knowledge of their rights as guaranteed in EU legislation.

In the above case, the analysis of the FRA could activate the sanction mechanism of article 7 TEU. The discriminatory behavior against the Roma is a violation of EU principles as described in article 2 TEU. Furthermore, this violation can be characterized as serious and persistent since it targets against a specific social group that due to its living conditions finds difficulties to react and has obtained a systemic character. However, none of the sanctions provided has been put on the member states in order to comply with the principles of the Union.

In that sense, the function of the FRA does not play any special role in the protection of fundamental right in EU. The main reason is not related to the function itself, but to the general approach regarding the power of FRA. On one hand, the member states are not ready to accept an *ex ante* monitoring of the level of protection of fundamental rights and on the other hand, the formal institutions of the Union are not willing to interfere in member states' internal issues in order to keep a high level of balance. Therefore, it would not be exaggerative to mention that the reports of the FRA are mostly used for scientific purposes.

IV. Conclusion

Two conclusions may be drawn from the paper: 1) the existence of a special body well organized and well staffed, that have nothing more than advisory power and the existence of a special mechanism, commonly accepted in institutional level, which provides the necessary means to force member states to comply with EU principles and 2) the lack of any form of interrelation among the two.

The lack of interrelation is what declines the importance of both the Agency and the sanction mechanism. Finding serious and persistent violations through monitoring is the first step;

¹³ For analysis on the background of the Agencies see Ronald van Ooik, *The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance* in Deirdre Curtin and Ramses Wessel (eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Intersentia, Antwerp, Oxford, New York, 2005, pp. 125-152, Damien Geradin, *The Development of European Regulatory Agencies: what the EU should learn from American experience*, "Columbia Journal of European Law", New York, vol. 11, 2004, pp. 1-52.

¹⁴ For further analysis see Philip Alston, Olivier de Schutter (eds.), *Monitoring Fundamental Rights in the EU: the Contribution of the Fundamental Rights Agency*, Hart Publishing, Oxford, Portland, 2005.

¹⁵ Fundamental Rights Agency, "The Situation of Roma in 11 EU Member States - Survey Results at a Glance", May 2012, the document is available online at http://fra.europa.eu/sites/default/files/fra_uploads/2099-FRA-2012-Roma-at-a-glance_EN.pdf.

the second one is combating the problem, otherwise the monitoring remains incomplete. Thus, what could be forwarded is the interrelation of the FRA reports with the application of article 7. When a report acknowledges a serious and persistent breach of fundamental rights by member states, it will be implied and the Commission would have to forward the issue according to article 7, par. 2 TEU to the European Council, after obtaining the consent of the European Parliament, in order for the European Council to finally decide whether the breach does take place. In that sense, the FRA will be empowered with the initiative to turn the sanction mechanism on; the final decision remains, as stated, at the hands of European Council.

This interrelation strengthens the fundamental rights policy in the internal of the Union. The reports submitted by the FRA as a monitoring organization will be used for the purpose of combating violations of fundamental rights in a massive dimension within member states. Hence, the sanction mechanism also obtains a more substantive role since it provides the institutional framework needed for such combat. In that sense, the different pieces of the puzzle will unite for the purpose that, from the very beginning, triggered their creation. The tools are there, the political will is missing.

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