Article 7 TEU

A Human Rights Defender or a Political Blind Alley?

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Abstract

The European Union is founded on common values such as democracy, the rule of law and respect for human rights. In order to become a Member State of the European Union the Copenhagen criteria need to be fulfilled. One important criterion of those is to introduce the human rights standard of the European Union. The required standard is set high and the European Union has received critique for demanding a higher level of protection for human rights of acceding states than what its own Member States uphold.

The control measure for safeguarding the common values of the European Union, such as the respect for human rights, is established through the political sanction mechanism stated in Article 7 of the Treaty on the European Union. However, the provision has never been applied on a Member State, possibly due to the lack of a responsible monitoring institution within the European Union, combined with the political impact on the applicability of the provision. As a result, the supposed defender of human rights in Article 7 of the Treaty on the European Union has lost its teeth and the European Union is lacking an effective mechanism for upholding the respect for human rights once a Member State has acceded.

*Keywords: European Union, Copenhagen criteria, common values, human rights, control measures, Article 7 TEU*
Preface

During the spring term of 2012, I was fortunate to be given the opportunity to combine the writing of this thesis with an internship at the Swedish Ministry for Foreign Affairs, within the department for International Law, Human Rights and Treaty Law. The Internship has given me a deeper understanding of international relations and foreign policy and developed my knowledge of various up to date human rights issues, which in turn has been very useful in the process of writing this thesis.

I would therefore like to take this opportunity to thank all of my colleagues at the Swedish Ministry for Foreign Affairs for providing me with helpful advice and information as well as all the instructive conversations about everything under the sun during this spring term. Furthermore, I would in particular like to thank Dr. Erik O. Wennerström, former Principal Legal Adviser on International Law at the Swedish Ministry for Foreign Affairs, for his kindness and inspiration when choosing the topic for my thesis. His talent to explain complicated legal issues in relation to ongoing human rights situations within the European Union gave me insight on the difficulties concerning Article 7 of the Treaty on the European Union which finally led to this thesis.

Moreover, I am thankful for the flexibility and support provided by my supervisor, Associate Professor Maria Bergström, when needed.

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Christine Nilsson
# Table of Contents

Abstract ................................................................................................................................. 3  
Preface ................................................................................................................................. 4  
Table of Contents ............................................................................................................... 5  
Table of Abbreviations ....................................................................................................... 6  
1 Introduction .................................................................................................................... 7        
1.1 Background .................................................................................................................. 7  
1.2 Purpose ....................................................................................................................... 8  
1.3 Delimitation ................................................................................................................. 8  
1.4 Method and Material .................................................................................................. 9  
1.5 Disposition .................................................................................................................. 10  
2 Human Rights Obligations before and after Accession to the European Union........... 11  
   2.1 Human Rights Obligations before Accession ....................................................... 11  
       2.1.1 The Copenhagen Criteria ............................................................................. 11  
       2.1.2 Common Foundation of Rights and Obligations .................................... 14  
   2.2 Human Rights Obligations after Accession ......................................................... 16  
       2.2.1 European Union Charter of Fundamental Rights ................................. 17  
       2.2.2 European Convention on Human Rights ................................................. 20  
       2.2.3 General Principles of EU Law ................................................................. 22  
   2.3 International Human Rights Obligations .............................................................. 23  
3 Control Measures for Upholding the Respect for Human Rights within the European  Union .......................................................................................................................... 26  
   3.1 Article 258 TFEU - Breach of EU Law ................................................................. 26  
       3.1.1 Various Types of Breaches ......................................................................... 27  
       3.1.2 Infringement Procedure ............................................................................. 29  
   3.2 Article 7 TEU - Political Sanctions ...................................................................... 32  
       3.2.1 Sanction Mechanism – Amsterdam Treaty .............................................. 32  
       3.2.2 Prevention Mechanism – Nice Treaty ....................................................... 35  
   3.3 International Human Rights Control Measures .................................................. 37  
4 The Effectiveness of Article 7 TEU .............................................................................. 39  
   4.1 Scrutiny and Surveillance Mandate ....................................................................... 39  
       4.1.1 The Failed Implementation of a Scrutiny and Surveillance Mandate ....... 41  
   4.2 Provisions for Applicability ............................................................................... 42  
       4.2.1 Political Impact on the Applicability ........................................................ 44  
   4.3 Concluding Observations ..................................................................................... 46  
       4.3.1 A Human Rights Defender or a Political Blind Alley? .......................... 47  
Bibliography .......................................................................................................................... 50
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>CFR</td>
<td>Charter of Fundamental Rights</td>
</tr>
<tr>
<td>CJEU</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>Commission</td>
<td>European Commission of the European Union</td>
</tr>
<tr>
<td>Council</td>
<td>Council of the European Union</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
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<td>FRA</td>
<td>European Union Agency for Fundamental Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
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<td>IHRL</td>
<td>International Human Rights Law</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>UN Charter</td>
<td>Charter of the United Nations</td>
</tr>
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</table>
1 Introduction

1.1 Background

In Article 2 of the Treaty on the European Union (hereafter “TEU”) it is stated that the European Union (hereafter “EU”) is founded on:

“[...] the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [my italics]. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

To become a Member State of the EU the applying state must meet a wide range of criteria, and among them some of the most important ones are based on the fulfilment of the common values, such as the respect for human rights, of the EU. Before acceding to the EU, an extensive scrutinizing of the applying state’s compliance with these values is made and the standard is set high. The importance of these common values has been realized through the genuine human rights legislation of the EU, such as the Charter of Fundamental Rights (hereafter “CFR”), the European Convention on Human Rights (hereafter “ECHR”) and the general principles of EU law. These rules and regulations should in turn be respected by the applying states once they have acceded.

Furthermore, in order to successfully achieve that the respect for human rights, is upheld even after accession, a proficient monitoring system is required as a guardian of the human rights obligations conferred upon the Member States of the EU. If a Member State fails to comply with the respect for human rights, a control measure which effectively corrects the damage has to get triggered. One such control measure is Article 7 TEU which provides the possibility of political sanctions if there is a clear risk of a serious breach, or an existence of a serious and persistent breach, of the values referred to in Article 2 TEU. However, this provision has never been applied on a Member State, indicating that it is hand-cuffed by the lack of a responsible monitoring institution and the sensitive nature of politics.
1.2 Purpose

The EU has been criticised for demanding a high level of standard when it comes to the level of protection of human rights during the accession of new Member States. At the same time the Member States of the EU have their own ongoing human rights issues and the EU has therefore been criticized for demanding a higher level of protection for human rights within the accession criteria, than what is required of the Member States themselves. For this reason, the thesis is investigating the existing control measures, within the EU, in order to make sure that the Member States, once acceded, continuously uphold the respect for human rights.

The purpose of this thesis is therefore in particular to examine the effectiveness of the control measure in Article 7 TEU, since this provision was established in order to ensure that the common values, such as the respect for human rights, of the EU is upheld within the Member States. Moreover, the possible reasons for its up until today non-application will be analyzed in order to answer the research question at issue of the thesis, namely if Article 7 TEU is a human rights defender or a political blind alley.

1.3 Delimitation

According to Article 2 TEU the EU is founded on a wide range of common values such as the principle of democracy, the rule of law and the respect for human rights. This thesis’ focus is on the principle of the respect for human rights and particularly on the protection of the rights of minorities, which is also specifically protected within Article 2 TEU. This delimitation and focus is chosen because human rights have an important role in the accession procedure to the EU. Moreover, both the earlier and ongoing debated situations within the Member States related to Article 7 TEU have mainly concerned human rights issues and in particular the protection of the rights of minorities.

When reviewing the human rights legislation within the EU, in Chapter 2, the recited sources are delimited to the treaties and conventions within the scope of the human rights obligations of the Member States of the EU. This delimitation is a result of that the purpose mainly is to create a general basis of knowledge of the scope of the human rights obligations within the EU, rather than reviewing a specific human right.
Secondary legislation and case law is therefore not recited if not necessary in order to contribute to the purpose of this part.

Moreover, concerning Chapter 3 and the selection of control measures for upholding the Member State’s respect for human rights, the possibility of using economical sanctions through the withdrawal of the European Commissions’ (hereafter “Commission”) aid funding has been left out. Unofficially this could be used as a political control measure when a Member State does not comply with its obligations according to EU law, but officially this is not stated in any provision of the EU Treaties. Therefore the focus of the thesis is delimited to the legal control measures provided for within the EU Treaties. However, the fact that there is an unofficial possibility to use economical sanctions as a political control measure supports the conclusions of the impact of political nature on the subject matter.

1.4 Method and Material

The thesis is based on the traditional legal method, using relevant legal sources such as treaties, conventions, directives, communications, case law, preparatory work, doctrine and articles, when nothing else is stated in the delimitation.

The primary human rights sources within the EU law sometimes refer to the terminology of “fundamental rights” and by turns “human rights”. In doctrine most commentators have found that these two definitions are interchangeable\(^1\) and therefore the term “human rights” will be used exclusively throughout the thesis.

In this thesis, when using the expression “human rights”, this refers to the rights that one has simply because one is a human and these rights are held by all human beings equally and inalienably.\(^2\) Furthermore, these human rights are established through the International Human Rights law (hereafter “IHRL”) and the Charter of the United Nations (hereafter “UN Charter”), as well as the EU law. However, since this is a thesis in EU law, also the additional human rights in the CFR specifically designed for the citizens of the EU, such as the right to free movement and residence, are included.

\(^1\) Williams [2010], p 112
\(^2\) Donnelly, p 21
Moreover, the thesis focuses on the human rights obligations and control measures within the EU, but in order to create a wider perspective and to compare the obligations and control measures within the EU with other international organizations, a brief exemplification of international human rights obligations and control measures will be provided by the end of Chapter 2 and 3.

Furthermore, since the subject matter in some parts is intertwined with political considerations, several examples of situations of human rights issues within both acceding states as well as Member States is used. Hereby the connection to politics is illustrated and the effectiveness of Article 7 TEU is exemplified, in particular with regard to the protection of minorities. For this purpose, even though the thesis aims at examining the issue of the effectiveness of Article 7 TEU from a legal perspective, the analysis is mostly relied on doctrine and articles published in legal journals.

