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Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider

Wojciech Sadurski*

Abstract

The Article 7 mechanism of the Treaty on European Union fills a gap in the Union's approach to human rights protection by setting up a system of early warning about the risk of breaches of rights in a member State, and of sanctions in the event of determination that such breaches have occurred. This working paper traces the history of discussions and decisions about incorporating this mechanism in the EU treaty system: I emphasize that, at each important stage of the evolution of this mechanism, the prospect of Eastward enlargement of the Union has played an important part. In the minds of the EU decision-makers, the new entrants from Central and Eastern Europe had to be seen with a degree of mistrust, as far as their commitments to human rights, democracy and the rule of law is concerned. In this way, somewhat ironically, the Eastward enlargement of the EU was an important impetus of supranational constitutionalisation of the Union.

Keywords

European Union; Treaty on European Union; European law, EU enlargement; Central and Eastern Europe; human rights

Introduction

The road of the European Union (EU) and its institutional predecessors to the recognition that human rights and democracy in its member states are part of a legitimate interest of the Union as a whole has been long and strenuous. Part of this road has been marked by a growing sense that some real *sanctions* for the violation of rights and democratic principles are necessary – even if not in order to be actually used, but at least to act as a deterrent. The inclusion of the sanctioning and – chronologically later – preventive mechanisms has been preceded by drawn out – as is often the case in the EU – deliberations about the appropriateness and the optimal shape of such mechanisms.

The need for such mechanisms was not obvious in the earlier years of the European Community (EC) until the mid-1990s. This is mainly for two sets of reasons. First, the perceived nature of the EC as a primarily common economic market made it unnecessary to build into the organization any specific precautions against breaches of rights in member states. Rights, in the minds of the European integration planners, could have been safely entrusted to the Council of Europe, with the European Convention of Human Rights as its

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foundational document. As Gráinne de Búrca puts it, “there was originally an implicit division of functions between the Council of Europe and the European Community ..., so that the EC until relatively recently played little or no role in relation to the establishment or protection of human rights.”¹ It was only the evolution of the European Community towards a more political and constitutional entity, symbolically encapsulated by the adoption of the name of the European *Union* in the Maastricht Treaty (1992), that eventually placed rights and democracy on the Union’s agenda.

Second, the commonality of political and legal cultures of the original like-minded members, and also new member states recruited subsequently from within Western Europe, created a sense of confidence in the proper behaviour of member states towards their own citizens (there was always a degree of illusion and self-congratulatory deception in it, but this was the dominant perception, especially against the contrasting background of Communist states of Central and Eastern Europe). It was only the ever more likely prospect of the Eastward enlargement of the Union, an inevitable consequence of the fall of Communism and the removal of a fundamental division of the Continent, which drove the movement towards the institutionalization of sanctions for breaches of human rights. Such breaches became, in the minds of the EU decision-makers, a likely prospect in the countries whose very recent past had been marred by massive and systemic violations of human rights and by strikingly undemocratic structures, and whose new-found enthusiasm for human rights and democratic practices could have been seen with a degree of mistrust.² As two thoughtful scholars were predicting, a few years before then 2004 enlargement: “With enlargement, the Union will be importing a new set of unresolved minority issues as well as additional human rights challenges, whose solutions will test the strength of many Community policies.”³ In this way, both the evolution of the EU towards a more political entity and the anticipation of its enlargement leading up to a much more heterogeneous membership were two independent agenda setters for the debate about preventive and sanctioning mechanisms within the EU.

This is the story that I will attempt to tell in this working paper. The story will have numerous characters: some well-known European politicians, some largely anonymous (or at least, generally unknown) bureaucrats, “three wise men” – and Mr Jörg Haider, now deceased, who had played a significant role in prompting the Union to establish an early-warning mechanism. Because, ironically, it was not a post-communist country from Central and Eastern Europe but one of the most consolidated European democracies, and in addition a country where fears against the Eastward enlargement were most pronounced – Austria – which fuelled this debate in an important way.

I will begin by describing the early pedigree of the Article 7 sanctioning measures, looking at various proposals put forward to that effect prior to the Amsterdam Treaty (1997), and will focus on an aspect often disregarded in the accounts of these debates,⁴ namely the link

¹ Gráinne de Búrca, “Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union”, *Fordham International Law Journal* 27 (2004): 679-714 at 683.

² The prospect of enlargement was, for instance, one among a number of reasons quoted by a “*Comité des Sages*” for “a comprehensive and effective internal human rights policy” within the EU, see “Leading by Example: A Human Rights Agenda for the European Union for the Year 2000”, in Philip Alston, ed., *The EU and Human Rights* (Oxford University Press: Oxford 1999): 921-27 at 922-22.

³ Philip Alston & J.H.H. Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights”, in *The EU and Human Rights* 3-66 at 16.

⁴ There are exceptions, though. Bruno De Witte and Gabriel Toggenburg observe that “The suspension mechanism [in Article 7, Amsterdam version] was implicitly related to the Copenhagen criteria, in so far as the political impetus for its enactment was the concern for human rights and democracy standards in applicant

between the proposals for introducing the sanctions and the prospective Eastward enlargement of the Union (Part 1). Next, I will describe the move, on the part of the EU, to include the “preventive measures” into the Article 7 mechanism, which was largely (though perhaps not exclusively) triggered by the inclusion of the extreme right-wing party into the governing coalition in one of the member states, Austria. Because of this connection, it will be necessary to provide an account of (what we may call, summarily), “the Haider Affair”, and the lessons that the Union drew from it, as encapsulated in the “three wise men” report (Part 2). I will suggest, in this context, that the force of the sanctions against Austria undertaken by the remaining 14 member states (though not formally by the EU as such) may be explained by their value as a warning addressed to the candidate states from post-communist Central and Eastern Europe. I will then (in Part 3) describe the evolution of various proposals leading up to the inclusion of the preventive mechanism, as accompanying the already existing sanctioning mechanism, in the Treaty of Nice, and subsequently (in Part 4), I will give an account of the “post-Nice” developments regarding the Article 7 mechanism, namely the post-Nice interpretations of the role and meaning of Article 7 provided by the main institutional actors, and also the connection between Article 7 and the newly established Fundamental Rights Agency.

Before proceeding, I wish to add a word about the methodology of this paper. Since I am describing the evolution of the “institutional thinking” about a particular mechanism which was included, at a certain stage of institutional development, into the EU legal and political system, I am mainly relying on publicly available documents: reports, communications, resolutions, press releases etc, generated by various EU bodies, including the main institutional players (the Commission, the European Parliament, the Council) as well as some working groups, reflection groups, “wise men” etc. Anyone familiar with the EU knows how frustrating it may be to go through the barren, wooden language in which such literature is often written. One has to patiently decode and interpret the meaning behind the concepts such as “the ‘Focused Observation and Assessment Agency on Union policies’ option”, and the like. This is not a particularly edifying effort – but a necessary one, especially if one can, as one should, distil the interesting, original, and creative proposals and ideas often hidden behind this type of jargon. This is what I will try to do. Ideally, one should supplement such text analysis with interviews with some of the authors (or their helpers, such as advisors, consultants, researchers etc) of these documents, and with the decision-makers who relied on them. This is something I was not able to do, both for objective reasons (some of the developments described here took place over ten years ago, and tracing the people behind the documents is often impossible), and also for lack of resources. I hope that this failure (partly compensated, I trust, by the support for my account found in the academic literature) has not resulted in any major distortions in the account that follows. But for a more comprehensive and more definite account, a confrontation of the documents with “real people” will be necessary.

1. The Road to Amsterdam

The sanctioning and preventive mechanism against member states’ violations of human rights, as we know it now, is described in Article 7 of the TEU: it was first settled by the

countries of Central and Eastern Europe once these would have become part of the EU”, Bruno de Witte and Gabriel N. Toggenburg, “Human Rights and Membership of the European Union”, in S. Peers & A. Ward, eds., *The EU Charter of Fundamental Rights* (Hart Publishing: Oxford 2004): 59-82 at 59. See similarly de Búrca, *op. cit.* at 696.

Amsterdam EU Treaty (sanctions only), and renewed and enhanced with a preventive mechanism by the Nice Treaty, to be then, virtually with no changes, confirmed by the Treaty of Lisbon.⁵ The *sanctioning* mechanism, as described in Art. 7(2) of the Treaty of Nice, makes it possible for the European Council to determine the existence of “a serious and persistent breach” by a Member State of Article 6 of TEU (originating from the Maastricht Treaty) which lists the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, as the principles on which the Union is founded.⁶ The Council determination must be made unanimously (without taking into account the vote of the representative of the Member State in question), on a proposal by either one third of Member States or by the Commission, and after obtaining the assent of the European Parliament (two-thirds majority of votes). When such a determination is made, the Council may decide to suspend certain membership rights, including the voting rights of the Member State in the Council. Subsequently, the Council may revoke or vary these measures, by a qualified majority, if the situation which gave rise to these measures changes. In turn, the *preventive* mechanism, described in Article 7 (1), can be triggered by three bodies: one third of member States, the European Parliament, and the Commission; requires a majority of four-fifths of the Council plus the assent (now the “consent”) of the EP, and may lead only to a determination by the Council of a “clear risk of a serious breach” of Article 6 (now, Article 2) principle.

(a) Reflection Group 1994-1995

The genesis of the Article 7 sanctioning measures can be traced to the run-up to the 1996 Inter-Governmental Conference (IGC), which paved the way to the Amsterdam Treaty. At its Corfu Summit (24-25 June 1994) the European Council decided to establish a Reflection Group, to prepare for the IGC, consisting of the representatives of the Ministers of Foreign Affairs of the Member States and the President of the Commission. The Group was to be chaired by a person appointed by the Spanish government (Carlos Westendorp, Spanish Minister of Foreign Affairs) and to begin its work in June 1995.⁷ Its mandate was defined as “to examine and elaborate ideas relating to the provisions of the Treaty on European Union for which a revision is foreseen and other possible improvements in a spirit of democracy and

⁵ The changes introduced by Treaty of Lisbon are, with one exception, purely cosmetic and editorial: e.g., replacing the word “assent” by “consent”, referring to Article 2 of TEU (in consolidated version) rather than Article 6, in accordance with the other changes to the structure of the Treaty. The only substantive change is that, in describing the preventive mechanism, the Treaty now abandons mentioning the possibility to call on independent persons to submit a report on the situation in the Member State in question. This reference was already dropped earlier, in the (failed) “Constitutional treaty” (the Treaty Establishing a Constitution for Europe) where Article 7 became Article I-59 of the proposed Treaty. The reasons of this deletion are unclear; Pieter van Nuffel suggests that it may have been done for the sake of greater “simplicity”, see Pieter van Nuffel, “Appartenance à l’Union”, in Giuliano Amato, Hervé Bribosia & Bruno de Witte, eds., *Genèse et destinée de la Constitution européenne* (Bruylant: Bruxelles 2007): 247-285 at 278 n. 116.

⁶ In the Lisbon Treaty the list of values includes: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”; the same article (Article 2 of the consolidated version of TEU) declares that these values are common to the member States “in a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

⁷ European Council at Corfu (24-25 June 1994) Presidency Conclusions available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00150.EN4.htm, Part IV: “Preparation of the 1996 intergovernmental conference”.

openness.” The mandate also explicitly referred to the prospect of enlargement, and its impact on the institutional questions of the Union.⁸

On 5 December 1995, the Reflection Group submitted its final report to the European Council in Brussels in view of preparing for the 1996 IGC. The Report identified two main areas in which “results should be achieved”: first, “making Europe more relevant to its citizens”, and second, “enabling the Union to work better and preparing it for enlargement”.⁹ Right at the outset, under the heading “The citizen and the Union”, the Report announces: “The Union is not and does not want to be a super-state. Yet it is far more than a market. It is a unique design based on common values. We should strengthen these values, which all applicants for membership also wish to share.”¹⁰ And then it goes on to say: “Human rights already form a part of the Union’s general principles. For many of us they should, however, be more clearly guaranteed by the Union, through its accession to the European Convention on Human Rights and Fundamental Freedoms. The idea of a catalogue of rights has also been suggested, and *a provision allowing for the possibility of sanctions or even suspending Union membership in the case of any State seriously violating human rights and democracy*. Some of us take the view that national governments already provide adequate safeguards for these rights”.¹¹

According to the report, such a sanctioning mechanism should be part of a general strategy aiming at reducing citizens’ disaffection with the EU by enhancing its democratic credentials or limiting its alleged ‘democratic deficit’. In the same section the report also explains some of the features of the proposed mechanism. It appears that some representatives in the Reflection Group questioned the need for affording more power to the EU by the establishment of an EU human rights policy when it is (as it was thought) a matter already thoroughly dealt with by the Member States. Hence, the report emphasises stringent conditions under which sanctions can be imposed: the existence of a “serious and persistent” breach and a requirement for a *unanimous vote* by the Member States.

The report is also informative regarding the kind of sanctions that were considered, and in particular, as to the possibility of a complete expulsion of the Member State under scrutiny – the possibility eventually rejected. As the report says: “Reference was even made to the possibility of expulsion. However, most representatives were wary about agreeing to such a possibility as they thought it would be unnecessary if suspension of rights achieved the desired effects and felt there might be a danger that this would call into question the irreversibility of membership of the Union.”¹² In fact, the suspension of rights provided for by Article 7(3) TEU (Nice version) in its most severe form, i.e.: the suspension of “the voting rights of the representative of the government of that Member State in the Council,” is functionally almost equivalent to a (temporary) expulsion. So one may observe that the authors of the 1995 Report were quite lucid in identifying a link between the question of sanctions and the question of the (ir)reversibility of membership. In fact, it was only in the “Treaty establishing a Constitution for Europe” (henceforth referred to as “Constitutional Treaty”) that a connection between these two issues has been explicitly made, by putting in

⁸ *Ibid.*

⁹ Reflection Group’s report, Part 1, available on the website of the European Parliament at http://www.europarl.eu.int/enlargement/cu/agreements/reflex1_en.htm .

¹⁰ *Id.*, Part 1, section 1.

¹¹ *Id.*, emphasis added.

