

Communication from the Commission on Article 7 of the Treaty on European Union (15 October 2003)

Caption: Compliance with the common principles set out in Article 6(1) of the Treaty on European Union constitutes a condition for any State wishing to accede to the European Union. In this communication, dated 15 October 2003, the European Commission reviews the implementing procedures laid down in Article 7 with a view to ensuring compliance with those principles, as well as the tangible means of action available to the Union's institutions.

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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 (15 October 2003)

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“Morality always makes better citizens than law”

Montesquieu *“Persian Letters”*

Introduction

Article 6(1) of the Treaty on European Union (the “Union Treaty”) lists the principles on which the Union is based: *“the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”*.

This enumeration of *common principles*, or to use the terminology of the draft Constitution, of *common values*,¹ puts the person at the very centre of the European integration project. It constitutes a hard core of defining features in which every Union citizen can recognise himself irrespective of the political or cultural differences linked to national identity.

Respect for these values and the concern to work together to promote them is one of the conditions for any State wishing to join the European Union. Article 49 of the Union Treaty speaks very clearly to States wishing to accede to the Union: *“Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union”*.

Article 7 of the Union Treaty, introduced by the Amsterdam Treaty and amended by the Nice Treaty, and Article 309 of the Treaty establishing the European Community (the “EC Treaty”), equip the Union institutions with the means of ensuring that all Member States respect the common values.

The entry into force of the Nice Treaty on 1 February 2003 was a defining moment for the Union's means of action here. By giving the Union the capacity to act preventively in the event of a clear threat of a serious breach of the common values, Nice greatly enhanced the operational character of the means already available under the Amsterdam Treaty, which allowed only remedial action after the serious breach had

already occurred.

In this respect, the amended Article 7 confers new powers on the Commission in its monitoring of fundamental rights in the Union and in the identification of potential risks. The Commission intends to exercise its new right in full and with a clear awareness of its responsibility.

The ultimate purpose of the means laid down is to penalise and remedy a serious and persistent breach of the common values. But first, and above all, they are intended to prevent such a situation arising by giving the Union the capacity to react as soon as a clear risk of a breach is identified in a Member State.

A serious and persistent breach of the common values by a Member State would radically shake the very foundations of the European Union. Given the current economic, social and political situation in the Member States, the European Union is without doubt one of the places in the world where democracy and fundamental rights are best protected, thanks largely to the domestic judicial systems and in particular the Constitutional Courts.

However, a number of factors of variable importance make it necessary to conduct a meticulous examination of issues linked to respect for democracy and fundamental rights in the Member States:

- 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.
- Developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms, are among the main objectives of Union and Community policies directed at countries outside the EU. In this connection, the Commission wishes to make clear, like the European Parliament in its report on the human rights situation in the European Union of 12 December 2002,² that the EU's internal and external policies must be coordinated and consistent if they are to be effective and credible.
- Members of the public and representatives of civil society who are most active in the protection of fundamental rights are unsure of the exact scope of Member States' obligations under Article 7 of the Union Treaty. The Commission notes in particular that the regular complaints that it receives from individuals show that Union citizens often regard Article 7 of the Union Treaty as a possible means of remedying the fundamental rights breaches that they have suffered.

In view of these various factors, the Commission believes that a debate on the protection and promotion of our common values within the meaning of the Union Treaty is vital.

The Commission wishes to contribute to this debate.

This Communication accordingly aims both to examine the conditions for activating the procedures of Article 7 and to identify the operational measures which, through concerted action by the Union institutions and cooperation with the Member States, could make for respect and promotion of the common values.

However, it does not address questions concerning the penalties that should be ordered by the Council against a Member State that is in default in accordance with Article 7(3) of the Union Treaty and Article 309 of the EC Treaty. The Commission considers that it would be well advised not to speculate on these questions. It prefers to approach Article 7 of the Union Treaty in a spirit of prevention of the situations to which it applies and in a concern to promote common values.

1. The conditions for applying article 7 of the Union Treaty

The innovation made at Nice was the addition of a prevention mechanism to the penalty mechanism provided for by the Amsterdam Treaty. Two mechanisms now coexist, with activation of the first not

required for the second: they are determination that there is a threat of a serious breach (Article 7(1)) and determination that there is a serious and persistent breach of the common values (Article 7(2)).

Article 7 of the Union Treaty is quite precise when it comes to the respective roles of the European Parliament, the Member States and the Commission in activating the two mechanisms. The Commission can only refer readers to the wording of Article 7, annexed to this Communication.

However, the Commission would wish to underline certain fundamental aspects of Article 7.

1.1. Mechanisms applicable in all areas of activity of the Member States

The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously.

The fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. 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, whatever the field in which the breach occurs.