1.5 Disposition

The thesis starts out in Chapter 2 explaining what human rights obligations that need to be fulfilled in order to become a Member State of the EU. Here, the Copenhagen criteria will be examined as well as examples of candidate and acceding states and their human rights issues. Furthermore, the human rights obligations that follow from a membership of the EU will be reviewed. This will constitute the ground for the understanding of what the phrase of “respect for human rights” means, which Article 2 TEU refers upon.

Thereafter, the control measures that are available within the EU in order to monitor and enforce Member States to uphold the respect for human rights is investigated in Chapter 3. The significance of the infringement procedure in Article 258 of the Treaty on the Functioning of the European Union (hereafter “TFEU”) as a way to ensure that the Member States uphold the respect for human rights will be examined and exemplified. However, particular attention will be paid to Article 7 TEU.

The latter provision will be further elaborated within Chapter 4, where the possible reasons for its non-application will be analyzed in order to be able to answer the research question at issue.
2 Human Rights Obligations before and after Accession to the European Union

Article 2 TEU states that the EU is founded on common values such as the principles of democracy, the rule of law and the respect for human rights, including the rights of persons belonging to minorities. These values are based on principles that are common to the Member States and on the human rights obligations within the EU, which are necessary for an applying state to comply with in order to become a Member State of the EU. This is a result of that human rights are a central part of the European integration and this chapter aims at constituting a ground for the understanding of what obligations the phrase of “respect for human rights” means, which Article 2 TEU refers upon. The first part reviews the meaning of the respect for human rights before the accession to the EU, while the second part contains a wider examination of the human rights obligations conferred upon a Member State once it has acceded.

2.1 Human Rights Obligations before Accession

Being a European country does not automatically ensure a membership in the EU. However, according to Article 49 TEU any European state which respect the values referred to in Article 2 TEU and which is committed to promote them, can apply for a membership in the EU. Furthermore, in order to become a Member State there are several criteria which the applying state need to fulfil. Among them, the respect for human rights plays an important role in the accession process.

2.1.1 The Copenhagen Criteria

The meaning of the accession requirements in Article 49 TEU was developed during the European Council (hereafter “Council”) meeting in Copenhagen in 1993. The EU then stated that an accession of a new Member State could take place as soon as the applying state was able to fulfil the obligations of a membership by satisfying one economic and one political condition. These criteria are often referred to as the Copenhagen criteria.\(^3\)

\(^3\) European Council in Copenhagen, Conclusions of the Presidency, [1993] SN-180/1 rev 1, p 12
rights and the protection of minorities, was due to the upcoming enlargement process of the EU by the central and eastern European states, which did not share the same history of democratic values and protection of human rights as the founding Member States of the EU.⁴

The economical criterion is that the applying state needs to have a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU. However, it is clear that as long as there is a market economy within the acceding state, the central test is not the economic development, but the political criterion. The political criterion requires that the applying state has achieved stability of institutions guaranteeing democracy, the rule of law, the respect for human rights and protection of minorities.⁵

The latter criterion focuses on the democratisation of the applying state’s political system, including the introduction of new laws on human rights. Furthermore, within the human rights area the political criterion is focused on observance of human rights law, civil, political, economic and social rights, as well as minority and cultural rights.⁶ When the EU is examining whether an applying state fulfils these criterion it first of all assesses what international human rights treaties the applying state has ratified. This constitutes a ground for the accession negotiation when the applying state turns into a candidate state and points out what needs to be achieved before eventually entering the EU.⁷

Turkey’s long-termed accession towards the EU has been focused on the political criterion of the Copenhagen criteria. One of the main obstacles to Turkey’s membership has been the status on human rights. Therefore, it was with a liberal interpretation of human rights that Turkey was able to receive a candidate status in 1999. Since then, several constitutional reform packages have been adopted in order to satisfy the intended accession negotiations with the EU.⁸ In 2005 the accession negotiations with Turkey were started, but on the condition that in the case of a serious and persistent breach of the principles of democracy, rule of law or human rights, the Commission

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⁴ Wennerström, p 163
⁵ European Council in Copenhagen, Conclusions of the Presidency, [1993] SN-180/1 rev 1, p 12
⁶ Chalmers, p 263
⁷ Faucompre and Konings, p 162
⁸ Toktas and Aras, p 697
can, on its own initiative or on the request of one of the Member States, propose a suspension of the accession negotiations and put forward the conditions for an eventual continuation.9

The main human rights attention in the negotiations with Turkey is brought by the protection of minorities and in relation to that, the freedom of expression. The Penalty Code in Turkey contains articles that offer a wide range of interpretations in order to protect the state rather than its citizens. There is especially an “insulting Turkishness-clause” which aims at protecting the state against “insults” and this clause have been used against minorities as well as journalists. As an effect of the EU accession negotiations, this clause has been amended which has resulted in a significant decrease of charges against citizens expressing their thoughts, for example on the issues of the Armenians and the Kurds.10 Furthermore, it has become more widespread to broadcast debates on minority rights and the issues about the Armenians and the Kurds, but because of the risk for legal interventions by the state, media sometimes feel enforced to apply self-censorship.11

Turkey also defines minorities entirely based on their religious belief and exclude minorities based on national, ethnic or linguistic grounds as is otherwise provided in all international declarations and conventions on human rights. For that reason, Turkey has made reservations to several conventions.12 Turkey’s official position is that Armenians, Greeks and Jews are accepted as minorities, but not Assyrians for example. Moreover, only non-Muslim groups are recognized as minorities and thereby granted the right to use their own language, the right of political and civil equality, the right to establish religious, educational and social welfare institutions, and the right to freedom of religion, travel and migration.13 Furthermore, even if it is not prohibited to publish information in other languages than Turkish, publications and organizations which by the Turkish authorities could be seen as an “insult of the Turkishness” could be punished under the Turkish Penalty Code, if the subject matter of the publication or the

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9 Negotiating Framework for Turkey of 3 October 2005 – Principles Governing the Negotiations [2005], para 5
10 Report on the Human Rights situation in Turkey, Swedish Ministry for Foreign Affairs [2011], p 8
11 Ibid
12 Ibid, p 16
13 Toktas and Aras, p 700
organization does not fall within the Turkish definition of minorities. This clearly constitutes a violation of the protection of minorities.\(^\text{14}\)

Moreover, in addition to non-Muslim minorities, Turkey has an Alewite minority in contrast to the Sunnite majority of the Turkish population. Several charges have been brought against Turkey before the European Court of Human Rights (hereafter “ECtHR”) because of the Governments’ treatment of the Alewite citizens. These cases mainly relate to the fact that the belonging of religion is given on the Turkish identity cards, which together with the mandatory nature of religion classes in the national educational system, is seen by the Alewites as a violation of the principle of secularism and equal treatment of the state’s citizens.\(^\text{15}\)

With respect to the Copenhagen political criterion, progress has been made in Turkey within the area of some political and civil rights and in the area of economic and social rights. The EU specifically defines the protection of minorities in the Copenhagen political criterion as a moral condition for membership and holds that there is a certain standard within the EU. However, much still remains to be done with respect to the protection of minorities and the freedom of expression, among other human rights, before the accession negotiations with Turkey will be taken to the next level.\(^\text{16}\)

2.1.2 Common Foundation of Rights and Obligations

When the EU finds that a candidate state is on its way to achieve the required levels of standard concerning the economical and political criteria of the Copenhagen criteria, an accession treaty according to Article 49 TEU will be entered between the EU and the, by that time, accessioning state. The accession treaty includes all the remaining measures that need to be achieved by the accessioning state before the accession can be completed. The accession treaty is structured based on the EU’s *acquis communautaire*. This French term stands for what has been agreed upon within the EU and constitutes the body of the EU law, including all EU legislation and the European Court of Justice’s (hereafter “CJEU”) case law.\(^\text{17}\)

\(^{14}\) Report on the Human Rights situation in Turkey, Swedish Ministry for Foreign Affairs [2011], p 16

\(^{15}\) Toktas and Aras, p 705

\(^{16}\) Faucompret and Konings, p 170

\(^{17}\) Wennerström, p 164
This common foundation of rights and obligations within the accession treaty contains several chapters with all the different areas essential for the EU membership. One of the chapters in the accession treaty establishes the standards for the judiciary and human rights within the EU. This chapter can be seen as a detailed version of the Copenhagen political criterion which requires the acceding state to ensure that its political system accurately fulfils all the principles and common values of the EU.\textsuperscript{18}

During the accession process the Commission monitors and produces screening reports of the acceding state’s achievements regarding the requirements in the different \textit{acquis} chapters. Croatia is one of the most recent acceding states to the EU, and in the EU’s latest screening report on Croatia, one of the Commissions’ focuses is on minority rights. The minorities of Serbs and Roma are facing particular difficulties in Croatia. Most of the Roma remain excluded from the mainstream of the Croatian society, the unemployment rate is widespread and many are illiterate.\textsuperscript{19} Through this monitoring and regular reporting the Commission annually reviews the progress of the acceding state in the different fields, such as minority rights.\textsuperscript{20} However, in the case of Croatia’s accession to the EU, the Commission has considered that Croatia fully meets the required standard and will be ready for a membership by 1 July 2013. However, the membership requires a continuing respect for the values on which the EU is founded upon, as well as the commitment to promote them.\textsuperscript{21}

Moreover, a new phenomenon in the enlargement process of the EU is the fact the Commission implements a monitoring instrument in the accession treaties, the so called Cooperation and Verification Mechanism. This mechanism gives the Commission the right to continue to closely monitor the acceding state’s fulfilment of all the commitments undertaken in the accession treaty. This includes those commitments which must be achieved before the date of accession, and its continued preparations to comply with the responsibilities upon accession.\textsuperscript{22} The Cooperation and Verification Mechanism is a result from the accession of Bulgaria and Romania in 2007. When Bulgaria and Romania acceded to the EU they still had to ensure that the Copenhagen