¹² Reflection Group report, Second Part, available at http://www.europarl.europa.eu/enlargement/cu/agreements/reflex3_en.htm, point 33.

the same Title IX (“Union Membership”) the “suspension of certain rights resulting from Union membership” (Article I-59) and the “voluntary withdrawal from the Union” (Article I-60) – a provision which did not exist in previous treaties. It then was accepted in the Treaty of Lisbon as Article 50 (1). Apart from the fact that the possibility of a voluntary withdrawal has always been a point of contention (up to the Constitutional Treaty), it may seem appropriate to leave to a State who gets nothing out of its membership but obligations (Article 7(3) TEU Nice version) the possibility to withdraw. But then, the *raison d’être* of the sanction mechanism seems to be undermined: after all, its purpose was to improve the human rights situation on the ground rather than to get rid of a “rogue” member state. As we can see, this fundamental dilemma was present at the very origins of the drafting process.

At the same time, the report drew a clear connection between the proposed sanction mechanism and the prospect of EU enlargement. Although the report concentrates more on the link between enlargement and the institutional reform, it acknowledges the intertwinement of the issues at stake, and especially the connection between enlargement and the pursuit of democratic legitimacy.¹³ On enlargement, it says: “We have already seen that enlargement is a response by the Union to the new challenges facing the continent of Europe. However, as we shall see below, it is also a challenge in itself. This is because of its threefold impact on an institutional system conceived for six founding States, on the internal and external security of the Union and on *the need to preserve and strengthen the Community as an entity based on the rule of law.*”¹⁴ This third “challenge”, though articulated in a somewhat cryptic manner, is a clear allusion to the concerns that the newly democratized states of CEE may bring into the EU an unwholesome baggage of cavalier approaches to legality and the rule of law.¹⁵

A more explicit link between the enlargement and the proposal for a sanctioning system appears in another part of the report: not the one dealing with enlargement but the one dealing with “the citizen and the Union”. In the section entitled: “Promoting European Values: Human Rights and Fundamental Rights” the Report flags an idea of “expressly including [in the Treaty] an obligation of the Member States to respect human rights and fundamental freedoms and add that non-compliance would prompt the Union to take suitable action”.¹⁶ It adds: “It is important to ensure this both for present members and *for those who will accede at the next enlargement*”.¹⁷ And to dispel any ambiguity, the Report emphasises in the next paragraph: “It is generally felt within the Group that during the current process of European construction, and *above all in the run-up to enlargement, there is an urgent need to ensure full observance of fundamental rights, both in relations between the Union and the Member*

¹³ “The Group favours comprehensive treatment of all the Conference issues as part of a single exercise. A Single Conference keeping a general vision of the essential issues and which is not split seems the most appropriate method of achieving consistent results able to cope with challenges facing the Union”, Reflection Group’s report, Second part: an annotated agenda, I. Reform of the European Union: a commitment to the future, D, point 23. What kind of conference?, available on the website of the European Parliament at http://www.europarl.eu.int/enlargement/cu/agreements/reflex1_en.htm .

¹⁴ Reflection Group’s report, Second part, point 19, emphasis added.

¹⁵ As de Schutter and Alston noted: “clearly, the provision [Art. 7] was conceived in order to meet certain fears raised by the perspective of the enlargement of the Union to certain newly democratized States, especially at a time where the Union was being attributed further powers in the fields of justice and home affairs”, Olivier de Schutter and Philip Alston, “Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency”, in Philip Alston & Olivier de Schutter, eds., *Monitoring Fundamental Rights in the EU: Contribution of the Fundamental Rights Agency* (Hart Publishing: Oxford 2005): 1-21 at 7.

¹⁶ Second Part, section II, Point 32 of the Reflection Group Report, available at http://www.europarl.europa.eu/enlargement/cu/agreements/reflex4_en.htm .

¹⁷ Point 32, emphasis added.

States and between States and individuals”.¹⁸ The Report added that, according to the majority opinion within the Group, an article should be inserted into the Treaty providing for penalties which could go so far as *suspension* of the rights inherent in membership in the case of any State which commits a serious and repeated breach of fundamental human rights or basic democratic principles. Reference was even made to the possibility of *expulsion*.¹⁹

“Above all in the run-up to enlargement...”: These words convey unmistakably a feeling of concern, anxiety and perhaps fear on the part of EU decision-makers at the time that the accession of post-communist states would significantly lower the standards of human rights protection within the Union. To prevent that (or punish for that), they decided that there must be a new and extraordinary system of sanctioning which, according to at least some members of the Reflection Group, might lead even to expulsion.

(b) The 1996 IGC

The Reflection Group’s recommendations found a positive response in the Union (not surprisingly, considering the composition of the Reflection Group, which in fact reflected the composition of European Council in that it consisted of representatives of all states), so at the end of the Madrid European Council (15 and 16 December 1995) the Presidency concluded: “having welcomed the Reflection Group’s report, the European Council decided to launch the Intergovernmental Conference on 29 March 1996 in order to establish the political and institutional conditions for adapting the European Union to present and future needs, particularly with a view to the next enlargement.”²⁰ In this context, the Reflection Group’s report “constitute[d] a sound basis for the work of the Conference.”²¹ So again, we have a confirmation of a clear connection between the proposal for an Article 7 mechanism (one of the key proposals of the Reflection Group) and the run-up to the Eastward enlargement.

In the IGC itself the creation of a sanction mechanism was not a priority topic, at least at the beginning of the Conference. Only four States expressly mentioned this issue in their position papers: Spain, Italy, Belgium and Austria. In the case of the first two it was quite understandable because they assumed Presidency of the Council in crucial periods from the point of view of the IGC: directly preceding (Spain, which held the Presidency in July-December 1995) and during the IGC (Italy, in January-June 1996).

Spain²² and Belgium²³ basically expressed their support for the idea of a sanction mechanism as expressed in the conclusions of the Reflection Group. Austria and Italy, however, presented much more developed positions, going well beyond simply endorsing the Reflection Group recommendations. In its position paper, Austria directly linked the issue of a sanction mechanism to enlargement. Having stated that the respect for fundamental rights is at the heart of the common heritage of EU Member States and an essential aspect of European identity, the Austrians declared: “Maintaining a high level of respect for human

¹⁸ Point 33, emphasis added.

¹⁹ *Id.*, point 33, emphases in original.

²⁰ Madrid European Council, 15 and 16 December 1995, Presidency Conclusions, Part A, Introduction, available at <http://www.hri.org/docs/madrid95/madr-s.html> .

²¹ *Ibid.*, point 1.

²² White Paper on the 1996 Intergovernmental Conference, Volume II, Summary of positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference, II.5. Spain.

²³ *Id.*, II.1 Belgium.

rights should also continue to be a strict condition for accession to the Union. For cases of serious infringement of human rights or fundamental democratic rights in a Member State of the Union, it would seem appropriate to make a provision in the EU Treaty for the possibility of political and economic sanctions against the State concerned”.²⁴ The rhetoric of this passage is interesting: while the second sentence mentions “a member State” without any distinctions, this mention follows immediately after, and as a sort of conclusion, from the sentence which addresses conditions of *accession* to the Union. The impression is that the writers anticipated the cases of “serious infringement of human rights” only, or primarily, in the context of an accession by new members.

This attitude is even more visible in the Austrian proposal, made jointly with Italy – formerly assuming the Presidency of the European Council – in favour of the insertion of a sanction mechanism in the EU Treaty. Austria and Italy did not propose to insert it after the article about the foundational principles of the Union principles²⁵ but rather after the article dealing with conditions for accession.²⁶ The very structure of the drafting would therefore clearly underline the sanctions-enlargement connection.

A comparison between the Austrian-Italian proposal²⁷ and what later became Article 7 TEU shows that the Austrian-Italian proposal was broader than the solution eventually chosen. The proposal suggested a more open right of initiative, the European Parliament being equally authorised to propose sanctions. The voting requirements for the determination of a human rights violation was also less demanding: a qualified majority instead of unanimity. This demonstrates that other Member States have been reluctant towards the creation of a broader sanction mechanism which could impinge on their sovereign rights. They also chose to disconnect the question of the sanction mechanism from the issue of enlargement, inserting it as an Article 7 (or F bis) of the TEU.

The Austrian-Italian proposal described above is consistent with the Progress Report of the Intergovernmental Conference prepared by the Italian Presidency at the end of its mandate (June 1996) for the incoming Presidency, and which “seeks to provide an overview of proceedings to date, so that an assessment can be made of the major political questions on which the next phase of the Conference will focus and possible answers to them.”²⁸ As one of the “general principles underlying the Union”, to be reflected in the clauses of the new treaty, the Report declares: “as the Union is composed of States whose systems of government are founded on the principles of freedom, democracy, respect for human rights and the rule of law, the accession of any new State should be conditional on it being established that that State complies with these principles (building on the principle at present contained in Article F(1) of the TEU)”.²⁹ Again, the language is clear: current Member States already *have*

²⁴ Conference of the Representatives of the Governments of the Member States, Translation of letter, from : Permanent Representation of Austria to the European Union dated : 22 May 1996, Subject : Basic positions of Austria for the Intergovernmental Conference, CONF 3857/96, Brussels, 4 June 1996, p.5.

²⁵ Article F TEU (Maastricht version).

²⁶ Article O TEU (Maastricht version). The Austrian-Italian proposal was to include an Article O bis providing for the sanction mechanism.

²⁷ The full text of Austro-Italian proposal of Article O bis is reproduced in Conférence des représentants des gouvernements des Etats membres, Note de couverture, Objet : Droits fondamentaux, Bruxelles, le 3 octobre 1996, CONF 3940/96, p.1.

²⁸ Conference of the Representatives of the Governments of the Member States, Report from Presidency to European Council, Subject : Progress report on the Intergovernmental Conference, Brussels, 17 June 1996, CONF 3860/1/96 REV 1, p.1.

²⁹ Id at p. 3.

systems of government based on democracy and human rights, while the acceding States *should* match the criteria present in the EU as it was composed at the time. This statement is followed by a more specific proposal of a sanction mechanism: “the rights attaching to membership of the Union should be linked to States’ compliance with these principles; in the event of a serious, persistent breach of these principles by a Member State, the European Council, acting under a procedure to be determined (which could involve the Court of Justice establishing that a breach had taken place ...), could order measures to be taken to suspend those rights in part...”³⁰ Interestingly, the scheme of the sanction mechanism as it arises from the IGC discussions till June 1996 also constitutes another illustration of the reluctance of the Member States to submit themselves to a constraining legal mechanism which could go, partly at least, beyond their full control. And it was probably the last time that an idea of formally involving the Court of Justice was openly entertained. This idea, as we know, turned out to be a non-starter, and eventually the Article 7 mechanism became thoroughly political, with no traces of a legal or judicial character in the procedure.

The last step on the road to today’s Article 7 is marked by the “approach suggested by the Presidency (*l’approche suggérée par la présidence*”), Ireland, in June 1996. The document contains a section entitled: “Adding a new Article F bis” where all the main elements which will eventually, with only some modifications, get into Article 7 are listed: the mechanism of establishing the grave and persistent violation of Article F principles, with the Council (at the level of heads of state or government) acting unanimously, at the proposal by the Parliament, the Commission or one-third of member States, with the state concerned being able to present its observation but without its vote being counted, with the actual measures (including suspension of certain membership rights) being decided by the Council by qualified majority, at the recommendation of the Commission and after consultation with the European Parliament.³¹

The “observations” attached to the proposal show that one of the main concerns during the deliberations on this mechanisms was how to better ensure Member States’ control over the procedure, and therefore, whether unanimity should be required at the stage of determination of violation (with the imposition of sanctions by qualified majority), or rather at the stage of the imposition of sanctions (with the determination of violation made by qualified majority).³² Also it is worth noting that even at this stage, the European Parliament had been given a relatively prominent role, namely having a right to initiate the whole procedure – a right which was to be replaced, in the actual Article 7, by an authority to merely give “assent” to the procedure.

At this point, the stage was fully set for the adoption of (what we call here) the Article 7 mechanism. At the same time, an earlier idea that the Union should be equipped with a more routine and regular mechanism of monitoring the respect of the principle of non-discrimination had disappeared, and had been placed outside the EU Treaty analysis. Including the principle of non-discrimination within the EC Treaty, and “within the limits of the powers conferred by it [the Treaty] upon the Community,”³³ seemed like a safe path to be taken by Member States fearing EU intrusion into their domestic human rights issues. This may explain why, at this point, the European Parliament (EP) displayed a clear

³⁰ Id. at p.3.

³¹ Conférence des représentants des gouvernements des Etats membres, *Approche suggérée par la Présidence*, Objet : droits fondamentaux, Bruxelles, le 8 octobre 1996, CONF 3945/96, p.2.

³² Ibid., p.3.

³³ Article 13 TEC (Amsterdam and Nice versions).

désintéressement in the sanction mechanism. At least since 1993, the EP pointed out the necessity of monitoring the situation of human rights in the Member States themselves, and of sanctioning them in cases of infringement. The 1993 resolution on respect for human rights in the European Community called for the creation of a “structure in which attention is paid to the protection and promotion of human rights within the Community and to combating racism and xenophobia, with a view to joint action being taken against the Member States concerned”.³⁴ It is clear that the EP favoured all along the insertion *in the EU treaty* of a clause condemning any form of discrimination, and establishing a form of condemnation of such practice at EU level.³⁵ Having fought for a more systematic and regular system of human rights monitoring,³⁶ the EP – not surprisingly – could not be too excited about the prospect of a sanction mechanism to be used only in the most extraordinary circumstances.

Indeed, the evolution of the dominant opinion, from the early Reflection Group to the actual drafting of Article 7 shows a steady tendency to reinforce the control of Member States, in the Council, over the new mechanism. It is seen in a combination of such institutional factors as a rule of unanimity in the Council, reduction of the role for the European Parliament, suppression of any role for the Court of Justice,³⁷ etc. The Member States, while clearly seeing the new mechanism in the context of the impending enlargement of the Union,³⁸ were at the same time careful not to extend, in any way, the scope of EU competences to the area of human rights, and to restrict the possible control by the Union of their own behaviour towards their own citizens.

³⁴ European Parliament, Resolution on respect for human rights in the European Community (annual report of the European Parliament), resolution A3-0025/93 and A3-0025/93 suppl., 11 March 1993, OJ C 115, 26.04.1993, p. 180, point 12.