Article 7 thus gives the Union a power of action that is very different from its power to ensure that Member States respect fundamental rights when implementing Union law. The courts have always held that Member States are obliged to respect fundamental rights as general principles of Community law. However, this obligation operates only in national situations where Community law applies.³ Unlike the mechanisms of Article 7 of the Union Treaty, compliance with this obligation is enforced by the Court of Justice, for example in infringement proceedings (Articles 226 and 227 of the EC Treaty) or in preliminary rulings (Article 234 of the EC Treaty).

1.2. Mechanisms allowing a political assessment by the Council

Article 7 gives a discretionary power to the Council both to determine that there is a clear threat of a serious breach and to determine that there is a serious and persistent breach, acting as appropriate on the basis of a proposal by the European Parliament, one third of the Member States or the Commission. However, the Council's hands are not tied either in determining that there is a clear risk or in determining that there is a serious or persistent breach.

Likewise, under Article 7(3), once the Council has determined the seriousness and persistence of the breach, it may decide to apply penalties, but is not obliged to do so.

These options underline the political nature of Article 7 of the Union Treaty, which leaves room for a diplomatic solution to the situation which would arise within the Union following identification of a serious and persistent breach of the common values.

However, the Council's discretionary power cannot evade democratic control by the European Parliament, in the form of the assent that it must give before the Council can act.

On the other hand, and despite the repeated suggestions made by the Commission in the run up to the Amsterdam and Nice Treaties, the Union Treaty does not give the European Court of Justice the power of judicial review of the decision determining that there is a serious and persistent breach of common values or a clear risk of such a breach. Under Article 46(e) of the Union Treaty, the Court reviews "*the purely procedural stipulations in Article 7*", which allows the relevant State's defence rights to be respected.

1.3. Involvement of independent persons

The involvement of “independent persons”, who can be invited to present a report on the situation in the relevant Member State within a reasonable time, as provided for by Article 7(1), could help to provide a full and objective picture of the situation on which the Council has to take a decision.

The Commission suggests that thought be given to the possibility for the Council of having a list of names of “independent persons” who could be consulted quickly if needed.

1.4. Essential conditions for applying Article 7 of the Union Treaty: the clear risk of a serious breach and the serious and persistent breach of the common values

For Article 7 of the Union Treaty to be applied, essential conditions must be met with regard to a breach or risk of a breach. These conditions are different for the prevention mechanism and for the penalty mechanism: the prevention mechanism can be activated where there is a "clear risk of a serious breach", whereas the penalty mechanism can be activated only if there is a "serious and persistent breach" of the common values.

A variety of international instruments can offer guidance for interpreting the concept of “serious and persistent” breach, which is taken over from public international law. Article 6 of the United Nations Charter reads: “*A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council*”. Likewise Article 8 of the Statute of the Council of Europe reads: “*Any member of the Council of Europe which has seriously violated Article 3⁴ may be suspended from its rights of representation ...*”.

However, the concept of risk introduced by the Nice Treaty to allow the Union to take preventive action is a specific creature of the Union legal system.

Before analysing these concepts, which distinguish between a situation of risk and that of a breach which has already taken place, we must first point out that the clarity of the risk of a serious breach and the persistence and seriousness of the breach determine the threshold for activating Article 7 of the Union Treaty. This threshold is much higher than in individual cases of breaches of fundamental rights such as established by the national courts, the European Court of Human Rights or, in the field of Community law, by the Court of Justice.

1.4.1. The threshold for activating Article 7 of the Union Treaty: breach of the common values themselves

It is obvious that, for the victim of a manifest breach of his rights, every breach is serious. In the light of the complaints it receives, the Commission has observed that a large and growing number of people consider that any breach of fundamental rights in the Member States could activate Article 7 and often suggest that the Commission start proceedings. It is therefore essential that this point be clarified.

The procedure laid down by Article 7 of the Union Treaty aims to remedy the breach through a comprehensive political approach. It is not designed to remedy individual breaches.

A combined reading of Articles 6(1) and 7 of the Union Treaty shows that there must be a breach of the common values themselves for the existence of a breach within the meaning of Article 7 to be established. The risk or breach identified must therefore go beyond specific situations and concern a more systematic problem. This is in fact the added value of this last-resort provision compared with the response to an individual breach.

This is not, of course, to say that there is a legal void. Individual fundamental rights breaches must be dealt with through domestic, European and international court procedures. The national courts, the Court of

Justice, in the field covered by Community law, and the European Court of Human Rights all have clearly defined and important roles to play here.