\textsuperscript{18} Screening Report of Croatia of 27 June 2007 – Chapter 23, Judiciary and Fundamental Rights [2007], p 2
\textsuperscript{19} Ibid, p 26
\textsuperscript{20} Hoffmeister, p 93
\textsuperscript{21} Treaty of Accession of Croatia [2012] OJ L-112/10, para 10
\textsuperscript{22} Ibid, para 11
political criterion of rule of law was fully observed in their national systems. In order for the Commission to be able to follow this progress a Cooperation and Verification Mechanism was established in the accession treaty which required a report every six month evaluating the process as well as benchmarking and flagging the most pressing issues that had to be addressed before the next report. A similarly mechanism has never been used before during the accession procedures.\textsuperscript{23}

Furthermore, in the light of the phrase of “respect of human rights” referred to in Article 2 TEU, an ambition of the EU to create a standard of the level of the human rights protection within the acceding states is indicated. However, it is debated whether the EU in relation to the Copenhagen political criterion is demanding a higher standard, on for example the protection of minorities, from the acceding states, while they remain unwilling to meet these standards with regard to their own minority groups. This criticism is based on the fact that the Member States of the EU have minority issues of their own.\textsuperscript{24} For example, Germany does not recognize its Turkish population as a minority, claiming that they are new in the country and are mainly represented by guest workers. Luxembourg holds that it does not have any minorities and France have not signed the framework convention on minority rights. Furthermore, Slovakia and Italy, among others, have been criticized for its discrimination against Roma. From this point of view it can be seen as if the EU prefers to create a moral concern for the improvement of minority rights within the Member States, at the same time as the EU requires a high level of protection of minorities from the acceding states.\textsuperscript{25} Therefore, when referring to the “respect for human rights” before accession to the EU, the meaning seems to be rather vague, but as the Copenhagen criteria states, guidance should be drawn from the human rights obligations that will be conferred upon the acceding states once they become Member States of the EU.

2.2 Human Rights Obligations after Accession

According to Article 6(1) TEU the EU is founded on the principles of liberty, respect for human rights, fundamental freedoms and the rule of law, as stated in the CFR. Furthermore, Article 6(2) TEU also assures that the EU should respect fundamental

\textsuperscript{23} Vachudova and Spendzharova, p 2
\textsuperscript{24} Hillion, p 716
\textsuperscript{25} Toktas and Aras, p 706
rights as guaranteed by the ECHR. Finally, Article 6(3) states that these fundamental rights have their origin in the constitutional traditions of the Member States, and that they therefore constitute general principles of the EU law. As listed in Article 6 TEU, there are three primary sources of human rights within the EU legal order; the CFR, the ECHR and the general principles of EU law.

2.2.1 European Union Charter of Fundamental Rights

The original EU Treaties did not express any provision concerning the protection of human rights, but were rather focused on economic integration. Human rights were later introduced in the legal order by the CJEU.\textsuperscript{26} As a result, the CFR was first drawn up in 1999-2000 with the motive to show that the EU was doing achievements in the field of human rights. From many of the Member States the enthusiasm was not very high and a common charter for human rights was by many seen as a duplication of the already existing ECHR. Therefore, the CFR should only work as recommendations within the human rights field, and was drafted with the intention not to be legally binding for the Member States.\textsuperscript{27}

Although the clear intentions of the CFR, as the EU developed more competence areas and the European integration increased, it began to seem important to have a human rights catalogue which could be directly applicable to the situations faced within the EU. The arguments were that it was necessary to strengthen the protection of the citizens of the EU against the EU institutions and the latter’s influence on national level.\textsuperscript{28} If the CFR was legally binding this would also give the EU a stronger democratic feature. This was something that was seen as important in relation to the continued enlargement process of the EU. Several of these new Member States lacked a long termed democratic tradition, and for those the CFR would be a helpful support in building an unequivocal culture based on respect for human rights, democracy and the rule of law. However, to be able to achieve this it was necessary to have a human rights catalogue that was legally binding, since recommendations would not be sufficient enough to protect the citizens of EU in concrete situations of human rights violations.\textsuperscript{29}

\textsuperscript{26} Craig, p 194
\textsuperscript{27} Bernitz, p 74
\textsuperscript{28} Ibid, p 75
\textsuperscript{29} Bernitz, p 75
The CFR became legally binding when the Lisbon Treaty came into force in December 2009. The Lisbon Treaty did not incorporate the content of the CFR into the other EU Treaties, but through the new Article 6(1) TEU the CFR was given the same legal status as the EU Treaties themselves. However, concerning the discussion of whether the CFR was necessary or a doublet of the ECHR, it has later been proven that even if the CFR in many ways establishes the same human rights as the ECHR and also gives these rights the same level of protection, it is still designed in a different way in order to meet the special needs of human rights protection within the EU.

An example of these human rights are the ones related to the free movement and residence of the citizen of the EU, as will be illustrated later on, and which do not correspond to the rights in the ECHR. The CFR is also designed in a more modern way, as well as it in some areas has a more ambitious level of protection than the ECHR. In Article 52 CFR it is stated that in so far as the CFR contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of these rights should be the same as those laid down by the ECHR. However, it has also been stated that there is nothing preventing the CFR from providing a more extensive protection than the ECHR. The latter could be seen as an intention of an even more ambitious protection than the ECHR. Furthermore, it also means that in the case of competition between the CFR and the ECHR, the highest level of protection of human rights will be the one applicable, in order to make sure that the most advantageous protection given for the individual is the one that is used as a legal basis.

The first sentence of the CFR states that the CFR is founded in the name of the peoples of Europe. Moreover, the human rights catalogue is divided into seven chapters where the common and indivisible universal values on which the EU is founded are established. The chapters cover areas of human dignity, freedom, equality, solidarity, citizens’ rights, justice and the final chapter establishes the general provisions. Furthermore, a non-discrimination principle is established through Article 21(1) CFR, which prohibits any discrimination based on grounds such as sex, age, religion or belief, language, political or any other opinion, or the membership of a national minority.

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30 Craig and De Búrca p 394
31 Bernitz, p 75
32 Ibid
33 Craig, p 205
provision is based on Article 14 ECHR which provides almost similar non-discrimination grounds.

Any legal system with a catalogue on human rights has to decide how far those protections are to apply. The reach of the CFR’s scope is in first hand vertical according to Article 51(1) CFR, which states that the provisions of the CFR are addressed to the institutions, bodies, offices and agencies of the EU with regard to the principle of subsidiarity and furthermore to the Member States only when they are implementing EU law.\(^{34}\) The view that the rights of the CFR should only apply vertically is based on a distinction between the public and private sphere which clarifies that the purpose of a human rights protection is to protect the individual against the state. The legal relation between individuals are on the other hand seen as a part of private autonomy, with the consequence that the choices individuals make about how to live their lives and deal with each other should not be up to the state to decide.\(^{35}\) However, the CJEU is also an EU institution which is bound to respect the rights, observe the principles and promote the application of the CFR in accordance with its respective powers as stated in Article 51(1) CFR. It can therefore be argued that this obligation is applicable as well when an individual seeks to rely on a human right within the CFR against another private individual, given that the subject matter falls within the scope of EU law. In this case the CFR would also be given an indirectly horizontal applicability.\(^{36}\)

Concerning the CFR’s applicability when it comes to the Member States, the formulation of “only when implementing EU law” was clarified in the explanatory memorandum that was approved when the CFR was re-issued in 2007, at the time when the Lisbon Treaty was signed. The memorandum stated that it followed from the CJEU’s case law that the obligation to respect the human rights within the CFR is binding on the Member States when they act within the scope of EU law. Furthermore, it was added that the human rights of the CFR also are binding to the Member States when they implement EU regulations.\(^{37}\) However, it could be held in the light of this memorandum that the Member States are bound by the human rights within the CFR when they act within the scope of EU law, and that the phrase “only when

\(^{34}\) Ibid, p 207
\(^{35}\) Ibid, p 208
\(^{36}\) Ibid, p 207
\(^{37}\) Explanations related to the Charter of Fundamental Rights [2007] OJ C-303/32
implementing EU law” is intended to contain the various senses in which Member States could be said to be acting within the scope of EU law.\textsuperscript{38}

Furthermore, Article 51(2) CFR states that the CFR does not extend the application of EU law beyond the EU’s already existing competence in the field, which results in that the CFR does not establish any new power, tasks or modify the already existing ones. From this it can be read that it is not possible for the EU legislative institutions to use the CFR-provisions as a legal base for new legislation.\textsuperscript{39}

\subsection*{2.2.2 European Convention on Human Rights}

After the Second World War, in an attempt to unify Europe, the Council of Europe was formed. In 1950 this international organization adopted the ECHR. The main reason for the ECHR was the need to set up the requirements of a membership in the Council of Europe.\textsuperscript{40} Furthermore, the ECHR provided a safety against communism which had spread from the Soviet Union into other European states after the Second World War and was moreover a reaction to the serious human rights violations that Europe had witnessed during the wartime.\textsuperscript{41}

The ECHR came into force in 1953 and is today ratified by all the forty-seven Member States of the Council of Europe. From the beginning the Council of Europe had only ten Member States, but the number of contracting parties increased greatly after the fall of the Berlin Wall in 1989 and the disintegration of the Socialist Federal Republic of Yugoslavia in the early 1990’s. The only European countries that are not members of the Council of Europe are Kazakhstan, Belarus and the Vatican.\textsuperscript{42}

For a long time it has been debated whether the EU should accede to the ECHR and this question was finally settled by the Lisbon Treaty’s amendment to Article 6(2) TEU, which states that the EU “shall” accede to the ECHR.\textsuperscript{43} A number of justifications for this can be found in doctrine. Firstly, the activity of the EU has expanded and increasingly moved into fields where human rights are frequently concerned, as for

\begin{itemize}
  \item \textsuperscript{38} Craig, p 212
  \item \textsuperscript{39} Chalmers, p 248
  \item \textsuperscript{40} Statue of the Council of Europe [1949] Council of Europe Treaty Series No. 1, Article 3
  \item \textsuperscript{41} Harris, p 1
  \item \textsuperscript{42} Ibid, p 2
  \item \textsuperscript{43} Craig and De Búrca, p 399
\end{itemize}
example in asylum, policing and judicial cooperation in criminal justice. Even if the EU has developed its own human rights catalogue through the CFR, there is still a concern that the EU might get things wrong. Therefore, the CFR should be interpreted in the light of the ECHR, where the latter in this way acts as a safeguard and controls if the internal checks of the EU have failed, or where a judgement reached by the CJEU does not seem to be justifiable.\textsuperscript{44} Secondly, the debate of the EU’s accession to the ECHR has mainly concerned the strengthening of human rights protection within the EU and the desire to make human rights a central mission on the EU’s agenda. For that purpose, when the EU will become a party to the ECHR, the EU will also become an even more central human rights defender in Europe.\textsuperscript{45}