³⁵ See, in particular, European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference – Implementation and development of the Union, 17 May 1995, OJ C 151, 19.06.1995, p.56.

³⁶ See European Parliament, Resolution embodying (i) Parliament’s opinion on the convening of the Intergovernmental Conference, and (ii) an evaluation of the work of the Reflection Group and a definition of the political priorities of the European Parliament with a view to the Intergovernmental Conference, 13 March 1996, OJ C 96, 1.04.1996, p. 77, pt. 2 & 4 *et seq.*; Committee on Institutional Affairs, Rapporteurs: R. M.E.A. Dury & H. Maij-Weggen, Report on (i) Parliament’s opinion on the convening of the Intergovernmental Conference, and (ii) an evaluation of the work of the Reflection Group and a definition of the political priorities of the European Parliament with a view to the Intergovernmental Conference, A4-0068/1996, 5 March 1996, available at <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+REPORT+A4-1996-0068+0+DOC+XML+V0//EN&L=EN&LEVEL=0&NAV=S&LSTDOC=Y> ; European Parliament, Resolution on the Florence European Council and the Intergovernmental Conference, 19 June 1996, (B4-0833/96), OJ C 198, 8.07.1996, p.78, pt 1.

³⁷ This last point received praise from some scholars. For instance, in the opinion of Bruno de Witte, leaving the ECJ out of the picture was a wise choice because “The Court of Justice, while well equipped to deal with ordinary breaches of fundamental rights in the context of specific cases and controversies, should not be drawn into the highly political and largely subjective exercise delineated by Article 7”, Bruno de Witte, “The Past and the Future Role of the European Court of Justice in the Protection of Human Rights”, Philip Alston, ed., *The EU and Human Rights* (Oxford University Press: Oxford 1999): 859-98 at 884. For an opposite view, see Manfred Nowak, “Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU”, in Alston, op. cit.: 687-98 at 697: “It is in our opinion regrettable that such important decisions [as those determining, under Art. 7, whether a member State committed a serious and persistent breach of human rights] are not subject to judicial control” (footnote omitted).

³⁸ As Gráinne de Búrca observes, “the addition of Article 7 to the TEU by the Amsterdam Treaty ... was evidently perceived as a necessary safeguard clause to provide for urgent action should one of the newer democracies, after its admission as a member, collapse or significantly fail to meet the standards asserted by the EU”, “Beyond the Charter” at 696.

2. Towards the Preventive Mechanism: The Haider Affair

The next important episode in the “Article 7 story” was the strengthening of the mechanism by adding at the 2000 IGC a new modality, namely the preventive mechanism. According to Article 7(1) of TEU (in the Nice version), “On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, 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(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.” The new Article adds: “The Council shall regularly verify that the grounds on which such a determination was made continue to apply.” As one can see, the main differences between the preventive and the sanction mechanism (relegated to Article 7(2) in the Nice version), are: (1) “a clear risk of a serious breach” of Art. 6 principles, as an event triggering the procedure (as opposed to the existence of “a serious and persistent breach”), (2) inclusion of the European Parliament as one of the authorized initiators of the procedure, (3) the qualified majority requirement of 4/5 of the Council, as opposed to unanimity, (4) “recommendations” from the Council to the State in question, as the only form of reaction, (5) an option of soliciting an independent report on the situation on the ground (the last mention dropped in the Lisbon Treaty version).

It is interesting that the inclusion of this new mechanism (directly triggered, as we shall see in a moment, by the Haider episode) was seen generally by EU decision-makers as the strengthening of the existing Article 7 system rather than its weakening or watering down, as one might initially believe. This conviction about the strengthening of the overall mechanism of monitoring human rights and democracy in member states, and also about the reform being a reaction to the situation in Austria at the time, is well captured by the European Parliament’s 2000 report on the constitutionalisation of the Treaties. As the rapporteur for the Committee on Constitutional Affairs, Olivier Duhamel, explained: “Respect for fundamental rights within the European Union has become a major political issue, not only owing to the Charter of Fundamental Rights, but also because of the concern to which the inclusion of an extreme right-wing party in the government of one of the Member States has given rise. The political responses to that event have included proposals from many quarters to strengthen the measures provided for in Article 7 of the Treaty on European Union.”³⁹ Therefore, to understand the background of this “strengthening” of the Article 7 mechanism, we must now describe what actually happened around that time in the EU member state that had been the most eager of all to introduce Article 7 in the first place: Austria.

(a) Austria 1999-2000

Before the 1999 general election, Austria had been ruled by the Social Democratic Party, governing either alone or in coalition for almost thirty years. Immediately prior to the election, Austria was governed by a coalition of Social Democrats and the Austrian People's Party as a junior coalition partner. The leader of the Social Democratic Party, Victor Klima,

³⁹ Committee on Constitutional Affairs, Rapporteur: Olivier Duhamel, Report on the constitutionalisation of the Treaties, (2000/2160(INI)), FINAL A5-0289/2000, 12 October 2000, at 10.

was the chancellor, while the leader of the People's Party, Wolfgang Schüssel, was foreign minister.

On 3 October 1999, elections to the lower chamber of the Austrian parliament, the Nationalrat, took place. Social Democrats clearly won, having obtained some 33.2 per cent of votes, and gaining 65 seats, but the truly amazing result was the meteoric rise of the extreme right-wing Austrian Freedom Party, which overtook the People's Party, if only by a few thousand votes, and became the second most popular political party in the country. The Freedom Party and the People's Party each gained some 26.9 per cent of the vote and took 52 seats each. As no party had an absolute majority in the 183 seat chamber, the Austrian president Thomas Klestil asked Chancellor Klima, as leader of the largest party, to form a government. Klima first attempted to form again a coalition with the People's Party, but he failed, and subsequently, he tried to form a minority government. This attempt was also unsuccessful and on 21 January 2000 Klima announced that he was unable to form a government.

Following this failure to form a government while staying clear of the Freedom Party, on 25 January 2000 the People's Party and the Freedom Party opened negotiations on the formation of a joint government. On 1 February the agreement was reached, and the coalition was grudgingly approved by President Klestil on 3 February. The new government was sworn in on 5 February, with the leader of the People's Party, Wolfgang Schüssel, becoming the chancellor. The Freedom Party's MP Susanne Riess-Passer took the post of deputy chancellor and the Freedom Party gained control of six out of 10 ministries, including defence, finance, social affairs, and justice. The leader of the Freedom Party, Jörg Haider, stayed out of the government.⁴⁰

It may seem ironic that the country which was one of the initiators of a mechanism against Member States' violations of human rights came to be governed by a coalition which itself became a source of strong human rights-related concerns by other member states. But to appreciate the force of this irony it is important to remember that in the 1996 Austrian position on the matter, the sanction mechanism had been conceived of as a tool against infringements of rights coming from prospective Central European Member States. And one of the significant political tenets of Freedom Party's leader was a strong animus against Central Europeans becoming part of the EU. For Haider, a plan to admit Austria's neighbours, including the Czech Republic, Hungary, Slovakia, and Slovenia as well as other CEE countries, into the EU, was seen as a great threat to Austria, both because of the crime problem and the labour problem: it was feared that East Europeans, whose wages were so much lower than Austrians', would come and take jobs. EU's decision on enlargement, Haider said in 1998, "is a declaration of war on all industrious and other hardworking people in Austria".⁴¹

(b) European Reactions and Sanctions – and Their Critics

⁴⁰ For a good summary of these events, see Matthew Happold, 'Fourteen against one: the EU Member States' response to Freedom Party participation in the Austrian government' (2000) 49 *ICLQ* 954 on whose account the opening paragraphs of this section are based. See also Heather Berit Freeman, "Austria: The 1999 Parliamentary Elections and the European Union Members' Sanctions", *Boston College International & Comparative Law Review* 25 (2002): 109-24.

⁴¹ Quoted in Nouray Ibryamova, Migration from Central and Eastern Europe and Societal Security in the European Union, Jean Monnet/Robert Schuman Paper Series, vol. 1, no. 2, August 2002 at p. 9, available at <http://www6.miami.edu/EUCenter/ibryamova.pdf>.

The European reactions came to be interpreted in various ways, including those interpretations which emphasize the CEE dimension. According to Miklós Haraszti, the main function of the official European response was to make a strong symbolic political statement, on the eve of the Eastward enlargement, by preventing any temptation coming from the Central Eastern countries to keep a democracy ‘*de façade*’ while substantially undermining it, and to flirt with extreme right wing parties.⁴² Haraszti identifies a number of such leaders and parties in Central and Eastern Europe at the time: Jan Slota in Slovakia, Vladimir Zhirinovskiy in Russia, Istvan Csurka in Hungary, Vadim Tudor in Romania,⁴³ and one can read in his account a warning sent to Central Europeans.

But while it is important, one should not overstate this point: the European reaction was not only (and perhaps, not primarily) underwritten by the concerns related to the impending enlargement but also by the trends and events in the member states of the EU, as it was then constituted. After all, the Haiderism was not an isolated phenomenon in the “old” Europe at the time. It was a period when Le Pen’s party in France, the *Front national*, obtained a substantive representation in the National Assembly (with 34 FN representatives entering the Assembly in 1986 elections), and Le Pen himself was at the peak of his popularity, which was later to be confirmed by the fact that in the 2002 presidential elections he made it to the second round, with over 16 percent of votes in the first round. It is also a period in which the *Alleanza Nazionale* (a successor party to neo-fascist Italian Social Movement) obtained over 15 percent in general elections in 1996 and over 10 percent in the 2000 European elections, becoming a political partner for Berlusconi’s party, *Forza Italia*, with the A.N. leader, Gianfranco Fini becoming a deputy prime minister after the 2001 general elections. As Michael Merlingen *et al.* assert, in an article looking at the European reactions from a domestic politics perspective: “rather than driven by identity, the sanctions against Austria were shaped by the self-interest of power-hungry politicians.”⁴⁴ The European governments and parties who felt threatened by domestic extreme right parties pressured their EU partners into accepting the sanctions. “Driven by their desire to win, or maintain themselves in office, they wanted to send out a clear signal to voters and to politicians considering co-operation with their extreme-right competitors that certain policy options were beyond the pale in the EU.”⁴⁵

The political debates about sanctions have been initially confined to a handful of leaders: Jacques Chirac, Gerhard Schröder, Guy Verhofstadt, Jose-Maria Aznar. Chirac insisted on a secretive course of action among like-minded heads of states, and as a result many governments, especially among smaller countries (particularly Finland, Greece and Ireland) were simply confronted with a *fait accompli* when the presidency of the EU issued its declaration on 31 January 2000. Neither of the two EU institutions representing the supranational dimension, the Commission or the Parliament, was consulted at this stage.⁴⁶ The statement, issued on behalf of 14 member states (henceforth: EU-14), not attributable to the EU as such, included the “bilateral measures” such as the freezing of any bilateral

⁴² Miklós Haraszti, “Haiderism East of Austria: Reactions, Impact, and Parallels”, *Constellations* 7 (2000): 305-15 at 309.

⁴³ *Id.* at 306.

⁴⁴ Michael Merlingen, Cas Mudde & Ulrich Sedelmeier, “The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria”, *Journal of Common Market Studies* 39 (2001):59-77 at 61.

⁴⁵ *Id.* at 61.

⁴⁶ For this account, see Cécile Leconte, “The Fragility of the EU as a ‘Community of Values’: Lessons from the Haider Affair”, *West European Politics* 28 (2005): 620-49 at 638-639.

contacts with Austrian government officials, the withdrawal of EU support for Austrians applying for senior positions in international organizations, and the absence of contacts with Austrian ambassadors, except at a “technical” level. The sanctions came into effect on 4 February 2000, after a new coalition government was sworn in by the Austrian President.

The sanctions have not lasted long; even before they were officially lifted in September that year, they had been undermined earlier at the regional level.⁴⁷ The common front soon broke up, and the lifting of the sanctions was welcomed by all participants to that affair, including the EU-14 leaders, the opponents to the sanctions within the EU-14, and the Austrian government, claiming a moral victory.

There were some limits to the sanctions (suspending any bilateral diplomatic contacts with the Austrian government, no support for Austrian candidates for positions in international organizations, etc⁴⁸) inherent to the national dimension. Indeed, Member States were staying in contact with the Austrian government within the European institutions.⁴⁹ But an important symbolic effect of the sanctions was that they reinforced the image of a common European political identity.⁵⁰ There were a number of political statements made in West European political capitals at the time which emphasized this aspect. For example, Portuguese Prime Minister Antonio Guterres said that the EU was “a Union based on a set of values and rules and on a common civilisation” while the Austrian Freedom Party did “not abide by the essential values of the European family.”⁵¹ In a similar vein, British Foreign Secretary Robin Cook said that the “naked appeal to xenophobia on which Mr. Haider has based his platform ... is something that strikes against the basis of the European Union.”⁵² It sheds light on a common European understanding of core European values, grounding the European construction. The rejection of the Freedom Party and the sanctions against Austria became seen as “a central part of the self-understanding of national and supranational policy-makers in the EU.”⁵³ As Merlingen *et al.* note, there was a consensus among the EU-14 that what happened in Austria was a deviation from the established standards of political behaviour in democratic states.⁵⁴

The European dimension of the crisis was bolstered by the Portuguese presidency of the EU at the time. On 31 January 2000, prime minister of Portugal signed a press release on his own letterhead, expressing a reaction of all 14 member states, even though he was not formally authorized to do so. Haraszti calls it, somewhat melodramatically, a “Portuguese coup.”⁵⁵ The Council has not undertaken any actions because it was even before Schüssel took office, and what happened so far in Austria clearly had not matched the conditions of Article 7: there was certainly no “serious and persistent breach” of human rights, democracy, the rule of law etc. in Austria at the time. As de Witte and Toggenburg emphasize: “There is no doubt about the fact that the statement was not made by the European Union, but by 14 of its member

⁴⁷ The regions of Friula Venetia in Northern Italy and Bavaria and Baden-Wurttemberg in Southern Germany expressed officially their opposition to the sanctions against the neighbour, see Leconte at 646 n 3.

⁴⁸ Merlingen, Mudde, Sedelmeier, at 60.