1.4.2. The clear risk of a serious breach

A risk of serious breach remains within the realm of the potential, though there is a qualification: the risk must be “clear”, excluding purely contingent risks from the scope of the prevention mechanism. A serious breach, on the other hand, requires the risk to have actually materialised. To take a hypothetical example, the adoption of legislation allowing procedural guarantees to be abolished in wartime is a clear risk; its actual use even in wartime would be a serious breach.

By introducing the concept of “clear risk”, Article 7 of the Union Treaty provides a means of sending a warning signal to an offending Member State before the risk materialises. It also places the institutions under an obligation to maintain constant surveillance, since the “clear risk” evolves in a known political, economic and social environment and following a period of whatever duration during which the first signs of, for instance, racist or xenophobic policies will have become visible.

1.4.3. Serious breach

The serious breach criterion is common to the prevention and the penalty mechanisms: the clear risk must be that of a “serious” breach and the breach itself when it occurs must be “serious”.

To determine the seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach.

Regarding the purpose of the breach, for instance, one might consider the social classes affected by the offending national measures. The analysis could be influenced by the fact that they are vulnerable, as in the case of national, ethnic or religious minorities or immigrants.

The result of the breach might concern any one or more of the principles referred to in Article 6. Even if it is enough for one of the common values to be violated or risk being violated for Article 7 to be activated, a simultaneous breach of several values could be evidence of the seriousness of the breach.

1.4.4. Persistent breach

This condition applies only to the activation of the penalty mechanism in respect of a breach which has already taken place.

By definition, for a breach to be persistent, it must last some time. But persistence can be expressed in a variety of manners.

A breach of the principles in Article 6 could come in the form of a piece of legislation or an administrative instrument. It might also take the form of a mere administrative or political practice of the authorities of the Member State. There might already have been complaints or court actions, in the Member State or internationally. Systematic repetition of individual breaches could provide stronger arguments for applying Article 7.

The fact that a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the European Court of Human Rights or by non judicial international bodies such as the Parliamentary Assembly of the Council of Europe or the United Nations Commission on Human Rights and has not demonstrated any intention of taking practical remedial action is a factor that could be taken into account.

2. Means of securing respect for and promotion of common values on the basis of article 7 of the Union Treaty

Apart from the fact that the Union policies themselves help to secure respect for and promotion of common values, the legal and political framework for the application of Article 7 as described above, based on prevention, requires practical operational measures to ensure thorough and effective monitoring of respect for and promotion of common values.

2.1. Introducing regular monitoring of respect for common values and developing independent expertise

Substantial efforts are already being made by the three institutions – European Parliament, Council and Commission. The European Parliament's annual report on the fundamental rights situation in the European Union is a major contribution to the elaboration of an exact diagnosis on the state of protection in the Member States and the Union.⁵

Many other sources of information are available, such as the reports of international organisations,⁶ NGO reports⁷ and the decisions of regional and international courts, among them the European Human Rights Court.⁸

The very large number of individual complaints addressed to the Commission or the European Parliament are another valuable source of information. In most cases the Commission has no grounds for investigating a breach of Community law and bringing an action against the Member State before the Court of Justice, as they concern situations for which the Member States alone are responsible without any link to Union law, but they do provide a basis for summing up the public's major concerns in fundamental rights matters.

In its 2000 report on the fundamental rights situation in the European Union,⁹ Parliament recommended establishing a network of authoritative fundamental rights experts to provide a high degree of expertise regarding each of the Union Member States. A pilot project was carried out involving the establishment in 2002 of a network by the European Commission.¹⁰ It is a good example of cooperation between the Commission and Parliament, because, although its aim is to provide input for the Commission's work, it also provides Parliament with essential information.

The network's main task is to prepare an annual report on the fundamental rights situation in the Union¹¹ giving a precise picture of the situation in each Member State. The published report reaches a wide audience.

The information should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty.

Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches.

Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.

It is important for the Member States to be involved in the exercise of evaluating and interpreting the results of the work of the network of independent experts. With a view to exchanging information and sharing experience, the Commission could organise regular meetings on the information gathered with the national bodies dealing with human rights.

The network of experts is independent of both the Commission and Parliament, and this independence must be preserved. Obviously neither the Commission nor Parliament is bound by the network's analyses.

The network is currently operating on the basis of a contract of limited duration between the Commission and a university centre.¹²

The role played by the current network of experts will be meaningful only if its continuity, or even permanent status, is ensured. To this end, the network's work needs to be provided with an appropriate legal basis.

Proper coordination would at all events be needed in order to avoid any risk of duplication with the European Monitoring Centre on Racism and Xenophobia,¹³ which for some years has played an important role in collecting data on racism and xenophobia in the EU's Member States through the network of national contact points (Raxen).

In the light of experience with the network, the situation could be reviewed in the medium term to see how best to continue.