The obligations of the EU under the ECHR are based on the \textit{Bosphorus} case. This is the most important ruling of the ECtHR concerning its jurisdiction over EU acts. The case was brought by the Turkish company \textit{Bosphorus} against Ireland for the impounding of two aircrafts, without any compensation, which the applicant’s company had leased from the national airline of the former Yugoslavia. At that time there were UN sanctions against the Governments of Serbia and Montenegro and the Irish authorities had impounded the aircrafts in reliance on an EU regulation. \textit{Bosphorus} argued that this was contradictory to EU law as it violated the right of freedom to conduct a business, but the CJEU ruled that it did not. \textit{Bosphorus} then brought the Irish Government before the ECtHR and argued that the impounding of the aircrafts had violated the right to property.\textsuperscript{46}

The ECtHR held that there had been a violation committed by Ireland due to the state’s compliance with a binding EU regulation. Furthermore, the EU regulation was the real source for the breach of the right to property. The ECtHR went on stating that the question was whether the important general interest of compliance with EU obligations could justify interference by the state on the individuals’ guaranteed human rights.\textsuperscript{47} The outcome was that \textit{pending} the EU’s accession to the ECHR, when an EU act leaves no discretion in implementation to the Member State, the state will be presumed to have acted in compliance with the ECHR as long as the EU’s control measures provides an

\textsuperscript{44} Chalmers, p 259
\textsuperscript{45} Ibid
\textsuperscript{46} Craig and De Búrca, p 401
\textsuperscript{47} C-84/95 \textit{Bosphorus Hava Yolları Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others} [1996] ECR I-3953, para 21
equivalent level of protection for human rights as to that provided by the ECHR.\textsuperscript{48} However, when an EU act leaves discretion in implementation to the Member State or if it is a by the Member State freely entered international agreement, a case can be brought before the ECtHR against the implementing state which remains responsible for any violation of ECHR.\textsuperscript{49} Moreover, a question that still remains is whether the ECtHR, also after the EU’s accession to the ECHR, will continue to apply the deferential Bosphorus approach and allowing the EU to benefit from a presumption of compatibility of its acts with the ECHR.\textsuperscript{50}

2.2.3 General Principles of EU Law

In the beginning of the European integration, the CJEU resisted to invoke rights and principles recognized by national law into the EU legal order, even if some fundamental principles were common to the legal systems of most of the Member States. Later on, when the doctrine of supremacy of EU law was implemented through Costa v ENEL\textsuperscript{51}, a discussion within the Commission and the European Parliament (hereafter “EP”) was started about the risk that human rights protected under the constitutions of the Member States could be undermined. Therefore the President of the Commission started to argue for an understanding of human rights as part of the “general principles” of EU law.\textsuperscript{52}

In Strauder the CJEU for the first time accepted an argumentation based on the right to human dignity and thereby affirmed the recognition of general principles of EU law, including the protection of the respect for human rights.\textsuperscript{53} This judgement was later on elaborated within Internationale Handelsgesellschaft when the CJEU held that the respect for human rights was an integral part of the general principles of EU law which the CJEU had to protect. Furthermore, the protection of such human rights must be ensured within the framework of the structure and objectives of the EU.\textsuperscript{54}

\textsuperscript{48} Bosphorus (n45), para 26
\textsuperscript{49} Craig and De Búrca, p 403
\textsuperscript{50} Ibid, p 404
\textsuperscript{51} C-6/64 Flaminio Costa v ENEL [1964] ECR 585
\textsuperscript{52} Craig and De Búrca, p 364
\textsuperscript{53} C-29/69 Erich Stauder v City of Ulm [1969] ECR I-419, para 7
\textsuperscript{54} C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR I-1125, para 4
The development of the general principles of human rights within the EU law continued through *Nold v. Commission*. In this case the CJEU stated that, in order to safeguard the general principles of human rights, the CJEU was bound to draw inspiration from constitutional traditions common to all the Member States. Moreover, the CJEU could for those reasons not uphold measures, which were incompatible with human rights recognized and protected by the constitutions of those Member States.\(^{55}\) This development by the CJEU is also incorporated within Article 6(3) TEU, which states that human rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitutes general principles of the EU law.

However, a question that arises when the common constitutional traditions are cited as a source of human rights obligations within the EU, is whether the CJEU should recognize only those rights shared by all, or most, Member States or whether recognition as a human right by even one Member State should be enough to qualify for the CJEU to treat such a right as part of the general principles of EU law.\(^{56}\) Guidance should probably be drawn from both the international human rights obligations and the fact that the principles of EU law have its origin in the traditions *common* to the Member States. If only one Member State should consider a right as a human right, it is probably not *common* to the Member States of the EU.

### 2.3 International Human Rights Obligations

For the Member States of the EU the main focus is on the European integration, which sometimes gives the impression that the EU is the centre of the world. However, since Europe only constitutes a modest part of the world’s states, the EU as well as its Member States unilaterally have to cooperate within different international fora, such as the United Nations (hereafter “UN”), within the human rights field, which also bring on international human rights obligations. For example, Article 103 of the Charter of the United Nations (hereafter “UN Charter”) states that if an obligation under the UN Charter would conflict with a obligation under any other international agreement, the obligation under the UN Charter prevail. As a result from this, Article 351 TFEU establishes that an international obligation agreed upon before 1 January 1958, or for

\(^{56}\) Craig and De Búrca, p 370
acceding states before their accession, should not be affected by the obligations of the EU Treaties.

The application of IHRL raises the possibility of the EU to protect human rights which are currently not protected by the EU’s human rights legal order, or may require the EU to protect a human right in a more extensive way.\(^\text{57}\) Moreover, in this sense, the Member States themselves are obliged to observe their duties under the UN Charter given both their prior membership of the UN according to Article 351 TFEU and due to the supremacy of international law over EU law as stated in Article 103 the UN Charter.

However, the CJEU has only occasionally referred to other IHRL-instruments as a source of law when considering the scope of the human rights within the EU legal order, but it is not unusual that the CJEU uses IHRL-treaties as guidelines. For example the CJEU has used conventions from the International Labour Organization in a number of EU labour law cases, as well as different UN conventions.\(^\text{58}\)

One judgement by the CJEU, which has drawn a lot of attention, is *Kadi and Al Barakaat*. This case concerned a UN Security Council resolution, adopted after the 11 September 2001 attacks on the US, which the EU had implemented. The resolution required all states to freeze the funds and other financial resources of any person or entity controlled directly or indirectly by the Taliban, or associated with Osama bin Laden or the Al-Qaeda network. The applicants, *Kadi* and *Al Barakaat*, who had got their funds frozen, argued that the EU regulation implementing the UN resolution was a violation of their human rights to use their property and the right to a fair hearing guaranteed by EU law. In this case the CJEU held that the EU regulation of implementing the UN resolution was a violation of the applicants’ human rights. The CJEU was accurate to state that the EU is obliged to follow international law and to provide the same level of protection for human rights as is provided by the UN, but in this case it was the EU legislation which contained a higher level of human rights protection and therefore the CJEU stated that the EU had to uphold this level of protection even though international law is supreme.\(^\text{59}\)

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57 Ahmed and Butler, p 772
58 Craig and De Búrca, p 368
59 C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, para 285
Seemingly, the EU has a genuine human rights legal order that the Member States need to comply with. The international human rights obligations do also constitute a part of this legal order. From this, the conclusion can be drawn that the “respect for human rights” referred to in Article 2 TEU includes all the human rights obligations within EU law and the IHRL.
3 Control Measures for Upholding the Respect for Human Rights within the European Union

The EU legal order contains a wide range of human rights obligations and an acceding state has a high level of human rights protection to comply with before an accession to the EU can be approved. However, the EU has got critique for demanding a higher level of protection for the respect for human rights from the acceding states than its own Member States.\(^6\) Therefore the question concerning what control measures the EU has to monitor the compliance of the human rights obligations conferred upon the Member States arise. This chapter will review the two legally stated control measures within the EU Treaties. The first part examining the more general control measure used when a Member State does not comply with EU law, human rights obligations or not, while the second part focuses on the control measure especially designed in order to control the Member States’ compliance with the common values, such as human rights, referred to in Article 2 TEU.

3.1 Article 258 TFEU - Breach of EU Law

According to Article 17(1) TEU the Commission is responsible for guarding the EU Treaties and to oversee the application and implementation of EU law within the Member States. When a Member State in some way acts against EU law, the Commission can bring enforcement proceedings against that Member State in order to make it comply with the legal obligations of the EU membership.\(^6\) This infringement procedure is established in Article 258 TFEU and states that if the Commission considers that a Member State has failed to fulfil an obligation under the EU Treaties, it can deliver a reasoned opinion on the matter after giving the state concerned the opportunity to explain its position. If the Member State concerned does not comply with the opinion within the given period of time, the Commission may bring the matter before the CJEU.

\(^6\) See e.g. Hillion, p 716, Toktas and Aras, p 706
\(^6\) Craig and De Búrca, p 408
Through the Lisbon Treaty an important change was made in Article 258 TFEU. The wording “obligation under this Treaty” was replaced with “obligations under the Treaties”, which highlights the fact that infringement proceedings can be applied on violations of obligations under both the TEU and the TFEU. The infringement procedure could be called a policing procedure to secure the rule of EU law within the EU and the mission of Article 258 TFEU is therefore to consider whether the observed level of non-compliance is considered as a serious problem for the EU community.