⁴⁹ On this point, cf. Happold, at 957.

⁵⁰ Merlingen, Mudde, Sedelmeier, at 61.

⁵¹ Quoted *id.* at 65.

⁵² Quoted *id.* at 65.

⁵³ *Id.*, at 63.

⁵⁴ *Id.*, at 65.

⁵⁵ Haraszti, at 307.

States acting formally outside the EU framework, while taking care to underline the connection between their action and their membership of the EU”.⁵⁶

It was the European collective dimension of the reaction, rather than the bilateral actions, which was seized by the critics of the sanctions, including by the Austrians, as the ground for the harshest denunciations.⁵⁷ Doubts were raised about the legality of such action. Some considered it to be an intolerable interference in a State’s internal affairs, and presented it as a case of big versus smaller countries of the Union. Much of the arguments were based on respect for the democratic will of the people of Austria. In the European Parliament, in the debate preceding the adoption of its resolution “on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People’s Party) and the FPÖ (Austrian Freedom Party)”,⁵⁸ it was said, for instance, that “this joint intervention [by fourteen Member States] claims the authority of the Treaty, as if this stated somewhere that henceforth the free and democratic expression of a people could be cancelled by the will of the heads of government of neighbouring countries who in fact, in this instance, have carefully refrained from consulting their own peoples.”⁵⁹ Another MEP, speaking on behalf of the German CSU party, found it “intolerable that the EU should involve itself in the formation of the government in a Member State,” and added: “It has no right to do so. Instead of prematurely condemning the FPÖ and the Austrian Government which is being formed, there should first be a critical examination and assessment of the government declaration and the party programme and policies of the coalition. Only after such critical appraisal of the future policies of the parties involved in the coalition discussions can a decision be made as to whether this government is contrary to the democratic spirit of Europe.”⁶⁰ And there was no scarcity of a real paranoia: the French MEP Gollnisch (TDI), speaking on behalf “of the Members of Parliament who represent the Front national, the Vlaams Blok and the Movimento sociale italiano,” asked: “Is this hysteria spontaneous? Is it the product of mere foolishness or, more probably, of a deliberate strategy, which is the same throughout the world. Who is imposing their will on the nations of Europe, daring to stop them choosing their own fate? Underground networks? The government of the United States, or of Israel? Or their Socialist back-up troops who, in this House, have the cheek to thrust their values down our throats?”

On this issue, the centre-right in the EP grouped in the European People’s Party (EPP) Group was divided. On the one hand, several national delegations, including the French-speaking wing of the Belgian Christian Democrats, the French UDF as well as the leader of the Spanish People’s Party, Jose Maria Aznar, were strongly against Haider and they viewed the Austrian ÖVP’s coalition with Haider’s party as a violation of the code of conduct of the EPP adopted in Athens in 1992, which included the rejection of nationalism and of all forms of extremism. On the other hand, the German, Flemish-speaking Belgian, Nordic and British delegations, as well as *Forza Italia*, rejected the idea of the condemnation of the ÖVP/FPÖ

⁵⁶ De Witte & Toggenburg at 75.

⁵⁷ For a discussion on this point, see Happold, at 958-62.

⁵⁸ Cf. European Parliament, Debates, 2 February 2000, Brussels, available at <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+CRE+20000202+ITEMS+DOC+XML+V0//EN&LEVEL=4&NAV=X&L=EN#creitem4> ; 3 February 2000, Brussels, “Vote : Joint resolution on Austria”, at <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+CRE+20000203+ITEMS+DOC+XML+V0//EN&LEVEL=5&NAV=S&L=EN> .

⁵⁹ The French MEP Mr Berthu, the Union for a Europe of Nations (UEN) (Debate on 2 February 2000).

⁶⁰ The German MEP Ferber (PPE-DE). (Debate on 3 February 2000)

coalition, contending that it had to be judged on its policies.⁶¹ In the end, the European Parliament adopted a resolution as early as 3 February 2000, “on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People’s Party) and the FPÖ (Austrian Freedom Party)”, by which it “[welcomed] the timely political intent of the statement of the Portuguese Presidency in so far as it reiterates Member States’ concern to defend common European values as an act of necessary heightened vigilance.”⁶²

One could nevertheless consider the EP’s position as somehow ambiguous since it also gave, with the same wording, its support to the Commission: the EP “welcome[d] the timely political intent of the statement of the Commission in so far as it reiterates Member States’ concern to common European values as an act of necessary heightened vigilance.”⁶³ For its part, the defend Commission seemed to favour an approach based on a strict assessment of actual human rights infringements. It appears that Romano Prodi, President of the Commission, was not consulted about the Member States’ proposed actions but merely informed of their decision very shortly after its promulgation.⁶⁴ At an emergency meeting convened on 1 February 2000 to respond to the 14 Member States’ decision, the Commission agreed to maintain working relations with the Austrian government unless and until it breached European treaty provisions on human rights, and it also indicated that it would rigorously scrutinise Austrian legislation for conformity with the treaties. On 2 February, the President of the Commission declared that the Commission “will continue to keep a close eye on events in Austria. Indeed, the European Union would not survive without the principles of freedom, democracy and respect for human rights. These are the foundations of the Union”.⁶⁵ The Commission’s position was summed up in a statement by Commissioner Neil Kinnock who said: “we will uphold without fear or favour the values and the provisions of Article 6 of the Treaty; and that we will take our part under Article 7 of the Treaty in ensuring that those values of liberty and democracy and fundamental freedoms are upheld. There is no complacency, no fragility and no ambiguity about any of that at all...”. And while he added: “There are several people here who like myself for many years past have become familiar with Herr Haider’s offensive statements, the xenophobia of many of his policy elements.... We understand that, and we recall too the sometimes short and selective memory that he has of Nazism”, nevertheless he concluded: “However, the Commission has to act on the basis of values and law and not only on the basis of instinct”.⁶⁶ This is a significant statement, and it can be properly seen as somewhat distancing the EU institutions from the action of EU-14, without at the same time condemning the sanctions in the slightest.

One of the concerns of the critics of the measures, both at the time and with the benefit of hindsight, was that they were counter-productive due to their capacity to create a backlash of support for Haider’s party and for other radical parties in the member states.⁶⁷ It has been also pointed out that, by taking such unprecedented action, EU-14 could have, and actually did,

⁶¹ Leconte, *op.cit.*, at 632.

⁶² European Parliament resolution on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People’s Party) and the FPÖ (Austrian Freedom Party), Thursday 3 February 2000, Brussels, B5-0101, 0102,0103, 0106 and 0107/2000, point 4, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0045+0+DOC+XML+V0//EN>

⁶³ *Ibid.*, point 6.

⁶⁴ See Happold at 956.

⁶⁵ Debates of the EP, 2 February 2000, above.

⁶⁶ Debates of EP, 2 February 2000, above.

⁶⁷ See Merlingen, Mudde, Sedelmeier, *op.cit.*, at 66.

fuel anti-EU sentiments across Europe.⁶⁸ And it seems that precisely the considerations of this kind guided the position of the European Commission. There have been a series of actions and pronouncements by Romano Prodi which now read as putting the Commission at a distinctly different track than the EU-14. On 2 February he declared that “the Commission would not be performing its role properly if it were to interrupt the working relationship it maintains with Austria”. This is because “when one of its members is in difficulty, the whole Union is in difficulty”.⁶⁹ He reiterated his position during the presentation of the main lines of his programme as President of the Commission to the European Parliament on 15 February 2000. Moreover, his statement demonstrates that he decided to trust Schüssel’s declaration on its commitment to the ‘common European values’, putting on him the responsibility to respect his vows: “on 7 February, I sent a message to Chancellor Schüssel of Austria, congratulating him on his appointment as I do to every new Head of Government of a Member State. the central and most important section addresses Chancellor Schüssel, in no uncertain terms. “I am sure”, I wrote in my letter to the Chancellor, “that, as set out in your declaration ‘Responsibility for Austria A Future in the Heart of Europe’, you will demonstrate the same commitment as shown by your predecessors to the construction of Europe and the defence of the common European values of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”.”⁷⁰

As already mentioned, the sanctions were short-lived. By the end of the Portuguese Presidency (end of June 2000) there was a widespread feeling among the European leaders that the sanctions could not continue and that they produced significant negative side-effects, especially in terms of rising Eurosceptic trends. Quite possibly, there had been also an unstated fear by national leaders that the process, set in motion during the Haider affair, might one day backfire against their own countries.⁷¹ Further, the shrewd policy of the Austrian government itself contributed to the accelerated lifting of the sanctions. On 19 June, at the summit of EU Heads of Government at Feira, leaders of the Austrian coalition government warned that the sanctions imposed by the 14 could affect decisions both on EU constitutional reform and on the accession of new Member States. At the summit Austria also blocked the adoption of a directive on the EC withholding tax on savings, stating that it could not endorse the scheme for “constitutional reasons”.

So, everything considered, were the unprecedented sanctions appropriate and justified? This is an important question from the point of view of the evolution of the Article 7 debate. If the sanctions are a matter of responding to concrete human rights violations a Member State has committed, then the intensity of the sanctions has to be proportionate to the gravity of the Member State’s actions. And in this particular case, they were announced despite no clear violation of EU rules by the new Austrian government. The only cause of concern, at that time, was not any governmental acts but rather some unacceptable statements by the leader of a political party about to join the governing coalition.⁷² If, in turn, the promotion of (vague) EU standards of human rights and democracy are the purpose of the sanctions, one probably could think of less drastic measures, other than creating a genuine “*cordon sanitaire*” around

⁶⁸ Id.

⁶⁹ EP Debates, 2 February 2000, see above.

⁷⁰ Romano Prodi, President of the European Commission, “2000-2005: Shaping the New Europe”, European Parliament, Strasbourg, 15 February 2000, SPEECH/00/41, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/41&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁷¹ Leconte at 639.

⁷² See de Witte and Toggenburg at 74.

Austria.⁷³ For Merlingen *et al*, “it is far from obvious that EU norms would have required such drastic measures. It is not at all clear that such severe measures would have been precisely the ones prescribed by, or the only ones compatible with these (diffuse) EU norms.”⁷⁴ But if, thirdly, the point of the sanctions was to send a strong message of an ideological and political nature to the other states – mainly, to the prospective new members – the sanctions do not appear to be too severe or disproportionate at all. Just to the contrary, they seem to be quite well calibrated to serve this purpose.

This is not to say that the sanctions were *primarily* conceived as a message addressed specifically to the candidate countries. Rather, they should be seen as a general ideological statement about the limits of what is, politically and ideologically, acceptable in the EU: what are the limits of the diversity, on the eve of a massive increase of the diversity within the Union. It is not so much what the Austrian government was expected to *do* but rather what Jörg Haider had already *said* that placed him – and consequently, any government tainted by the presence of his party, as being beyond the pale. The uncertainties about what level of populism, irrationality or bigotry the new member state may bring into the EU, and the anxieties stemming from those uncertainties, may explain why it was actually useful for the EU-14 to focus on a particularly nasty example of a West European political leader, and castigate him relatively severely, to make a statement about the threshold of political commonality and limits of diversity in the enlarging EU.

(c) Three Wise Men and Their Report

On 29 June, agreement was reached among the EU 14 on a plan drawn up by the Portuguese Presidency for a committee of “three wise men” to report on Austria's compliance with “common European values”. The general intention was that, if the report states that Austria *was* complying with such standards, the sanctions would be lifted, probably at the beginning of 2001, when the Presidency passed from France to Sweden. Once this plan has been accepted, the Portuguese Prime Minister Antonio Guterres wrote to the President of the European Court of Human Rights, asking him to appoint three people who would deliver, on the basis of thorough examination, a report regarding (1) the Austrian Government's commitment to the common European values, in particular concerning the rights of minorities, refugees and immigrants; (2) the evolution of the political nature of the FPÖ.⁷⁵

On 12 July, the President of the Court, Judge Luzius Wildhaber announced his appointments: Martti Ahtisaari, former president of Finland, Professor Jochen Frowein, director of the Max Planck Institute for Comparative Public Law and International Law and former member and vice-president of the European Commission of Human Rights, and Marcelino Oreja, former Spanish minister for foreign affairs, former secretary general of the Council of Europe and former member of the European Commission.

In the meantime, in Austria Chancellor Schüssel went on an offensive against the EU 14: following a meeting of the coalition parties, on 5 July he announced plans for a national

⁷³ Merlingen, „Mudde & Sedelmeier, at 66.

⁷⁴ *Ibid.*.

⁷⁵ European Court of Human Rights Press Release no 491, 29 June 2000, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=the%20%7C%20Austrian%20%7C%20Government%27s%20%7C%20commitment%20%7C%20to%20%7C%20common%20%7C%20European%20%7C%20values%2C&sessionid=40515506&skin=hudoc-pr-en> .

referendum on Austria's attitude to the EU. The referendum was to consist of six questions. In a not-so-subtle exercise of articulating loaded questions, the referendum was to ask the voters: "Should the federal government... ensure by all means that the unfairly imposed sanctions on Austria be lifted immediately?" The subsequent questions would ask about the future form the EU should take and whether it would be fair for larger EU States can override the will of the smaller.⁷⁶ The referendum was to take place on 29 October or 26 November 2000. The Austrian government has stated, however, that the referendum will be abandoned if sanctions are lifted.⁷⁷ It is worth noting that the idea of a referendum was first proposed by the former leader of the Freedom Party, Jörg Haider, in April, but it was opposed by the People's Party (Schüssel). The latter changed his opinion due to the forthcoming French EU Presidency, President Chirac, having firmly restated his opposition to the sanctions lift. Chirac's tough stance clearly had an influence on the outcome of the Feira summit: the maintaining of sanctions over Austria.

Consequently the three wise men had to draft their report under huge pressure; on the one hand, a divergence of opinions about the lifting of the sanctions amongst Member States, on the other hand, Austria's referendum ultimatum (with a deadline: Autumn 2000). This may explain the speed with which the three wise men produced their report (appointment: 12 July, the report issued on 8 September), and the similar promptness with which Member States endorsed the report's conclusions (the lift of the sanctions: 12 September).