2.2. Concertation between institutions and with the Member States

Activating the Article 7 mechanism would have repercussions for the Member State being criticised but also for the Union as a whole. The seriousness of the resulting situation will be such that a need for concerted action will probably be felt, especially with the European Parliament and the country concerned.

If the Commission is to make a proposal, it will seek, with due respect for its powers, close contacts with the two other parties involved at the various stages prior to presenting a proposal with a view to identifying situations likely to be caught by Article 7, to analysing them and to making initial informal contact with the authorities of the Member State concerned.

This Member State could be contacted for its opinion on the situation. These contacts would enable the Commission to present the facts of which the Member State is accused and allow that Member State to make its views known.

Any such informal contacts would not be mandatory and would in no way prejudice the decision which the Commission will ultimately have to take in all conscience.

The Commission considers that it would be helpful for the Member States to designate contact points that could operate as a network with the Commission and the European Parliament and provide support to the network of independent experts.

2.3. Cooperation with the Council of Europe's Commissioner for Human Rights

Established in 1999 as an independent institution within the Council of Europe,¹⁴ the Commissioner for Human Rights is a non judicial body responsible for promoting respect for and education in human rights, as derived from the Council of Europe's instruments. It submits an annual report to the Committee of Ministers and the Parliamentary Assembly.

As part of the cooperation between the Council of Europe and the European Community, contacts should be established between the Council of Europe's Commissioner and the Community institutions. The Commission is willing to establish such contacts with a view, for example, to mutual exchange of information.

2.4. Regular dialogue with civil society

Civil society plays a particularly important monitoring role, both in protecting and in promoting fundamental rights. It is often thanks to reports by non governmental organisations that public and institutional attention is drawn to breaches but also to good practices.

The Commission would therefore like to establish a regular dialogue with NGOs responsible for fundamental rights in the Union along the lines of what is done under its external policy.

2.5. Information and education for the public

Education projects and projects promoting fundamental rights are already in place, supported by the Community programmes Socrates, Youth and Leonardo da Vinci or by other education and culture programmes, as well as devised as part of the Commission's information policy on the Charter of Fundamental Rights.¹⁵

The Commission considers it would be worthwhile developing a public awareness and education policy with the Member States and international organisations, like the Council of Europe and NGOs active in the fundamental rights field, which have developed a body of practice.

Conclusion

The European Union is first and foremost a Union of values and of the rule of law. The conquest of these values is the result of our history. They are the hard core of the Union's identity and enable every citizen to identify with it.

The Commission is convinced that in this Union of values it will not be necessary to apply penalties pursuant to Article 7 of the Union Treaty and Article 309 of the EC Treaty.

But the preservation of the common values must be at the centre of every political consideration and every action of the Union, in order to promote peace and the well being of its peoples.

The Commission believes it is contributing to achievement of that objective by insisting on measures based on prevention, strict monitoring of the situation in the Member States, cooperation between the institutions and with the Member States and lastly, public information and education.

Annex

Article 7 of the Treaty on European Union

1. 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 Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the

Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community .

¹ Article I 2 of the draft Treaty establishing a Constitution for Europe.

² A5 0451/2002.

³ Judgment in Case 5/88 *Wachauf* [1989] ECR 2609 (given on 13.7.1989) and in Case C 260/89 *ERT* [1991] ECR I 2925 (given on 18.6.1991).

⁴ “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

⁵ Report on the fundamental rights situation in the European Union (2002) (2002/2013(INI)), Rapporteur: Mr Fodé Sylla, A5 0281/2003. See also, for 2001, report by Ms Swiebel (PE311.039/DEF) and, for 2000, report by Mr Cornillet (PE 302.216/DEF).

⁶ E.g. Resolutions of the UN General Assembly and reports by the Human Rights Commission, the Council of Europe, and its Commissioner for Human Rights in particular, and the OSCE.

⁷ E.g. documents and reports published by Amnesty International, Human Rights Watch and Fédération Internationale des Droits de l'Homme.

⁸ But also the International Court of Justice and, in future, the International Criminal Court.

⁹ 2000/2231(INI).

¹⁰ The invitation to tender for the network was issued in OJ S60 on 26 March 2002.

¹¹ http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm.

¹² The network is made up of high-level experts from each Member State, coordinated by Mr O. De Schutter from the Université Catholique de Louvain.

¹³ Regulation (EC) No 1035/97 of 2 June 1997, OJ L 151, 10.6.1997.

¹⁴ Resolution (99) 50 on the Council of Europe Commissioner for Human Rights adopted by the Committee of Ministers on 7 May 1999, at its 104th Session.

¹⁵ The Commission has approved the Community financial contribution for several projects selected after a call for proposals. They seek to inform the public about their fundamental rights, including the Charter.