Furthermore, the system of having an international court as a control measure to make sure that the contracting parties comply with international agreements is a common mechanism used by several international cooperation organisations like the UN and the Council of Europe which both have their permanent courts; International Court of Justice and the ECtHR. The gain of having a common court for all the contracting states is that it functions as a political neutral institution when solving disputes. According to international law it is voluntary for the contracting states to submit to an international court’s jurisdiction, but both the ECtHR and the CJEU differ from this since they have a legally binding jurisdiction once a state accedes to the ECHR or becomes a Member State of the EU. As a result from this, the Member States of the EU cannot choose to bring other measures against another Member State, which breaches against the EU Treaties, than to bring a procedure before the CJEU. This is also regulated in Article 259 TFEU which states that a Member State can bring an infringement procedure before the CJEU against another Member State, if the Commission has given its reasoned opinion on the matter. However, this proceeding is quite unusual since it can be seen as an unfriendly act and therefore most of the Member States prefer that the Commission raises the infringement procedures.

3.1.1 Various Types of Breaches

The description in Article 258 TFEU is a very general provision stating that the Commission simply must consider if a Member State has “failed to fulfil an obligation under the EU Treaties”. This may include actions as well as omissions, failure to

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62 Ibid, p 409
63 Chalmers, p 319
64 Gröning and Zetterquist, p 238
65 Ibid
66 Ibid, p 240
implement directives, breaches of specific treaty provisions or other secondary legislation, or breaches of any rule or standard which is an effective part of EU law. 67

Since the infringement procedure is formally brought against the state and not the government, the first thing to find out is what acts to be considered as state actions and which capacities and responsibilities that is expected from the state. 68 Regarding the definition of state actions, all the acts and omissions of the state agencies, even if they are constitutionally independent, is under the responsibility of the state. Furthermore, the definition of a state agency contains all institutions of the government on national, regional or local level. Also agencies that are not formally a part of the government but are subject to public authority, or private companies which the government have considerable influence over, are covered by the same definition. By this wide definition, for the purpose of securing the rule of EU law, the state should not be able to avoid its responsibilities by outsourcing state duties. 69

One type of breach of EU law is the systemic and persistent breaches of EU law. The Commission has used this as a basis for an infringement procedure when for example monitoring an ongoing implementation of a particular set of laws in a Member State. 70

One situation where this has recently been applied is in the case of Hungary. By the end of 2010 and the beginning of 2011, Hungary implemented a new media law of which the content was debated intensively throughout Europe because of its threat to the freedom of expression. In January 2011, the Commission decided to bring an infringement procedure against this law and forced the Hungarian Government to amend certain parts of it. At the same time a proposal for the new Hungarian constitution had been drafted, and when it entered into force in January 2012 it became even more controversial. 71

The new Hungarian constitution is based on conservative, national and largely Christian ideals and values. For example, Article 2 in the new constitution states that the life of a foetus is protected from the moment of conception, which according to doctrine could

67 Craig and De Búrca, p 423
68 Chalmers, p 327
69 Ibid
70 Craig and De Búrca, p 427
71 Nergelius, p 1
indicate, that abortions sometimes could be deemed to be illegal.\(^{72}\) Another issue concerns the criteria, of churches and new religious communities to be acknowledged, since them according to the new Hungarian constitution must be approved by a two-third parliamentary majority, in each individual case, in order to be recognized. This regulation is a clear violation of the right to freedom of religion and association assured in Articles 10 and 12 CFR, and Articles 9 and 11 ECHR.\(^{73}\) As a result, the Commission once again brought an infringement procedure against Hungary in January 2012, this time on the basis of the new constitution.\(^{74}\)

### 3.1.2 Infringement Procedure

As stated above, when a Member State is not complying with the human rights obligations, as exemplified within the case of Hungary, an infringement procedure according to Article 258 TFEU will be initiated. The infringement procedure is comprised by three stages and the average procedure takes approximately twenty-three months. Firstly, there is the *informal* letter were the Commission notifies the Member State of why it suspects that an infringement has taken place. The Commission may have discovered an infringement through its own initiated investigations or because it has received a complaint from a third party.\(^{75}\) At this stage the Member State concerned is given the opportunity to explain its position and to reach a compromise with the Commission. Approximately sixty-eight per cent of the complaints are being closed at this first informal stage.\(^{76}\)

Secondly, there is a letter of *formal* notice since the Commission is only allowed to issue a reasoned opinion after the Member State concerned has had the opportunity to explain its position. Usually the Member State is given two months to reply, except in cases of urgency, like in the case of Hungary. Furthermore, the Commission must set

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\(^{72}\) Ibid, p 2

\(^{73}\) Ibid, p 4

\(^{74}\) European Commission press release of 17 January 2012 on the accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary [2012] IP/12/24

\(^{75}\) Chalmers, p 332

\(^{76}\) Craig and De Búrca, p 413
out all legal complaints in the letter of formal notice, since everything not mentioned will be deemed precluded.\textsuperscript{77}

Thirdly, after the concerned Member State has submitted its observations, and if an agreement still cannot be reached, the Commission will issue a reasoned opinion. The reasoned opinion clearly sets out the grounds on which the alleged infringement is based and this is the starting point for the time period within which the Member State has to comply, if the Commission should not refer the matter before the CJEU. Therefore, it is only if compliance with the reasoned opinion cannot be reached as the infringement procedure will go through all the way to the CJEU.\textsuperscript{78}

In the case of Hungary, the Commission took the first stage in the infringement procedure in January 2012, when they sent the first informal letter of concerns to Hungary, to which the Hungarian Government had one month to respond to. One of the concerns of the new constitution of Hungary regarded the age discrimination of the judiciary. Non-discrimination is a human rights principle of the EU which is stated in Article 21(1) CFR and Article 14 ECHR. According to the new Hungarian legislation it was decided to lower the mandatory retirement age for judges, prosecutors and public notaries from 70 years to the general pensionable age of 62 years.\textsuperscript{79} As a result, 274 judges, some of whom were members of the Supreme Court, now had or would soon have to resign. Even if 62 years is the general retirement age in Hungary, on this occasion the retirement was not changed for any other profession, which constitutes an unlawful discrimination against judges. Furthermore, Hungary had earlier communicated its intentions to increase the general retirement age to 65 years to the Commission, because of a necessary economic reform, and therefore this measure against the judges clearly pointed in another direction.\textsuperscript{80}

The EU directive on equal treatment in employment and occupation prohibit discrimination at the workplace because of age.\textsuperscript{81} Also according to a recent judgement by the CJEU it was ruled that if a government decides to reduce the retirement age for

\begin{itemize}
\item \textsuperscript{77} Chalmers, p 335
\item \textsuperscript{78} Craig and De Búrca, p 413
\item \textsuperscript{79} European Commission, Press Release, Strasbourg 17 January 2012
\item \textsuperscript{80} Nergelius, p 5
\end{itemize}
one group of people and not for others, the measure has to have an objective and a proportionate ground for justification. In this case the concerned group were airplane pilots and the CJEU held that the retirement age, only for airplane pilots, could not be decreased from 65 years to 60 years without an objective justification, since it otherwise would constitutes discrimination on grounds of age.\textsuperscript{82} In the case of Hungary, the Commission has not found any objective justification for treating judges and prosecutors differently than other groups, in particular not when the retirement age throughout Europe is progressively increasing.\textsuperscript{83}

One month later, in February 2012, the Hungarian Government responded to the Commission. As far as the retirement age of the judiciary is concerned, the Hungarian Government expressed its intentions to make it possible for judges to continue to work until they are 70 years old, if the wish to do so. In March 2012, a move in this direction was made when a system was proposed which made it possible for the judges and prosecutors concerned to apply for a new permission procedure, which would give them the same pension schemes as other high-ranking civil servants, and they would therefore not be discriminated anymore.\textsuperscript{84}

Still there were more concerns than the human rights related age discrimination of the judiciary communicated by the Commission. These regarded the independence of the Hungarian Central Bank and the new National Authority for Data or Computer Protection, which both concern the common values of the EU, such as the principle of democracy and the rule of law. Therefore the Commission in March 2012 sent a formal letter of notification to Hungary requiring the Government to comply with EU law and to change the concerned laws, or otherwise the Commission is threatening to refer the matter before the CJEU. This development is now followed with great interest throughout Europe.\textsuperscript{85}

\textsuperscript{82} C-447/09 Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG [2011], para 75
\textsuperscript{83} European Commission press release of 17 January 2012 on the accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary [2012] IP/12/24
\textsuperscript{84} Nergelius, p 6
\textsuperscript{85} European Commission press release of 7 March 2012 on the further legal steps in the infringement procedure against Hungary on measures affecting the judiciary and the independence of the data protection authority - notes some progress on central bank independence but further evidence and clarification needed [2012] MEMO/12/165
The situation in Hungary is a good example of when the infringement procedure in Article 258 TFEU can be used as a control measure against a Member State who does not uphold the respect for the common values of the EU and the respect for human rights referred to in Article 2 TEU. However, the infringement procedure seem to be more suitable in situations of specific human rights violations, as for example concerning the pension age of the Hungarian judiciary, rather than when the violations concern a more systemic breach of one or several of the common values of the EU.

3.2 Article 7 TEU - Political Sanctions

Since the infringement procedure in Article 258 TFEU may not be sufficient in order to control the Member States’ respect for the common values of the EU, such as human rights in general, a special control measure was established in order to meet the need of safeguarding Article 2 TEU. This control measure was made through Article 7 TEU, which constitutes a possibility to suspend certain political membership rights, as the voting right in the Council, of a Member State who does not comply with the values of the EU referred to in Article 2 TEU.

3.2.1 Sanction Mechanism – Amsterdam Treaty

The need for this type of control measure was not obvious during the first decades of the EU’s existence, when the main purpose of the European integration was economic cooperation. At that point there was also a more distinct division between the functions of the EU and the Council of Europe, where the latter was the one with the mandate to protect human rights in relation to the ECHR. However, when the respect for human rights started to constitute a central part of the EU’s agenda and the EU had developed a human rights system of its own, it also made sense to have a control measure that could guard this legitimate interest. Another reason discussed in doctrine was the fact of the slow but surely existing enlargement process of the EU. The newly acceding Member States were mainly from western Europe and represented countries that did not have the same kind of like-minded political and legal cultures as the other Member States of that time. Furthermore, the new Member States had recent pasts of, massive and systemic

86 Craig and De Búrca, p 390
87 De Búrca, p 683
88 Sadurski, p 386
violations of human rights. Therefore it was important for the EU to be able to ensure that the respect for human rights was upheld by both the present Member States and those who would accede through the enlargement process of the EU.  