Moving on to the report itself,⁷⁸ the first point within the three wise men's mandate concerned the rights of minorities. The conclusion was unambiguous: "The Austrian legal system has established a specific protection for the national minorities living in Austria. ... The Austrian legal system protects the existing national minorities in Austria to a greater extent than such a protection exists in many other European Union countries."⁷⁹ Same for the rights of refugees, "the legal situation of applicants for asylum is similar to that in other European Union countries."⁸⁰ Lastly, concerning the rights of immigrants, the report found that "the present Austrian Government has continued the policy of former governments to restrict new immigration and to give priority to the integration of the foreigners residing legally in the country. It has also recognised the principle that family reunification should be possible. It can be stated that the policy of the Austrian Government as to immigration shows a commitment to common European values."⁸¹

Having assessed the international obligations contracted by Austria and the norms belonging to its own legal system, and by comparison to other Member States and former Austrian government, the three wise men came to the conclusion that the Austrian government was indeed committed to common European values. However, they expressed their reservations concerning the FPÖ specifically, thus making the transition to the analysis related to the second part of their mandate, namely, the political nature of the FPÖ. "The determination of the present Federal Government must, however, be evaluated in the context of what will be described as the ambiguous language being repeatedly used by some high representatives of

⁷⁶ "Austria plays referendum card against EU partners", *The Guardian*, 5 July 2000, available at <http://www.guardian.co.uk/world/2000/jul/05/austria.ianblack> .

⁷⁷ Happold, *op.cit.*, at 958.

⁷⁸ Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja, adopted in Paris on 8 September 2000, available at <http://www.lex.unict.it/cde/documenti/var/2000/000908rapporto.pdf> .

⁷⁹ *Ibid.*, point 29, at p.10.

⁸⁰ *Ibid.*, point 40, at p.14.

⁸¹ *Ibid.*, point 51, at p.16.

the FPÖ” – the report said.⁸² This link between the two parts of their mandate is emphasised by the three wise men, with the view of narrowing the scope of their inquiry: “the evolution of the political nature of the FPÖ is to be seen in the context of the common European values as expressly referred to in the first part of the mandate. Only in so far as the evolution of the political nature of the FPÖ may raise issues in the context of these common European values should our report address them.”⁸³

In that part of the report, the three wise men started by reassessing “European public order”⁸⁴ mostly based on the European Convention on Human Rights and the case-law of the European Court of Human Rights, regarding freedom of expression, freedom of elections, freedom of association and political parties, democratic pluralism,⁸⁵ and their limits: “the protection of the rights and freedoms of others.”⁸⁶ In this context, they asserted “the positive obligation on the part of European governments to combat any form of direct or indirect propaganda for xenophobic and racial discrimination, as to react against any kind of ambiguous language which introduces a certain trivialization or negative ‘normalization’ of the National Socialist past.”⁸⁷

There is, in this part of the report, an indirect depiction of a contrast between the legal rules and the facts regarding the behaviour of the FPÖ: between the prohibition of any national socialist organisation by the Austrian legislation guaranteed by the Austrian constitutional court on the one hand,⁸⁸ and the national-socialist roots and the xenophobic character of its electoral campaigns on the other hand.⁸⁹ The point of contention is thus the position of the Austrian constitutional court towards the FPÖ: “[I]t is clear from the case-law of the Austrian Constitutional Court that in any case where a political party appears before the Court, the Court may ex officio rule on the question whether the prohibition law [concerning political parties] applies where the Court has reason to take up that issue. The FPÖ has been an applicant before the Court in many cases concerning electoral matters. The Court has not seen any reason to question the lawfulness of the FPÖ in relation to the “*Verbotsgesetz*,”⁹⁰ whereas the three wise men reached the conclusion that the “FPÖ has been described as a “right wing populist party with extremist expressions. This description is, according to our judgment still applicable after the party joined the Federal Government”.”⁹¹

As for the situation at the time of the inquiry and since the constitution of the ÖVP/FPÖ coalition, the three wise men draw a distinction between the officials of the FPÖ, who make a “continuous use of ambiguous language” and the “Austrian Federal Ministers from the FPÖ” who have not “used these types of expressions since the forming of the Austrian Federal Government,” thus apparently demonstrating the respect by the FPÖ government members of the terms of the February 2000 declaration jointly signed by Haider and Schüssel.⁹² However,

⁸² *Ibid.*, point 64, at p.20.

⁸³ *Ibid.*, point 65, at p.21.

⁸⁴ *Ibid.*, point 69, at p.22.

⁸⁵ *Ibid.*, points 66-68, at p.21.

⁸⁶ *Ibid.*, point 69, at p.22.

⁸⁷ *Ibid.*, point 70, at p.22.

⁸⁸ *Ibid.*, points 73-75, at p.22.

⁸⁹ *Ibid.*, points 76-83, at p.24.

⁹⁰ *Ibid.*, point 75, at p.23.

⁹¹ *Ibid.*, point 92, at p.27.

⁹² *Ibid.*, points 88-91, at p.27.

the three wise men also showed their concern regarding “attacks on the freedom of criticism”⁹³ consisting mainly in the “use of libel procedures by the FPÖ”.⁹⁴

Lastly, concerning the issue of sanctions, the three wise men stated: “It is not within our mandate to pronounce ourselves on the lawfulness of the measures adopted by the 14 Member States.” Accordingly, they did not directly address the legitimacy of these measures. However, they emphasised their positive impact: “There is no doubt that in the case of Austria the measures taken by the 14 Member States have intensified the efforts by the Austrian Government. They have also energized the civil society to defend these values.”⁹⁵ And yet, the report also identifies the negative side effects of the sanctions and unqualifiedly supports their discontinuation: “It is our opinion ... that the measures taken by the XIV Member States, if continued, would become counterproductive and should therefore be ended. The measures have already stirred up nationalist feelings in the country, as they have in some cases been wrongly understood as sanctions directed against Austrian citizens.”⁹⁶

3. Toward the Preventive Mechanism

The report of three wise men, apart from making specific observations regarding the situation in Austria, as discussed above, also made some more general recommendations as to the refinement of the Article 7 mechanism. They recommended the introduction of “preventive and monitoring procedures into Article 7 of the EU Treaty, so that a situation similar to the current situation in Austria would be dealt with within the EU from the very start.”⁹⁷ Such a mechanism, they said, “would also allow from the beginning an open and non-confrontational dialogue with the Member State concerned.”⁹⁸ In a more ambitious assertion, they describe their proposal as aiming at “the development of a mechanism within the EU to monitor and evaluate the commitment and performance of individual Member States with respect to the common European values.”⁹⁹

But the three wise men’s report was not the first call for the refinement of the Article 7 mechanism, within the political circles of the EU. The first proposal to modify Article 7 TEU was made by the European Parliament in its “Resolution containing the European Parliament’s proposals for the Intergovernmental Conference”¹⁰⁰ of 13 April 2000. However, the idea proposed by the European Parliament was not so much to create a preventive mechanism but rather (1) to expedite the procedure for activating Article 7, and (2) to relax the criteria of the existing sanctioning mechanism. The EP proposed the procedure for suspending a Member State by the Council, acting by a four-fifths majority of Member States on a proposal by one third of the Member States or the European Parliament or the Commission after obtaining the European Parliament’s assent. The determination would

⁹³ *Ibid.*, points 93-96, at p.28.

⁹⁴ *Ibid.*, points 97-103, at p.28.

⁹⁵ *Ibid.*, point 115, at p.33.

⁹⁶ *Ibid.*, point 116, at p.33.

⁹⁷ *Ibid.*, point 117, at p.34.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ European Parliament resolution containing the European Parliament’s proposals for the Intergovernmental Conference (14094/1999 – C5-0341/1999 – 1999/0825(CNS)), A5-0086/2000, 13 April 2000, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0165+0+DOC+XML+V0//EN&language=EN>.

concern the existence of “a serious breach by a Member State of principles mentioned in Article 6(1)” (rather than a “serious and persistent” breach).¹⁰¹

This proposal turned out to be a non-starter and the developments went in the direction of leaving the sanctioning mechanism intact and adding a preventive mechanism. The first suggestion to that effect was made by one of the main actors in the debate: Belgium.¹⁰² Procedurally, the Belgian proposal suggested a right of initiative by one third of the Member States or the Commission, with the role of the Parliament restricted to being informed, and a determination of the action to be taken by the Council acting by a qualified majority. The recourse to the preventive mechanism would thus be easier than the recourse to the sanction mechanism (unanimity vote). Substantially, the review would need to determine whether there was “a threatened breach” of the principles mentioned in Article 6(1) in a Member State. A “threatened breach” is, of course, quite a vague expression, leaving a huge margin of assessment and the space for case-by-case interpretation. If such a determination were to be made, the Council would issue an “appropriate recommendation,” if necessary accompanied by “appropriate measures”.

Another Member State which made a proposal for introducing a preventive mechanism into the Article 7 system was... Austria. Not surprisingly, the Austrian proposal was presented as being triggered by a wish, among other things, to ensure “the principle of fair hearing” and to protect “the rights of the State under scrutiny.”¹⁰³ Hence, the preventive mechanism it proposed on 7 June 2000 provided for a very complex and detailed procedure with quite stringent conditions. Besides, Austria, considering itself the victim of improper sanctions taken by EU-14, stated expressly that “all Member States will undertake to act solely within the framework of Article 7”.¹⁰⁴

According to the Austrian position, the kind of breach triggering a European reaction should be restricted to an “objectively demonstrable” risk of “a serious and persistent breach” of the principles mentioned in Article 6(1). As one can see, under these standards, the developments in the Austrian political scene in 2000 would have probably not met the requirements for even a *preventive* action. The Austrian proposal distinguishes three phases in the preventive procedure, thus transforming it into a last resource means, an exceptional mechanism: (1) a request to the Council to discuss the matter (the Commission or one third of the Member State), (2) a determination of the existence of a breach (the Council on the basis of a report from the Commission), and (3) a determination of the action to be taken (the Council in the composition of the Heads of State of Government acting by unanimity). The stringency of the procedural conditions put forward by Austria is evident.

The question of possible modifications of the Art. 7 mechanism was on the agenda of the Feira European Council of 14 June 2000 and the document prepared by the Portuguese Presidency acknowledged the ongoing lack of agreement among member states upon whether any modifications would be needed at all: in the document we can read that, according to

¹⁰¹ *Ibid.*

¹⁰² Belgian Draft Amendment to Article 7 of the TEU, 2 May 2000, CONFER 4739/00.

¹⁰³ Letter from Gregor Woschnagg, Representative of Austria at the Conference of Representatives of the Governments of the Member States to Mr Javier Solana, Secretary-General/High Representative, , “IGC 2000: Draft amendments to Article 7 and 46 of the TEU”, Conference of the Representatives of the Governments of the Member States, CONFER 4712/00, Brussels, 15 February 2000, available at <http://www.unizar.es/euroconstitucion/library/historic%20documents/Nice/Negotiation/Basic%20principles%20of%20Austria%27s%20position.pdf> .

¹⁰⁴ *Ibid.*

some member states, “It was difficult – indeed impossible – to determine objectively the kind of circumstances in which this provision [added to the existing Art. 7] would be required.”¹⁰⁵ It also observed that there was a wide discrepancy of views about procedural matters, and in particular, about what majority would be needed, and indeed “whether any provision should be made for adopting measures at all [once a positive determination is made], since what is involved is identifying a *slight risk* rather than a clear breach of the principles in Article 6”.¹⁰⁶ The Portuguese put forward their own rather cautious proposal,¹⁰⁷ with the right of initiative held by the Commission or one third of the Member States plus an assent of the EP, with the determination of the action to be taken held by the Council acting by a majority of nine-tenths of its members (which is arguably as close to unanimity as one can think of); with the preventive action limited only to an “appropriate recommendation to the Member State in question,” and with the Member State under scrutiny invited to submit its observations on the subject before the Council decides on the appropriate recommendations to be formulated.

On 4 October 2000, the Commission adopted a communication proposing an amendment to Article 7 of the Treaty on European Union.¹⁰⁸ It is worth noting that it was the French commissioner Michel Barnier (a prominent member of the RPR, a political party led by President Jacques Chirac, who was one of the most fervent supporters of the sanctions against Austria), who was at the time responsible for the Intergovernmental conference. Barnier was a strong proponent of adding the preventive mechanism (“a preventive political dialogue”, as he euphemistically put it).¹⁰⁹ And he has not hidden the point that enhancing the Article 7 mechanism is, among other things, a message addressed *to the candidate states*: in his speech at the plenary session of the European Parliament, on 11 April 2000, Barnier said: “As we all know, it is sometimes necessary to state the obvious, for all the current Member States and all those, which are preparing to join the Union. Because democracy and respect for citizens’ rights must never be taken for granted, but fought for and defended.”¹¹⁰

The procedure proposed by the European Commission envisaged the right of initiative held by the Commission, one third of the Member States, and the European Parliament (significantly, it was the only proposal at the time which put the EP in such a prominent position). A determination of the action to be taken would be made by the Council acting by a majority of two thirds of its members – a compromise between the unanimity system proposed by Austria, quasi-unanimity proposed by the Portuguese Presidency, and the qualified majority suggested by Belgium. Under scrutiny would be the existence of “a threat of a breach,” a loose definition proposed by Belgium and the Portuguese Presidency. Similar

¹⁰⁵ *Ibid.*.

¹⁰⁶ *Ibid.*, emphasis added.

¹⁰⁷ Presidency report to the Feira European Council, Intergovernmental Conference on Institutional Reform, CONFER 4750, 14 June 2000, available at <http://www.ena.lu>, p.116.

¹⁰⁸ Cf. Bulletin EU 10-2000, “Intergovernmental Conference”, available at <http://europa.eu/bulletin/en/200010/p101001.htm>.

¹⁰⁹ Cited in European Commission, press releases, “Intergovernmental Conference: the Commission proposes an addition to Article 7 of the Treaty on respect for democratic values”, IP/00/1116, Brussels, 4 October 2000, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/1116&format=HTML&aged=1&language=EN&guiLanguage=en>.

¹¹⁰ Michel Barnier, European Commissioner in charge of the European policy and responsible, *ad personam*, of the Intergovernmental Conference. Proposals by the European Parliament for the Intergovernmental Conference, Plenary session of the European Parliament, Strasbourg, 11 April 2000, Press release SPEECH/00/136, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/136&format=HTML&aged=1&language=EN&guiLanguage=en>.

to what the Austrians and Portuguese proposed, the preventive action would consist only of “appropriate recommendations to the Member State concerned,” and the Member State would be invited to submit its observations on the subject before the Council would decide on the appropriate recommendations to be formulated. As one can see, the Commission identified a compromise solution under which the procedure would be quite open, the conditions for an action – less stringent than the ones applying in the case of the sanction mechanism, however with rather limited effects: the formulation of recommendations only, contrary to the sanction mechanism.

In October and November 2000, in preparation of the Nice Summit, there were some hurried steps taken, in quick progression, by the French Presidency. First, it asked ministers of Member States, on 5 October 2000, to give their opinion on a series of questions in order to amend the wording of Article 7 TEU and prepare for the ministerial meeting taking place on 8 and 9 October 2000. The questions concerned the very principle of expanding the Article 7 provisions, the details of activation procedure, the nature of recommendations to be addressed to the member state concerned, etc.¹¹¹ Soon after, on 18 October, after the informal Biarritz European Council on 13-14 October which had agreed to adopt the EU Charter of fundamental rights as a political declaration at the Nice summit in December, the French Presidency issued a note on Article 7 TEU and made the following statement: “A majority view favours supplementing the present Article 7 by a mechanism to be used in the case of a threatened breach by a Member State of the principles laid down in Article 6.”¹¹² The note contained a set of questions, very much like in the document of 5 October. Following this, matters quickly took shape. A version of Article 7(1) was proposed on 23 November 2000 in a “revised summary,”¹¹³ which in fact was to become more or less the final one, giving birth to Article 7(1) of the TEU (Nice version).

The final shape of the Article 7 of the TEU, in its Nice version, included the following elements. First, there was no amendment of the sanction mechanism (Article 7(2) TEU). Second, a warning mechanism was created (Article 7(1) TEU), and the only action allowed to be taken in case of a risk of a fundamental rights breach consisted in the issuing of recommendations. Third, the right of initiative for the warning mechanism included a *reasoned* proposal of one third of the Member States or the Commission or the European Parliament, the EP thus being placed on equal footing with Member States and the Commission, contrary to the case of the sanction mechanism. A certain oddity emerged, however, namely that the EP was granted both the right of initiative and the right of assent (or “consent”, in Lisbon treaty wording). Fourth, the action to be taken was to be determined by the Council acting by a majority of four-fifths of its members, after obtaining the assent of the EP. Fifth, the behaviour under review is described as “a *clear* risk of a serious breach” (thus reinforcing the formulation of the “revised summary” by adding the word “clear”). Sixth, there is a sort of “right of defence” of the Member State under scrutiny, namely, before taking its decision on the recommendations to be formulated the Council is required to hear the Member. In addition, the Council is to regularly verify that the grounds on which such a

¹¹¹ Note from Presidency to Ministerial Conclave of the IGC, “Article 7 of the TEU”, Conference of the Representatives of the Governments of the Member States, CONFER 4782/00, LIMITE, Brussels, 5 October 2000, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/cig2000/EN/4782en.pdf.

¹¹² Note from Presidency, “IGC 2000 : Article 7 of the TEU”, Conference of the Representatives of the Governments of the Member States, CONFER 4785/00, LIMITE, Brussels, 18 October 2000 (19.10), point 1.

¹¹³ Conference of the Representatives of the Governments of the Member States, “Revised Summary – Intergovernmental Conference on institutional reform”, CONFER 4810/00, LIMITE, Brussels, 23 November 2000 (24.11), p.2.

determination was made continue to apply. Seventh, and lastly, the idea of the issuing of a report was retained: a report by “independent persons” (without further precisions)¹¹⁴ would be called on by the Council. Eventually, in Article I-59 of the (failed) Treaty establishing a Constitution for Europe, the possibility for the Council to ask for an independent report would be removed, as it was also eventually in the Treaty of Lisbon. The reason given during the European Convention for this removal is the following: “[T]he only change in relation to those Articles [7 TEU and 309 TEC] is that the possibility for the Council to request for a report from independent persons is not mentioned: self-evidently so.”¹¹⁵ It is not clear what is so “self-evident” about such a step, beyond a rather obvious observation that requesting a report is always a possibility for the Council, so perhaps it need not be stated explicitly. Whether such a procedure is to be followed is now left to the discretion of the Council, and is not obligatory (as indeed it was not in the Nice Treaty, though such an option was explicitly included).

4. After Nice, Towards the Fundamental Rights Agency

Finally, it is interesting to look at the views of the main actors, the roles for whom are prescribed in the Article 7 system, expressed already *after* the enhanced design has been put in place in Nice, regarding their perception and interpretation of the system. One of the earliest and most articulate interpretations was provided by the Commission in its communication of 15 October 2003, somewhat grandiosely sub-titled “Respect for and promotion of the values on which the Union is based.”¹¹⁶ Very significantly, from the point of view of this paper, right at the outset the Commission is outlining “a number of factors of variable importance” which make it necessary to examine the issues related to democracy and fundamental rights in the member states, the first being *the prospect of enlargement* to the East. It is worth quoting this passage: “At a time when the Union is about to enter on a new stage of development, *with the forthcoming enlargement and the increased cultural, social and political diversity between Member States* that will ensue, the Union institutions must consolidate their common approach to the defence of the Union's values.”¹¹⁷ The connection drawn between the enlargement (with the increased diversity it will produce) and the importance to defend the “Union’s values” shows the anxiety related to the anticipated accession of CEE states in an unmistakable way. The Commission emphasizes that Article 7, as amended in Nice, equips the Union institutions with the means of ensuring the respect for “the common values” by all member States,¹¹⁸ and suggests that the entry into force of the Nice Treaty, with the preventive mechanism of Art. 7(1), was a “defining moment” for the Union’s means of action in this respect.¹¹⁹ As far as itself is concerned, the Commission

¹¹⁴ Earlier, in the document of 18 October 2000 referred to above (“Note from Presidency”), the French Presidency foreshadowed the following options: “independent persons” appointed by the Presidency or by the next Presidency, a special rapporteur appointed by the Court of Justice, or by the Commission.

¹¹⁵ The European Convention – The Secretariat, Note from the Praesidium to the Convention, “Title X: Union Membership”, CONV 648/03, Brussels, 2 April 2003 (03.04), p.8.

¹¹⁶ 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, COM(2003) 606 final, Brussels, 15.10.2003, COM(2003) 606 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0606:FIN:EN:PDF>.

¹¹⁷ Id at 4, emphasis added.

¹¹⁸ Id, at 1.

¹¹⁹ Id at 1.

promises that it is going to exercise its new powers (granted upon it by 7(1)), “in full and with a clear awareness of its responsibility.”¹²⁰

Most important is the section of the Communication which concerns the conditions for applying Article 7 (Part 1 of the Communication) where the Commission emphasizes that “Article 7 of the Union Treaty is horizontal and general in scope”,¹²¹ suggesting that it is not confined to areas covered by Union law but can be applied “in area where the Member States act autonomously.”¹²² This is because, “If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members.”¹²³

This last sentence is significant and is worth reflecting on. Unless it is read as a piece of rather unreflective, bureaucratic sloganeering, it expresses a very fundamental point about the meaning of the “foundations of the Union”. The Union is considered to be crucially based on the values which permeate the domestic life of Member States and is not limited to the interaction between the States, or to those areas (common market in particular) which are identified as the competence of the Union. Values listed in Article 6 (now Article 2) which Article 7 refers to are, for the most part, related to (what may be called) the “domestic” life of member States: democracy, the rule of law, respect for human rights (many of which are, strictly speaking, outside the strict competence of the EU). If their breach can be seen (as the above quoted sentence explicitly states) as the undermining of the “very foundations of the Union”, then it implies that the Union is construed here in an expansive, comprehensive way which deliberately ignores the traditional distinction between the domestic realm and the sphere of EU competence. In this way, Article 7 is a powerful, and perhaps unique, instrument of union building and of construction, even if only a symbolic or deterrent device of construction, of transnational polity which is blind towards the conventional distinction between the national and the European (as long as the mechanism is unlikely to be actually triggered).

Concerning the definition of *what* can be considered either as a clear risk of a serious breach or as a serious and persistent breach of common values, the Commission gives some clues as to its own interpretation. Regarding a breach of “common values,” the Commission insists upon the difference between individual cases of breach and breach which “must go beyond specific situations and concern a more *systematic* problem”.¹²⁴ So it is not *any* breach of fundamental rights in a member State that activates Art. 7. Instead, there must be a systemic problem, and the Article 7 procedure must be seen as “th[e] last-resort provision.”¹²⁵ Regarding a “clear risk of a serious breach”, the Commission says that this formula is meant to exclude “purely contingent risks” from the scope of the preventive mechanism: it provides, as a hypothetical example, the adoption of legislation allowing procedural guarantees to be abolished in wartime.¹²⁶ Now whether the adoption of such legislation can be properly characterized as constituting only a “risk” or whether it is per se a serious breach of common values is a matter for debate. And in fact, it *has* been debated. This point was the subject of a criticism addressed by the European Parliament to the Commission’s communication, where

¹²⁰ Id. at 1.

¹²¹ *Ibid.*, p.5.

¹²² *Ibid.*.

¹²³ *Ibid.*.

¹²⁴ *Ibid.*, p.7, emphasis added/

¹²⁵ Id at 7.

¹²⁶ Id at 7.

it was stated that “a higher standard of protection of fundamental rights is needed than proposed by the Commission.”¹²⁷ Some explanation can be found in the report drawn by the Committee on Constitutional Affairs: “To take the example given by the Commission (abrogating due process in wartime), a higher standard of human rights protection would imply that the relevant law itself already represents a breach of fundamental rights”. The report regarded as unacceptable “that the entry into force of a binding legal provision which violates fundamental rights should be seen only as a risk of a breach and not in itself as a serious and persistent breach of such rights. In the example given by the Commission, Article 7 could not even begin to offer protection against the application of such a law in wartime”.¹²⁸

Regarding the criteria of a “serious breach”, the Commission refers both to the “purpose” and the “result” of the breach. As far as the purpose is concerned, it states, as an example, that the nature of “the social classes affected” may be a criterion, when the classes are “vulnerable,” as is the case of national or religious minorities, or immigrants.¹²⁹ While this reads like an echo of the Haider affair, it can be also seen as a more general warning addressed towards the candidate states from CEE, with their messy record in the field of treatment of Roma people (especially, in Czech Republic, Slovakia, Romania, and Hungary) and ethnic and national minorities (e.g. the treatment of Russian-speaking minorities in all three Baltic states).¹³⁰ The second prong of the “serious breach” test applies to the result (effect) of an offending national regulation: it concerns any one or more of the principles referred to in Article 6 (let us recall: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law). Even if to activate Article 7 measures it is enough to cite a violation, or a risk of violation, of one of these principles, “a simultaneous breach of several values could be evidence of the seriousness of the breach”.¹³¹

Again, an aside regarding the European Parliament’s response to the Commission’s communication is in order. The European Parliament’s rapporteur expressed a belief “that the Commission has not taken sufficient account of general risks and breaches”.¹³² It is followed by a quite remarkable litany of examples of what, according to the rapporteur, might constitute the breach within Article 7: “[A] Member State’s failure to act on violations of human rights, such as tolerance of anti-Semitic, racist and xenophobic protests, of incitement against minorities, of the discriminatory ‘pauperisation’ of sections of society or of a general political climate in which individuals rightly feel that their fundamental freedoms are under threat, and a sustained failure to act concerning equality for women” While this list is unobjectionable, as a catalogue of State’s possible breaches of EU common values, it is unclear why it would be seen as inconsistent with the Commission’s formulations just cited.

¹²⁷ European Parliament, legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), P5_TA(2004)0309, 20 April 2004, OJ C104E, vol.47, 30 April 2004, p.408.

¹²⁸ European Parliament, Committee on Constitutional Affairs, Rapporteur: Johannes Voggenhuber, Report on the Commission communication on Article 7 of the Treaty on European Union : Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), A5-0227/2004 FINAL, 1 April 2004, available at <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+REPORT+A5-2004-0227+0+DOC+XML+V0//EN&L=EN&LEVEL=0&NAV=S&LSTDOC=Y> , p.11.

¹²⁹ Communication from the Commission on Article 7 of the Treaty on European Union.2003, op. cit. at 8.

¹³⁰ More in Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer: Dordrecht 2005) at 205-207.

¹³¹ Communication from the Commission on Article 7 of the Treaty on European Union.2003, op. cit. at 8.

¹³² European Parliament, Committee on Constitutional Affairs, Rapporteur: Johannes Voggenhuber, Report on the Commission communication on Article 7 of the Treaty on European Union, op. cit. at p. 11.

After all, each of these actions or failures to act can be characterized as falling under one or more of principles listed in Article 6. Perhaps the difference between the Commission's wording and the EP rapporteur is that the latter explicitly refers also to the State's "*failure to act*", thus expanding the list of breaches beyond the State's actions (by including, in the list, also the State's inactions). This would suggest that the Parliament holds on to a "horizontal" understanding of the scope of Article 6 principle in the sense that they operate in the sphere of the "private" relationship between individuals (the list of such phenomena in the Parliament's catalogue just cited being a good example of such horizontal relations), with the duty of the State being to respond actively to societal victimization and discrimination rather than watch passively.