When determining the shape of this human rights protecting mechanism, inspiration was drawn from the control measure in Article 8 of the Statue of the Council of Europe, which establishes that a Member State of the Council of Europe which seriously violates the principle of the rule of law or the enjoyment of human rights, as stated in Article 3 of the Statue of the Council of Europe, may be suspended from its rights of representation or even requested to withdraw from the Council of Europe.

In the discussion concerning the shape of the control measure, the possibility of expulsion was therefore considered. However, the Member States of that time agreed upon that the purpose of this kind of provision was to improve the human rights situation within the potential Member State concerned, and therefore an expulsion of a Member State that did not comply with the values of the EU was not the desirable way to go. This reasoning led to the sanction mechanism within Article 7 TEU, which stated that:

“The Council [...] 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 [my italics] by a Member State of the principles mentioned in [Article 2 TEU [...]”

On 1 May 1999 the Treaty of Amsterdam came into force and Article 7 TEU was put to the test short thereafter. Before 1999 the Social Democratic Party had ruled Austria for almost thirty years. In October, the same year, the new election was held, where the Socialist party got thirty-three per cent of the votes. Twenty-seven per cent of the votes went to the Austrian People’s Party, which before had acted coalition government with the Socialistic party. Furthermore, twenty-seven per cent of the votes were gained by the extreme right-wing Freedom Party. The Socialist party tried to arrange a new coalition government with the People’s Party, but the latter refused. Thereafter the Socialist party tried to form a minority government, but in January 2000 the Socialist party

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89 Wennerström, p 138
90 Ibid
91 Sadurski, p 390
93 Sadurski, p 398
communicated that it was unable to govern. This led to that the People’s Party and the Freedom Party started to negotiate and finally reached a coalition agreement in February 2000.94

The Freedom Party led by Jörg Haider was a right-wing party with extremist views and this was the first time that such a party was able to form a government within a Member State of the EU. Therefore the ECtHR ordered an investigating report on the Austrian Government’s compliance with the common values of Europe, in particular concerning the rights of minorities, refugees and immigrants.95 The report witnessed on that the Freedom Party’s founders was members of the former German National Socialist Party and that the party clearly stood for a xenophobic and even racial political views.96 Furthermore, the Freedom Party had a clear agenda and Jörg Haider was a strong opponent against that east Europeans like the Czech Republic, Hungary, Slovakia and Slovenia acceded to the EU. The argumentation used was that these countries would be a threat to the Austrian labour market since they were willing to work for much less than Austrians and therefore would take the latter’s jobs.97 In the party program Austria was also described as a non-immigrant country.98

Even if this was not the first time that extreme right-wing parties had gained mandates in a Member State’s government, such as the Front National Party in France in 1986, the situation in Austria was taken one step further because of the wide mandate gained and this shook the other Member States of the EU.99 The other Member States agreed that the development of the Austrian Government could disregard the values stated in Article 2 TEU. However, they could not act within the institutions of the EU since Article 7 TEU did not authorize the political sanctions proceedings on the anticipated disregard of the common values of the EU. This resulted in that the Member States acted unilaterally, outside the EU, applying political sanctions against Austria, instead of being able to use the political sanctions within Article 7 TEU.100

94 Ibid
95 Ahtisaari, Frowein and Oreja, p 1
96 Ibid, p 23
97 Sadurski, p 398
98 Ahtisaari, Frowein and Oreja, p 24
99 Sadurski, p 399
100 Wennerström, p 140
In 2001 a similar situation arose in Italy as Berlusconi’s party formed a coalition government with the right-wing party Alleanza Nationale. Once again Article 7 TEU could not be applied because of its structure, but it was then even clearer that there was a need for a human rights protecting mechanism within the EU.\textsuperscript{101}

3.2.2 Prevention Mechanism – Nice Treaty

The situations of non-application of Article 7 TEU in the Austrian and Italian cases gave rise to an amendment of the provision through the Treaty of Nice, which came into force on 1 February 2003. Article 7 TEU was then formed into the shape that it has today and consists of two paragraphs. Article 7(2) TEU contains the same provision as in the Treaty of Amsterdam, but Article 7(1) TEU adds that:

\begin{quote}
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 \textsuperscript{[my italics]} by a Member State of the principles mentioned in [Article 2 TEU] [...].\textsuperscript{102}
\end{quote}

While the Treaty of Amsterdam permitted political sanctions only after a serious breach of the common values of the EU had occurred, the Treaty of Nice today gives the EU mandate to also preventively act against a Member State who clearly threatens to breach the common values referred to in Article 2 TEU.\textsuperscript{103} However, the political sanction mechanism is still not easily triggered and has up until today never been applied, even if several Member States have balanced on the edge of violating the values referred to in Article 2 TEU, in particular the protection of minorities.

For example, in 2010 there was a mass relocation of individuals in France, identified by direct reference to their ethnic origin Roma\textsuperscript{104}, primarily from Romania.\textsuperscript{105} The Council of Europe has estimated the number of Roma in Europe to be slightly more than eleven million. In France there are between three-hundred and four-hundred thousand Roma compared to approximately seven or eight-hundred thousand in Bulgaria and two

\begin{footnotes}
\item[101] Ibid, p 141
\item[102] Treaty of Nice [2001] OJ C-80/6
\item[103] Wennerström, p 142
\item[104] The term Roma is used as an umbrella description for a group of people in Europe who originally migrated from India about one-thousand years ago.
\item[105] Dawson and Muir, p 751
\end{footnotes}
million in Romania.\footnote{Kristi Severance, France’s Expulsion of Roma Migrants: A Test Case for Europe [2010]} The situation in France was a result of violence involving French police and some Roma which led to that the French President Sarkozy announced an official statement of evacuating unauthorized Roma settlement and started to send back Roma to Bulgaria and Romania by force, or with what was called “voluntary returns” since they were offered three-hundred euro in exchange for their cooperation in the return process. The Commission and the EP responded to these actions with disapproval.\footnote{Dawson and Muir, p 752}

The main ground for the Commission’s position was the breach of the principle of free movement and residence of the citizens of EU, combined with the discrimination on grounds of nationality and belonging to an ethnic minority.\footnote{Ibid} The EU directive on the right to free movement and residence for citizens of the EU and their families applies to all citizens of the EU and constitute a right to equal treatment of all citizens of the EU in a host Member State. According to the directive, citizens of the EU can enter any other Member State and remain for up to three months. If a longer stay is wanted, demonstration of employment or other sufficient means of support must be provided. Citizens of the EU can be expelled for reasons of public health, public security or public policy, but the expulsion can only be based on the conduct of an individual at question. Therefore the French expulsion of the Roma, applied to a whole ethnic group, was against EU law.\footnote{Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the Rights of Free Movement and Residence for EU Citizens and their Families [2004] OJ L-158/77} For this reason the Commission started an infringement procedure against France on the ground that France had failed to implement the EU directive on free movement and residence into its national legislation.\footnote{Kristi Severance, France’s Expulsion of Roma Migrants: A Test Case for Europe [2010]} France complied with the Commission’s complaints, but for the Roma already repatriated, the damage was done and their human rights had already been violated.\footnote{Dawson and Muir, p 761}

However, France is not alone in having issues related to human rights and particularly in relation to the protection of minorities. Parties with xenophobic or even racial political views have increased throughout Europe. For example, in the latest election in Greece of May 2012 yet another extremist right-wing party was elected into a government within a
Member State of the EU.\footnote{Dimitrakopoulos, p 2} This trend goes in the opposite direction of the desired human rights development within the EU, but Article 7 TEU has not been triggered in any situation, even though the protection of minorities are especially protected within the common values of the EU. Moreover, the non-application of Article 7 TEU is despite the amendment incorporated through the Treaty of Nice, allowing preventive actions. However, the only time when Article 7 TEU has been discussed lately is in the situation of Hungary and its new constitution, where the EP has discussed the possible application of political sanctions.\footnote{Resolution adopted of the European Parliament of 16 February 2012 on the Recent Developments in Hungary [2012] RSP/2012/2511}

3.3 International Human Rights Control Measures

Every human rights protecting organization need to have a control measure to make sure that the human rights obligations agreed upon are being followed by the contracting parties. As a comparison to the EU system of human rights protecting mechanisms described above, a description of the corresponding UN measure follows.

The UN system of scrutiny of state performance in protecting and promoting human rights in relation to the main international human rights treaties is structured by a Universal Periodic Review procedure (hereafter “UPR”). The UPR-procedure is different from the other peer review processes developed within the UN system, which are constituted by a preparatory phase, a consultation phase and a reporting and assessment phase, conducted by the different UN agencies.\footnote{Gaer, p 112} Instead the UPR-procedure is a state-driven process, under the support of the UN Human Rights Council, which provides the opportunity for each state to declare what actions they have taken to improve the human rights situations in their state and to fulfil their international human rights obligations. Furthermore, the UPR-procedure is designed to ensure equal treatment of every state when their human rights situations are assessed. The UPR-procedure is one of the key elements within the UN that reminds states of their responsibility to fully respect and implement all universal human rights. The ultimate
aim of the UPR-procedure is to improve the human rights situation in all states and address human rights violations wherever they occur.115

The UPR-procedure consists of different parts. Firstly, there is an examining of a report made of the state concerned on the implementation of the norms in the international human rights treaties, followed by a dialogue with all the scrutinizing and scrutinised states. The dialogue leads to written conclusions and recommendations that should be followed up during the next time of scrutiny.116 Moreover, the UPR-procedure functions as a cooperative human rights protecting mechanism within the UN, which is based on an interactive dialogue with full involvement of the state concerned. Through this constructive dialog there is a possibility to diplomatically discuss human rights issues without the feeling of attacking one state or the other, since all one-hundred ninety-two UN Member States will be scrutinized once every four years. Therefore, the UPR-procedure is a unique process promoting the situation of human rights worldwide.117

In view of the EU’s control measures for upholding of the respect for human rights, tendencies of the sensitivity of the nature of politics make itself reminded. This is clarified through the unwillingness of one Member State to bring an infringement procedure before the CJEU against another Member State, in accordance with Article 259 TFEU. Furthermore, the Member States are also unwilling to initiate the applicability of Article 7 TEU. Both the infringement procedure and the political sanctions are perceived as serious and unfriendly acts, and therefore most Member States prefer that it is the Commission who raises the infringement procedure or initiate an action of political sanctions. Regarding the UPR-procedure the same unfriendliness is not as present and a possible reason thereof is because a large number of states are scrutinized at the same time in the UPR-procedure, while the EU’s control measures have more features of naming and shaming. In the UPR-process the scrutinized state has also, during the same dialogue, been scrutinizing other state’s compliance and is therefore not the only state being questioned and reprimanded. This kind of mutual criticism, rather than naming and shaming, seems more effective when dealing with human rights issues.