Finally, the Commission supplied, in its communication, a test for a "persistent" breach (which activates the mechanism of Article 7(2) only), which "must last some time,"¹³³ but the "persistence" itself may be displayed in a variety of manners, the Commission says. It may come through a piece of legislation or an administrative instrument, or it may be reflected in an administrative or political practice of the authorities (implicitly: without any specific legal enactment). Repetition of individual breaches provides a stronger argument, and so do condemnations by such international bodies as the European Court of Human Rights or the UN Commission of Human Rights, especially when the state "has not demonstrated any intention of taking practical remedial action."¹³⁴

In its 2003 communication on Article 7 TEU, the Commission addressed also the need for "introducing regular monitoring of respect for common values and developing independent expertise."¹³⁵ In doing so, it emphasised the role played by the network of independent experts which was set up in 2002 by the European Commission in accordance with a call by the European Parliament – the network which had been producing serious and comprehensive reports on fundamental rights within the EU on the basis of the Charter of Fundamental Rights. Its reports covered the situation in each member state, as well as there were consolidated annual reports synthesizing its main conclusions. Even though the Charter, in its Article 51, limited its own scope to the institutions of the Union and to the member states only in their implementation of the EU law, the network of independent experts wisely took the view that the Charter constitutes a catalogue of the common values of the union and extended its scrutiny upon the scope covered by all the Charter rights.¹³⁶ The reason for it can be only seen in the context of an introduction of the Article 7 mechanism: it is for the purpose of the proper implementation of Art. 7 that a serious monitoring had been found necessary, giving birth to the network of independent experts.¹³⁷ In its 2003 communication, the Commission praised the network of independent experts as being "a good example of cooperation between the Commission and the Parliament, because, although its aim is to provide input for the Commission's work, it also provides Parliament with essential information"¹³⁸ (Incidentally, the Parliament itself seemed to be less than impressed by this suggestion, and in its Report on Article 7 it jealously protected its own autonomy in fact-

¹³³ Communication from the Commission on Article 7 of the Treaty on European Union.2003, op. cit. at 8.

¹³⁴ Id. at 8.

¹³⁵ Id at 9.

¹³⁶ See Olivier de Schutter and Philip Alston, "Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency", in Philip Alston & Olivier de Schutter, eds., *Monitoring Fundamental Rights in the EU: Contribution of the Fundamental Rights Agency* (Hart Publishing: Oxford 2005): 1-21 at 6.

¹³⁷ For a detailed discussion of the relationship between the Charter, the Article 7 mechanism, and the network of independent experts, see Manfred Nowak, "The Agency and National Institutions for the Promotion and Protection of Human Rights", in Alston & de Schutter, op. cit., 91-107 at 96-98.

¹³⁸ Communication from the Commission on Article 7 of the Treaty on European Union.2003, op. cit. at 9.

finding related to possible actions under Article 7: “notwithstanding all necessary consultation and information, the definitive opinion of Parliament must be based on autonomous procedures involving, for instance, its own delegations, independent experts, hearings, fact-finding missions and any other necessary action”.¹³⁹) The Commission favoured the continued maintenance and indeed an enhancement of the network of independent experts by providing it “with an appropriate legal basis”, in which case “[p]roper coordination would at all events be needed in order to avoid any risk of duplication with the European Monitoring Centre on Racism and Xenophobia.”¹⁴⁰ For reasons which are outside the scope of this working paper this strategy was not eventually chosen, and the network was discontinued in 2004 when the Fundamental Rights Agency (FRA) was set up as an expansion of the European Center on Racism and Xenophobia. The Agency does not have any real decision-making powers, it cannot receive any complaints from individuals,¹⁴¹ and its action is largely dependent on the Commission's requests for information. Still, as a monitoring and advisory body it has the potential to be an important agent of “shaming” member states which are in violation of fundamental rights.

When the decision about setting up of FRA has been already taken, one of the main issues was the scope of its scrutiny. The Commission in its 2004 communication on the Fundamental Right Agency framed the question in the following way: “Should it be confined to the areas covered by Community (or Union) law or should it extend further to cover the scope of Article 7 TEU, setting up a procedure which could be used only exceptionally, according to the gravity of the situations to which it would apply?”¹⁴² The issue is very delicate because it raises the question of EU competence. After all, no general competence in the field of human rights has been transferred from the Member States to the EU. At least under the orthodox account, the EU lacks general competence in the field of human rights. Its competence is only in some specific areas, such as in a limited range of external policies and within the Union, and in anti-discrimination policy. Further, the Member States are only subject to the ECJ's adjudication on human rights in so far as they are implementing EU laws.¹⁴³ As the ECJ famously observed some time ago, “No Treaty provision confers on the Community institutions any general power to enact rules on human rights.”¹⁴⁴ Any legal provision containing human rights obligations at the EU level is directed towards EU legal rules and not national rules *per se*. The EU Charter of Fundamental Rights illustrates this point well, restricting as it does its applicability to EU institutions and Member States only when they are implementing Union law.¹⁴⁵ But here enters Article 7, as an exception to the general rule, and it proves to be of strategic value. As the Commission, in the same communication, observes, “The scope of Article 7 is broad, giving the EU institutions the ability to act not only within the limited framework of the areas covered by EU law but also in the event of a breach in an area *where the Member States act autonomously*.”¹⁴⁶ This has to be linked to the par excellence *political* nature of Article 7 mechanisms.

¹³⁹ European Parliament, Committee on Constitutional Affairs, Rapporteur: J.Voggenhuber, Report on the Commission communication on Article 7 of the Treaty on European Union, *op.cit.* at 12.

¹⁴⁰ *Id.* at 10.

¹⁴¹ For a critique of this weakness of the Agency's design, see Nowak, “The Agency” at 101.

¹⁴² Commission of the European Communities, Communication from the Commission – The Fundamental Rights Agency – Public consultation document, COM(2004) 693 final, Brussels, 25.10.2004, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0693en01.pdf, p.5.

¹⁴³ For a good summary of the “orthodox account”, see de Búrca, “Beyond the Charter” at 684-86.

¹⁴⁴ Opinion 2/94 on Accession by the Community to the ECHR [1996] E.C.R.I-1759.

¹⁴⁵ Art 51 (1) of the Charter.

¹⁴⁶ Communication from the Commission – The Fundamental Rights Agency, 2003, *op.cit.* at 5, emphasis added.

However, the European Parliament in its “Resolution on Promotion and Protection of Fundamental Rights: the Role of National and European Institutions, including the Fundamental Rights Agency” asserted that “the European Union and Member States share competence for human rights, and that therefore they are obliged to respect human rights and fundamental freedoms *in their respective spheres of competence* in accordance with the principle of subsidiarity.”¹⁴⁷ This may be read as a gentle reminder about the limited scope of EU competences in this field and about the need of the FRA to confine itself to this sphere. Indeed, such an aspiration could have been found earlier in the minority opinion formulated by members of the European Parliament following the Voggenhuber report on 17 March 2004. “The principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law are common to the Member States, which defend them primarily by means of their national democracies and their national judicial systems”.¹⁴⁸ The minority went on to stress that the EU can therefore play only a “complementary” role in safeguarding these principles, and then it stated: “The Voggenhuber report ... highlights the risk of unwanted developments inherent in the introduction at European level of a centralised system of preventive measures and penalties pursuant to Article 7 of the EU Treaty. It could lead to permanent multilateral monitoring, carried out in response to situations whose definitions can be stretched ... and on an arbitrary basis, regardless of whether the decisions taken by a people are democratic or not.”¹⁴⁹

Furthermore, in its resolution specifically on Article 7 of the TEU, the European Parliament sets forth a “principle of confidence” in “the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles.”¹⁵⁰ Such a principle, if taken seriously, in fact would lead to a virtual disempowerment of the EU (and more specifically, of the FRA) in scrutinizing member states for their human-rights related behaviour. This is confirmed by a statement in the same report: “Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union.”¹⁵¹ However, in its 2005 resolution on the Fundamental Rights Agency, the European Parliament expresses a more nuanced view, by saying that “Establishing the Agency should make a contribution to further enhancing mutual confidence between Member States and constitute a guarantee of continued observance of the principles set out in Article 6 and 7 of Treaty on European Union...”.¹⁵²

So at the stage of the planning and designing the new agency – and indeed, of thinking about the role of the EU in the human rights area, at the eve of a new and strategically crucial enlargement – the main question was how to reconcile the limited EU competence in the field

¹⁴⁷ European Parliament, resolution on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007(INI)), P6_TA(2005)0208, 26 May 2005, OJ C117 E, 18.5.2006, p.243, emphasis added.

¹⁴⁸ European Parliament, Report on the Commission communication on Article 7, *op.cit.* at 14.

¹⁴⁹ European Parliament, Report on the Commission communication on Article 7, *op.cit.* at 14.

¹⁵⁰ European Parliament, legislative resolution on the Commission communication on Article 7 of the Treaty on European Union, *op.cit.*, point 11(a).

¹⁵¹ *Ibid.*

¹⁵² European Parliament resolution on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0208+0+DOC+XML+V0//EN> point 26.

with the broad mandate of the new agency, successor to the body – the European Monitoring Centre on Racism and Xenophobia (EUMC) – the mandate of which was already quite broad. In the 2005 EP resolution just cited, the connection between the remit of a new agency and the broad scope of the Charter of Fundamental Rights was explicitly drawn, and the proposal was made that the new agency should concern itself, among other things, with matters such as “the freedom of expression, assembly and association and thought, the right to participate under equal conditions in election processes, the rights to education and liberty, solidarity and social rights, children’s right, gender equality, violence against women, trafficking in human beings, citizens’ rights and justice, the right to asylum, the Roma issue and minority rights and respect for cultural, religious and linguistic diversity.”¹⁵³ As one can see, violations of these rights might well fit the scope of Article 7. Further, the Parliament depicts explicitly the connection between the enlargement and the need to monitor in particular respect for minority rights: “Protecting national minorities *in an enlarged EU* is a major issue and ... it will not be achieved simply by fighting against xenophobia and discrimination; ... this complex must also be addressed from other angles and that the question of protection of ethnic and national minorities should be one of the Agency’s specific tasks.”¹⁵⁴ The Parliament also expressed the opinion that the new Agency should be endowed with an advisory and consultative role regarding Article 7 and in this context it should support the Parliament and the Council, in particular “using the information, knowledge and expertise gathered from its networks.”¹⁵⁵

The Commission itself has adopted a more ambiguous position. In the 2005 Commission’s proposal for a Council regulation establishing a European Union Agency for Fundamental Rights, in the explanatory memorandum, the Commission declares at the outset that the “decision to extend the mandate of the EUMC to become a Fundamental Rights Agency is in line with the specific commitments of the Union to respect and strengthen fundamental rights, as laid down in Articles 2, 6 and 7 of the Treaty on European Union.”¹⁵⁶ Subsequently, it lists a number of options for the Agency. First (to be eventually rejected by the Commission) is the “Widest Possible Observation and Assessment Agency’ option” according to which “the Agency would observe fundamental rights both within and outside the Union policy framework, also for the purposes of Article 7 TEU.” While there are some good things to be said about this choice, the Commission says: “[i]t would be a very effective option as a means of achieving policy objectives” – nevertheless, considering the legal limits of Community powers, such a mandate “could cause friction between the EU and the Member States and international organisations.” For this reason, the Commission favours what it calls the “Focused Observation and Assessment Agency on Union policies’ option” under which “the Agency’s mandate would be open to collecting and analysing data on fundamental rights with reference to, in principle, all rights listed in the Charter, but the thematic areas within the scope of Union law would periodically be defined for the Agency’s actions.”¹⁵⁷ Furthermore, it is worth quoting the impact assessment report drafted by the Commission staff working paper annexed to the Commission’s Council Regulation proposal in which, in assessing the different policy options, it asserts that Article 7 “enables the Union to suspend the rights of a

¹⁵³ Id. point 39.

¹⁵⁴ Id., point 40, emphasis added.

¹⁵⁵ Id. point 47.

¹⁵⁶ Commission of the European Communities, Proposal for a Council regulation establishing a European Agency for Fundamental Rights ; Proposal for a Council decision empowering the European Union Agency in areas referred to in Title VI of the Treaty on European Union, COM(2005) 280 final, 2005/0124 (CNS); 2005/0125 (CNS), Brussels, 30.06.2005, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0280en01.pdf , at 2.

¹⁵⁷ Id. at 5.

Member State if it seriously and consistently breaches fundamental rights, *regardless of whether a Member States acts within or outside the framework of Union law.*¹⁵⁸ The document states: “Such crisis would be identified without any specific mechanisms at the EU level.”¹⁵⁹ However, when it comes to the specific role of the Agency with respect to Article 7, the Commission seemed to limit its role to the situations when the action under Article 7 has been already initiated by one of the authorised parties: “The Council may exploit the expertise of the Agency if it finds it useful when acting on a proposal by one third of the Member States, by the European Parliament or by the Commission during the procedure under Article 7 TEU. The Agency will not, however, carry out systematic and permanent monitoring of the Member States for the purposes of Article 7”.¹⁶⁰

The Member States themselves were not in favour of empowering the Fundamental Rights Agency with the task of permanently monitoring the situation of fundamental rights in the Member States outside the realm of the implementation of EU law. An evidence for this is provided by the document generated by the Ad Hoc Working Party on Fundamental Rights and Citizenship, set up by the Council on 6 June 2006. The paper states that the proposed regulations for the FRA allow the Agency to make, on request by the Council, its expertise available to it in the context of the Article 7 procedure, both in terms of Article 7(1) when the Council calls on “independent persons” to submit a report on the human rights situation in a member State, and in the context of Article 7(2). It appears from the document that, during the discussions, the question was raised whether, and to what extent, conferring such a task upon the FRA would go beyond Community competence, and hence violate the Treaty. It was also questioned whether the FRA could be considered as “an independent person” within the meaning of Article 7. A written opinion by the Council’s Legal Service was sought, and it was then established that it is really up to the Council whether it wants to treat, in any particular case, the FRA as an “independent person” for the purposes of the Article 7 procedure: it may consult the FRA in this context but it does not have to, and it may consult any other person or body. The Council has left itself a maximum discretion in this regard. At the same time, the Working Party observed that, should the FRA be selected for that purpose, it would then “not be acting on the basis of its remit, established by its constitutive act, but on the basis of the terms of the request for consultation defined by the Council acting on the basis of Article 7 TEU.”¹⁶¹ And a few days later, the same Ad Hoc Working Party proposed to clarify that “Nothing precludes the possibility for the Council to have recourse to the Agency in a situation according to the meaning of Article 7 TUE.”¹⁶²

¹⁵⁸ Commission of the European Communities, Commission staff working paper, Annex to the Proposal for a Council regulation establishing a European Agency for Fundamental Rights and to the Proposal for a Council decision empowering the European Union Agency in areas referred to in Title VI of the Treaty on European Union, Impact assessment report, SEC(2005) 849, Brussels, 30.6.2005, available at http://ec.europa.eu/justice_home/doc_centre/rights/doc/sec_2005_849_en.pdf, at 13, emphasis added.

¹⁵⁹ Id. at 9 n. 11.

¹⁶⁰ Commission Proposal for a Council regulation establishing a European Agency for Fundamental Rights; COM(2005) 280, op. cit. at 6.

¹⁶¹ Council of the European Union, outcome of proceedings of the Ad hoc Working Party on Fundamental Rights and Citizenship, subject: Proposal for a Council regulation establishing a European Agency for Fundamental Rights ; Proposal for a Council decision empowering the European Union Agency in areas referred to in Title VI of the Treaty on European Union, 10610/06, LIMITE, JAI 315, CATS 125, COHOM 111, COEST 185, Brussels, 9 June 2006, available at <http://register.consilium.europa.eu/pdf/en/06/st10/st10610.en06.pdf>, p.2.

¹⁶² Council of the European Union, outcome of proceedings of the Ad hoc Working Party on Fundamental Rights and Citizenship, subject: Proposal for a Council regulation establishing a European Agency for Fundamental Rights ; Proposal for a Council decision empowering the European Union Agency in areas referred to in Title VI of the Treaty on European Union, 10755/06, LIMITE, JAI 321, CATS 128, COHOM 114, COEST

Therefore, the Article 7 mechanism creates, for the FRA, a useful though ambiguous legal basis for extending the reach of its radars beyond EU competence when important human rights violations (or risks of such violations) within member States are suspected. It is useful, because it refers to the litany of fundamental values upon which the Union is based (in Article 6 in the pre-Lisbon versions of TEU, in Article 2 in the Treaty of Lisbon) which do not know the distinction between the situations when a member State is implementing the EU law, and all other (“domestic”) circumstances. It is, however, ambiguous, because when the FRA is to be activated for the purposes of Article 7, it acts as “an independent person,” whatever it may mean, rather than “on the basis of its remit.”¹⁶³ How, in reality, the FRA has been, and will be, resolving the tension written into this ambiguity, is a matter well beyond the bounds of this paper.

Conclusions

The developments described in this working paper concern one of the themes in a larger story about the growing inclusion of human-rights concerns and concerns about democracy in member states, within the European Union. The story about “Article 7” – the mechanism for collective action by the Union in preventing and sanctioning human rights violations in member states, is only one of many chapters in this broader narrative, and not necessarily the most important one. The other aspects include the relationship between the EU and the Council of Europe (including the issue of accession of the EU to the European Convention),¹⁶⁴ the drafting of, and the consequences of the adoption of the EU Charter of Fundamental Rights,¹⁶⁵ the human-rights related conditionality in the accession negotiations and in the external relations of the EU,¹⁶⁶ police and judicial cooperation in criminal matters, which has clear human rights implications,¹⁶⁷ the use of an open method of coordination in the field of human rights,¹⁶⁸ etc.

But, while the Article 7 mechanism is perhaps not the most important aspect of the “EU and human rights” (after all, it has never been activated, and it is not very likely that it will be

187, Brussels, 29 June 2006, available at <http://register.consilium.europa.eu/pdf/en/06/st10/st10755.en06.pdf> , p.14.

¹⁶³ On the dangers of an approach which postulates a restricted remit for the FRA, and limiting it to the sphere of EU law or Member States’ implementing the EU law, see Andrew Williams, “The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK’s Invasion of Iraq”, *European Law Review* 31 (2006): 3-27 at 26-27

¹⁶⁴ The Treaty of Lisbon provides, in Article 6 (2) (Consolidated text) that the Union shall accede to the ECHR. The literature on the relationship between the two European Courts is enormous; for a good recent analysis see Olivier De Schutter, ‘L’influence de la Cour européenne des droits de l’homme sur la Cour de justice des Communautés européennes’, in G. Cohen-Jonathan & J.-Fr. Flauss (eds.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l’homme*, (Bruylant-Nemesis: Bruxelles, 2005), pp. 189-242.

¹⁶⁵ The Treaty of Lisbon makes a reference, in article 6(1), to the Charter which has the same legal status as the European Union treaties. Again, the literature on the Charter is huge. For a good collection of essays, see Steve Peers and Angela Wards, *The EU Charter of Fundamental Rights* (Hart: Oxford 2004). Of course, the disconnection of the Charter from Article 7 is purely artificial: the Charter may be now seen as a yardstick for surveillance mechanisms under Article 7; see Armin von Bogdandy, “The European Union as a Human Rights Organization? Human Rights and the Core of the European Union”, *Common Market Law Review* 37 (2000): 1307-38 at 1309.

¹⁶⁶ See Nowak, “Human Rights ‘Conditionality’”, *op.cit.*

¹⁶⁷ See Steve Peers, “Human Rights and the Third Pillar”, in Alston, *EU and Human Rights*, *op. cit.*, 167-85.

¹⁶⁸ See de Búrca, “Beyond the Charter”, at 704-708.

activated in the predictable future),¹⁶⁹ it is significant nevertheless. It is widely thought that a transnational system committed to human rights is not complete unless it contains some elements of sanctions, and optimally, also prevention.¹⁷⁰ Article 7 fills this gap, and thus allows us to take seriously the EU's claims that it is a community of values, and that the violations of these values (at least, *serious* violations) in any member state is a matter for legitimate concern in the Union as a whole. As such, Article 7, used or not, by its very existence and the accompanying deterrent effect creates an important mechanism for enhancing supranationalism within the EU. Perhaps even more importantly, the Article 7 mechanism, by its connection with Article 6 (now Article 2) which identifies the main values on which the Union is based as fundamentally those the violation of which can occur in the practice of members States themselves, is blind towards a distinction between the "national" practice on the one hand and the practice of EU institutions or of member States when they implement the EU law, and therefore is a practical way of extending the concerns of EU bodies and institutions upon the law and practice of member States, without being concerned too much about the strict limits upon the EU competence.

And that is the way Article 7 has been understood and applied by various EU bodies and institutions. The European Parliament, having long before the birth of Article 7 called for Community's monitoring of human rights in Member States,¹⁷¹ seized enthusiastically Article 7 to reaffirm this point and begun quoting, since 2000, in its resolutions on respect for human rights, Article 7 (alongside Articles 6 and 29, the latter concerning a European area of freedom, security and justice) to urge that "It is ... the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they made in signing the Treaty of Nice on 27 February 2001, *with particular reference to new Article 7(1) thereof.*"¹⁷² The EU Network of Independent Experts in Human Rights, set up by the Commission in 2002, monitored the situation in Member states and in the EU, on the basis of the EU Charter of Fundamental Rights, and it has held the view that the remit covered by Article 7 is broader than the scope of the Community (or Union) law.¹⁷³ In a Commission communication, summarized at length earlier in this paper, the Commission asserted broadly that "Article 7 of the Union Treaty ... equip[s] the Union institutions with the means of ensuring that all member States respect the common values"¹⁷⁴ of liberty, democracy, respect for human rights and the rule of law, and it emphasized: "The scope of Article 7 is not confined to areas covered by Union law. ... Article 7 is horizontal and general in scope..."¹⁷⁵ So it is no wonder that a prominent legal scholar could suggest that the structure of Article 7 (in combination with Article 6) put in place in Amsterdam, provided "the Union with the

¹⁶⁹ "Its use would be catastrophic. Even its possible application would set in train disastrous events that might undo the very fabric of the Union", Williams, *op.cit.* at 27.

¹⁷⁰ See de Búrca, "Beyond the Charter", at 682.

¹⁷¹ In the EP resolution on human rights adopted 9 July 1991, the Parliament "[c]onsiders that the Community must ensure respect for human rights not only in other countries but more particularly in its Member States", EP's resolution on human rights, 9 July 1991, OJ C 240, 16.09.1991, p. 45.

¹⁷² European Parliament resolution on the situation as regards fundamental rights in the European Union (2000) (2000/2231(INI)), 5 July 2001, A5-0223/2001, available at <http://www.europarl.europa.eu/activities/expert/ta/sides.do?language=EN>.

¹⁷³ See EU Network of Independent Experts in Fundamental Rights, Position Paper on the Human Rights Agency, CFR-CDF.Agency.16.12.04.doc, 16 December 2004, points 21-22.

¹⁷⁴ Commission communication on Article 7, 2003, *op.cit.*, at 3.

¹⁷⁵ Commission communication on Article 7, 2003, *op. cit.*, at 5.

power to develop a democracy and general human rights policy *in relation to the Member States* and a competence to a general monitoring role.”¹⁷⁶

In my rendition of the Article 7 story I have tried to emphasize the “CEE dimension” of the narrative. In my view, the prospect of the major Eastward expansion of the EU – the prospect which became increasingly real after the fall of Communism in CEE – prompted EU decision-makers, advisors and analysts to take on board the concerns that shortly there would be a major increase of political and legal diversity within the Union, and that some of this diversity would be less than welcome. CEE applicant states were seen as bringing with them different traditions, political cultures and patterns of political behaviour, affected as they were not only by decades of Communist authoritarianism but also by less than fully democratic and liberal pre-Communist traditions. Some of these concerns were legitimate while others were based on prejudice and ignorance, but their existence was a political fact which cannot be ignored in telling the story of Article 7. These anxieties could have only been strengthened by the patterns of enlargement of the Council of Europe, where many newly but not fully democratized states from CEE were often prematurely admitted on the basis of the theory that it is better to have them *in*, and be able to influence them *within* the club rather than outside it. The experiment has not always been absolutely reassuring, as the statistics about cases coming to Strasbourg from CEE states indicate.¹⁷⁷

There is some evidence – and I tried to document it in my working paper – that the anxiety about the prospects of bringing some CEE states into the EU featured in the thinking of those who proposed (what was to become) the Article 7 mechanism. (And, as an aside, it is telling that already after the major enlargement of 2004, the mechanism of Article 7 was incorporated with no significant changes to the Constitution for Europe, and then into the Treaty of Lisbon, raised almost no debate, and much less excitement, during the Constitutional Convention¹⁷⁸ – suggesting that it has, to some extent, performed already its task as a signalling and warning device). As Gráinne de Búrca nicely put it, by including Article 7 into the Amsterdam Treaty, “the EU was asserting its own virtue and the virtue of its existing members, while simultaneously sending a note of warning to the new and future candidate States to the east.”¹⁷⁹ It was thus ironic that the country in which something like the circumstances targeted by Article 7 occurred was a consolidated democracy and a relatively “old” member state, and in addition, a member state which was among the most active in arguing for inclusion of Article 7 in the EU institutional system. The Austrian episode of 2000 triggered an important enhancement of the mechanism by building into it an early warning system (Article 7 (1)). Its inclusion was seen as an important affirmation of the EU’s commitment to “common values” and at least part of this rhetoric was addressed towards the candidate states on the eve of the Eastward enlargement of the Union.

The role that Article 7 actually played in “disciplining” the CEE candidate states prior to the accession was rather marginal: there was an extensive system of political conditionality, encapsulated in the “Copenhagen criteria”¹⁸⁰ and concretized in a detailed monitoring system

¹⁷⁶ von Bogdandy at 1318, emphasis added.

¹⁷⁷ See Wojciech Sadurski, “Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments”, *Human Rights Law Review* 9 (2009): 397-453 at 410-412.

¹⁷⁸ As noted by Pieter van Nuffel, *op. cit.*, at 280.

¹⁷⁹ De Búrca, “Beyond the Charter”, at 696.

¹⁸⁰ The European Council decided in June 1993 in Copenhagen on a number of political criteria for accession to be met by CEE candidate states, namely, that they must achieve “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.

of preparedness of candidate states towards accession, which included a broad spectrum of human rights and democratic institutions and behaviour, and which may be well traced in the Commission's Regular Reports on progress of particular candidate states towards the accession.¹⁸¹ This pattern of conditionality was largely effective, especially when aligned with indigenous democratic and liberal forces and movements in candidate states¹⁸² – but it is a theme well outside the frame of this working paper. In that other story – about conditionality's effect upon the improvement of behaviour of CEE states in the field of human rights and democracy – the prospect for the future use of Article 7 did not play, to my knowledge, any significant role.

However, Article 7 *does* exist, and in principle, can be used towards any member State, whether old or new. Its inclusion into the Treaty system has had (as observed above) an important function in enhancing the supranationalism of the EU, and thus – the distinctive constitutionalism of the EU.¹⁸³ Constitutionalism of any entity is incomplete unless the statement of common values is left without any enforcement mechanism: preventive, or sanctioning, or – ideally – both. So if the thesis propounded in this working paper – that the inclusion of Article 7 into the system was largely prompted by the prospect of the Eastward enlargement – is correct, then it can be seen as yet another way¹⁸⁴ in which the enlargement of the EU towards the East in 2004 and 2006 was an important impetus of supranational constitutionalisation of the EU.

¹⁸¹ For an excellent analysis of these reports, see James Hughes, Gwendolyn Sasse & Claire Gordon, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe: The Myth of Conditionality* (Palgrave Macmillan: Houndmills 2004): 91-117.

¹⁸² See Wojciech Sadurski "Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe", *European Law Journal* 10 (2004): 371-401.

¹⁸³ As de Witte and Toggenburg observed, "On the eve of the enlargement, [the Amsterdam sanction mechanism] represents an attempt to guarantee the future respect for the EU 'constitutional' rules", *op. cit.*, at 73.

¹⁸⁴ Elsewhere, I have argued that the "double standards problem" consisting in applying much higher standards to candidate states than to actual member states, as far as human rights are concerned, prompted the work on constitutionalization of human rights within the EU, reflected *inter alia* in the adoption of the Charter of Fundamental Rights; see, Wojciech Sadurski in George A. Bermann and Katharin Pistor, eds., *Law and Governance in an Enlarged European Union* (Hart: Oxford 2004): 61-96. For a broader argument about how the enlargement resonated with constitutionalism, namely that the very ideals which facilitated the enlargement are also those that were crucial to EU's constitutional identity, see Neil Walker, "Central Europe's Second Constitutional Transition: The EU Accession Phase", in Adam Czarnota, Martin Krygier & Wojciech Sadurski, eds., *Rethinking the Rule of Law after Communism* (CEU Press: Budapest 2005): 341-69 at 356.