115 Ibid, p 116
116 Ibid, p 118
117 Ibid, p 128
4 The Effectiveness of Article 7 TEU

The EU has a genuine human rights legal order which is built on common values of respect for human rights and the protection of minorities. Furthermore, the EU Treaties provides for two control measures, of which one in particular is designed for the upholding of the common values of the EU referred to in Article 2 TEU. In order to claim that the EU is an organization with human rights high on its agenda, the EU needs to protect and realise the human rights for its citizens. Therefore, the question is raised whether Article 7 TEU is an effective defender of human rights. This chapter examines the two possible reasons for the provisions’ non-application up until today. The first part deals with the structure of the monitoring mandate over the Member State’s compliance with human rights obligations in relation to Article 7 TEU. The quality of the scrutiny of the human rights obligations strongly indicate how serious the protection of human rights is taken within the EU. The second part discusses the political impact of when the provision is or is not more likely to be applied on a Member State. Moreover, the third part contains concluding observations that answer the research question at issue in this thesis.

4.1 Scrutiny and Surveillance Mandate

When dealing with the acceding state’s continuous upholding of the respect for human rights, the Cooperation and Verification applied in the accession treaties gives the EU competence to monitor the acceding state’s compliance with the human rights obligations, even after accession. However, when it comes to current Member States, the EU has to rely on Article 7 TEU as a control measure. In order for Article 7 TEU to work effectively as a human rights defender, there has to be a mandate for an EU institution to scrutinize and surveil the Member States’ compliance with the human rights obligations conferred upon them. In its opinion on the accession of the EU to the ECHR, the CJEU has held that no EU Treaty provision confers any general power on the EU to enact rules on human rights. However, it has been claimed both in doctrine and by the Commission that the structure of Article 7 TEU has provided the EU with

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the power to develop a general human rights policy in relation to its Member States and therefore conferred new powers on the Commission in its monitoring role.\textsuperscript{119} This could be seen as if the Commission claims that it has become a new competence, including the monitoring of the fulfilment of the human rights obligations within the Member States, and that it is able to identify potential risks with regards to Article 7 TEU. Furthermore, the Commission has communicated that it intends to exercise its new power in full, but with a clear awareness of its limited competence areas.\textsuperscript{120}

As the guardian of the EU Treaties the Commission is the responsible EU institution to monitor the Member States’ compliance with EU law, which also includes the human rights obligations. This need it met through the control measure in Article 258 TFEU, which corrects a Member State’s failure to comply with a specific EU regulation through the infringement procedure. This way of protecting human rights have been seen both in the case of France and Hungary, when the compliance of specific directives has been questioned by the Commission. However, when dealing with more systemic human rights violations that covers more than one specific directive, but rather is against the common values of the EU, there is a need for the especially designed control measure in Article 7 TEU to get triggered. Moreover, in order to create an effective human rights defender through Article 7 TEU, it is necessary that an EU institution is given a clear mandate to scrutinize and surveil the Member States’ compliance with the human rights obligations. In order to make sure that the respect for human rights required before accession is upheld even after accession, the monitoring mandate must be extended to go beyond the scope of the Member State’s implementation of EU law.\textsuperscript{121} However, even if the Commission has modestly claimed to have such monitoring competence, the Member States have shown its disapproval of such mandate.\textsuperscript{122}

\textsuperscript{119} Williams [2006], p 4
\textsuperscript{120} Communication from the EU Commission to the EU 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 [2003] COM 2003/606, p 3
\textsuperscript{121} Dawson and Muir, p 753
\textsuperscript{122} Craig and de Búrca, p 390
4.1.1 The Failed Implementation of a Scrutiny and Surveillance Mandate

In 2007 the European Union Agency for Fundamental Rights (hereafter “FRA”) was established as another step in the EU’s development of a human rights policy. The basic structure chosen for the FRA is of an administrative character under EU law, even though the FRA has a number of duties assigned to its area of responsibility. However, the FRA was not mainly established as a phenomenon of EU law, but was specifically designed to be an independent institution promoting human rights within the EU.123

The legislative history of the FRA indicates the need for high quality information during a procedure by Article 7 TEU, and the intention was that the FRA could be involved in the procedure on the Council’s request. Furthermore, the debate preceding the establishment of the FRA was whether its power should include a monitoring mandate over the Member States’ compliance with the common values of the EU for the purpose of Article 7 TEU. This was controversial and the Member States refused to include such monitoring function within the FRA’s mandate.124 However, the Council declared that even if the FRA was not given a monitoring mandate, neither the EU Treaties nor the regulation concerning the FRA prohibits the Council to seek assistance from the FRA when assessing a situation within a Member State in the light of Article 7 TEU.125

The FRA became an advisory agency of the EU, which helps to ensure that the human rights of the citizens of the EU are protected by collecting evidence about the situation of human rights across the EU and by providing advice on how to improve the situation. In practice, the FRA works as a library of collected data, used to gain knowledge of the human rights situation within the EU. However, in doctrine the discussion still remains whether the FRA will bring the kind of energy and momentum desired in the area of the EU’s human rights policy.126 Even if the FRA can supply the Council with information on the human rights situation within the Member States, for the purpose of the effectiveness of Article 7 TEU, the shaping of the FRA’s mandate was a disappointment. The need for an EU institution with a clear monitoring mandate of the Member State’s compliance with the human rights obligations is therefore still not met.

123 Von Bogdandy and Von Bernstorff, p 1035
124 Craig and de Búrca, p 390
126 Craig and de Búrca, p 391
4.2 Provisions for Applicability

For the application of Article 7 TEU to be considered, there has to be either *a clear risk of a serious breach* or *an existence of a serious and persistent breach* of the values referred to in Article 2 TEU. The question is what situation the Council needs to have in hand in order to reckon that such a breach is likely to happen, or has already happened.

In the Commission’s communication on Article 7 TEU it is stated that a serious and persistent breach of the common values of the EU would radically shake the very foundations of the EU, and therefore the ultimate purpose of the Article 7 TEU is to penalise and remEDIATE a serious and persistent breach of the common values. But firstly, and above all, Article 7 TEU is intended to prevent such situation from arising by giving the EU the possibility to react as soon as a clear risk of a breach is identified in a Member State. Furthermore, the Commission has stated that the scope of Article 7 TEU is not restricted to areas covered by EU law, meaning that the EU could act not only in the event of a breach in the field of shared competence, but also in the event of a breach in an area where the Member States act within exclusive competence. This is, according to the Commission, motivated by the fact that Article 7 TEU seeks to secure the respect for the common values of the EU, which also constitutes the conditions of the EU membership. It would therefore be inconsistent if the EU had to ignore breaches of human rights in areas of national jurisdiction, as also has been mentioned in relation to the needed scrutiny and surveillance mandate.

The communication also gives some guidelines on how to interpret the Article 7 TEU criteria. Firstly, the provision is aiming at breaches of the common values, such as human rights *in general*, which means that the risk or existence of a breach identified must go beyond specific situations and rather concern a more systemic issue. Violations of individuals are therefore not in this category and need to be dealt with through other procedures. Secondly, a *clear risk* of a serious breach is aiming at the potential breach of the respect for human rights. Moreover, an *existence* of a serious and persistent

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127  Communication from the EU Commission to the EU 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 [2003] COM 2003/606, p 3
128  Ibid, p 5
breach has materialised the potential risk.\textsuperscript{129} For example, the adoption of legislation allowing death penalty in wartime is a \textit{clear risk} of a serious breach of Article 2 CFR and Article 2 ECHR guaranteeing the right to life, but it is not an \textit{existence} of a serious breach until death penalty actually is used. Thirdly, when determining the \textit{seriousness} of a breach, both the purpose and result of the breach are taken into account. For example, national, ethnic or religious minorities or immigrants could be particularly vulnerable, as exemplified with the Roma in France. Furthermore, if a Member State has been condemned for the same type of breach several times, by for example the ECtHR, and has not demonstrated any intention of correction, that is a clear sign of a \textit{persistent} serious breach.\textsuperscript{130}

With the guidelines for the applicability of Article 7 TEU at hand, one may wonder why the measure has never been used. As described above, there have been several situations where Member States of the EU have been balancing on the edge of violating the common values of the EU, such as human rights and the protection of minorities. However, not in any of the cases of Austria, Italy or Greece it has actually been considered that a \textit{serious breach} has occurred, perhaps because not any explicit legislation that could be deemed as xenophobic or discriminatory against a certain group of citizens of the EU was adopted. Instead the issues concerned the gain of mandate in the government by extreme right-wing parties, but as the EU human rights legal order contains the right to freedom of expression, it also includes the freedom to hold opinions supporting extreme right-wing parties. Furthermore, in the case of France, the Commission chose to consider the mass relocation of Roma as a failure to implement the EU directive on free movement and residence of citizens, instead of a \textit{serious breach} of the protection of minorities referred to in Article 2 TEU. The above indicates that the EU is more likely to bring an infringement procedure against a Member State for the failure to implement a specific EU regulation, rather than accusing it for breaching the common values of the EU and apply political sanctions, simply because it is less politically sensitive. However, the violation of the respect for human rights and the protection of minorities is still the same.

\textsuperscript{129} Ibid, p 7
\textsuperscript{130} Ibid, p 8
Moreover, the only time recently when Article 7 TEU has been discussed, is in the case of Hungary, were the potential breach of common values concerns the new constitution. If Article 7 TEU would be applied on Hungary, as discussed, it would more likely be on the grounds of the common values such as the principles of democracy and the rule of law, since most human rights issues, as for example the retirement age of the judiciary, have been dealt with through the infringement procedure brought by the Commission in January 2012. Furthermore, if it would be applied, it would be an important step forward for the EU, showing that the common values of the EU are guarded by an effective control measure.

However, it does not seem like any of the cases described qualify to be considered as an existence of a serious and persistent breach of Article 2 TEU, but the situation in Austria does seem to have qualified as a situation of a clear risk of a serious breach of the respect for human rights and the protection of minorities. Even if Article 7 TEU could not be applied proactively back then, the example of Austria shows that a situation where a xenophobic party gains a significant part of the mandates in a government of a Member State could be seen as a clear risk of a serious breach of the respect for human rights and the protection of minorities, since such a government could adopt legislation in violation with the common values of the EU.

### 4.2.1 Political Impact on the Applicability

As indicated above, politics has a serious impact on when Article 7 TEU could or should be applied on a Member State. As in the case of the infringement procedure, the provision in Article 259 TFEU was described as unlikely to be applied, since the Member States rather see that it is the Commission who brings another Member State before the CJEU than themselves. These kind of diplomatic thoughts are considered in the case of Article 7 TEU as well, and the Commission has emphasised the sensitivity of the nature of politics of the provision. Therefore, the Commission has expressed its wish to empty every opportunity to a diplomatic solution in the event of a breach of the respect for human rights, before the political sanctions in Article 7 TEU should be considered.\(^{131}\)

\(^{131}\) Williams [2006], p10
One situation of sensitive nature of politics is the United Kingdom’s invasion of Iraq, in consent with the USA, in 2003. Also after the democratically elected Government of Iraq took over in 2005, the United Kingdom’s forces remained in Iraq.\textsuperscript{132} During this time, the United Kingdom was accused of breaching human rights obligations. The Council acknowledged the ill treatment of prisoners and the unlawful killings of Iraqi citizens and stated that it was essential to the EU that the world at large did not get the impression that such an abuse by a Member State was taken lightly.\textsuperscript{133} However, the important issue was not that the EU took lightly on the fact that human rights were abused, but rather that they did not act against a Member State that violated human rights. Given that the violations had racial and religious elements involved within the context of the Islamic culture, it is hard to understand why the EU did not take any further measures, by for example applying political sanctions against the United Kingdom according to Article 7 TEU, in order to statue an example of the common values of the EU, including the respect for human rights.\textsuperscript{134}

The possible reason for the EU’s lack of action is that the Member States’ foreign policy falls outside the scope of the EU’s competence, even if the United Kingdom’s invasion of Iraq probably could be deemed as contrary to the common values of the EU.\textsuperscript{135} However, since the Commission has stated that the scope of Article 7 TEU is not restricted to areas covered by EU law, meaning that it also includes breaches of the common values referred to in Article 2 TEU in areas where the Member States act with exclusive competence. It can therefore be argued, that for the purpose of upholding the common values of the EU in relation to Article 7 TEU, the EU may also have competence within areas of national jurisdiction, such as national foreign policy.\textsuperscript{136}

However, when dealing with the Member States’ foreign affairs, as in the case of the United Kingdom, it is far too politically sensitive for the Commission to use its self-declared competence related to Article 7 TEU. This leads to that the EU’s ambition to promote the respect for human rights will probably stay within the borders of the EU, since interfering with a Member State’s foreign affairs is far too controversial. As a

\textsuperscript{132} Ibid, p14 \\
\textsuperscript{133} European Council Annual Report on Human Rights [2004] ISSN 1680-9742, p 115 \\
\textsuperscript{134} Williams [2006], p 21 \\
\textsuperscript{135} Ibid, p 5 \\
\textsuperscript{136} Communication from the EU Commission to the EU 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 [2003] COM 2003/606, p 5
result, it seems rather clear that the common values, such as the respect for human rights, combined with the human rights obligations within the EU, only protects human rights within the Member States’ territory, due to the sensitivity of the nature of politics.\textsuperscript{137}

4.3 Concluding Observations

Through the analysis of the human rights obligations of the EU, and furthermore the control measures to make sure that the Member States uphold the respect for the human rights obligations, the strengths and weaknesses of the EU’s ability to promote and protect the respect for human rights emerge with clarity. The EU has developed a genuine human rights legal order and showed its willingness to be at the frontline in the field of human rights. The step taken through the Lisbon Treaty to give the CFR the same legal status as the other EU Treaties, as well as legally establishing the intent of acceding to the ECHR, are two acts embodying this ambition.

However, in order to have a functioning system of protection of human rights there ought to be a sufficient scrutiny and surveillance measure to help the EU to uphold its ambition of being a defender of human rights. The infringement procedure in Article 258 TFEU can be used as such a measure, but it is mainly designed for situations concerning specific legislation within Member States that do not in comply with EU law. In comparison, for situations of systemic violations, such as the constitutional reform in Hungary, where several common values of the EU are put to the test, the infringement procedure is not a sufficient control measure. In these situations, when it is unclear whether a Member State’s whole constitution is compatible with the common values of the EU such as democracy, the rule of law and the respect for human rights, there is a need for the EU to be able to statue an example on what can, and cannot, be accepted within its Member States.

It is in situations like this when the control measure in Article 7 TEU is supposed to be triggered, both as a legal mechanism and a political statement. Article 7 TEU was designed to guard the common values of the EU, but since it has never been applied, the question arises whether there has not ever been a clear risk of, or an existence of a

\textsuperscript{137} Williams [2010], p 147
serious breach of the respect for human rights referred to in Article 2 TEU, or if Article 7 TEU has lost its teeth and does not work as the effective human rights defender it was intended to.

4.3.1 A Human Rights Defender or a Political Blind Alley?

After the examining of several of situations where the respect for human rights, and in particular the protection of minorities, have or has been threatened to be violated within the Member States, it seems questionable that not any situation has been deemed to constitute a clear risk of, or an existence of a serious breach of the common values of the EU. In particular with regards to the protection of minorities, it is clear that several Member States are facing an unwanted trend towards xenophobia. The recent expulsion of the Roma in France in 2010 should have set the alarm bells, highlighting the EU’s inability to intervene in situations of such human rights violations.

After a closer analysis of the effectiveness of Article 7 TEU, the conclusions are that there are two reasons for the paralysation of the EU in situations where the respect for human rights within Member States is questionable. Firstly, in order to maintain a high quality control measure for upholding the respect for human rights, there has to be an explicit scrutiny and surveillance mandate for an EU institution, giving the right to monitor the Member States’ activity both within the scope of implementing EU law and within its exclusive competence, in order to make sure that the Member States comply with the human rights obligations conferred upon them. The Member States’ refusal to include such mandate within the FRA is interesting from the point of view that one of the main criteria for accession to the EU is to fully respect the common values of the EU, including the respect for human rights and the protection of minorities. The obligation to respect the common values of the EU referred to in Article 2 TEU, is therefore within the nature of the membership in the EU. Furthermore, the Member States’ compliance with international human rights obligations is already being scrutinized unilaterally through the UPR-procedure. For this reason, the unwillingness of Member States to be scrutinized within the EU could be seen as unjustified.

However, the second reason for Article 7 TEU’s ineffectiveness as a human rights defender answers that justification ground. The reasonable explanation of the Member States’ refusal to implement such monitoring mandate is because of the sensitivity of
nature of politics. The case of the United Kingdom’s invasion of Iraq in 2003, on which the EU took no actions despite the violations of the respect for human rights, illustrates the political sensitivity of such situations. The fear of interfering with a Member State’s political and foreign affairs is connected to the fear of showing internal disagreement, since this sends out the wrong message to the rest of the world, potentially disrupting the picture of the EU being twenty-seven countries united in diversity as one unanimous and strong voice. Furthermore, the fact that the EU’s competence in relation to Article 7 TEU is quite vague, despite the Commission’s communication on the matter, makes it rather clear that the EU will not be able to interfere with the Member States’ actions if they reach beyond the territorial borders of the EU. The protection of the common values of the EU is therefore, due to the political impact on when Article 7 TEU could or should be applied, limited to cover the human rights violations only within the Member States.

However, even when human rights violations occur within Member States, the sensitivity of the nature of politics is likely to make itself reminded. It is therefore concerning that political considerations are the determining factor when, or not, Article 7 TEU should be applied on a Member State. This could lead to a risk that the provision would be applied on Member States with less political impact in the EU, such as Hungary, rather than on great powers like France and the United Kingdom. This development is undesirable from a human rights perspective. In order to avoid this, it would be more efficient to give a monitoring mandate to an independent EU institution such as the FRA, for the purpose of ensuring equal effectiveness of Article 7 TEU, regardless where the common values of the EU are violated. This would provide a higher level of legal security, than if a political institution like the Commission would claim such a mandate.

Moreover, it will be interesting to follow the situation in Hungary to see whether Article 7 TEU is applicable, and thereby given the opportunity to act as the human rights defender it is supposed to be. This is a possibility for the EU to constitute an important statue of example of that the EU is a defender of human rights. The human rights ambitions of the EU would also be more trustworthy if the control measure designed to uphold the respect for human rights was an effective mechanism, ensuring that human rights are respected not only before accession to the EU, but also after accession. The
criticism against the EU regarding its requirement of a higher level of protection of human rights and minorities from acceding states, than what current Member States uphold, is therefore justified by the fact that the EU is currently lacking an effective control measure through Article 7 TEU.

To sum up, in the way that Article 7 TEU is constructed today it is caught up in a political blind alley leading to non-application in situations where it is needed. As a result, the supposed defender of human rights in Article 7 TEU has lost its teeth and the EU is lacking an effective mechanism for upholding the respect for human rights within its Member States.
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