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*Committee on Civil Liberties, Justice and Home Affairs*

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## **WORKING DOCUMENT II**

on the situation of fundamental rights in the European Union in 2012

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Louis Michel

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## **The need to develop EU instruments in the field of fundamental rights, the rule of law and democracy under the current Treaties and in the future**

The current Treaties already grant to the EU a wide competence on fundamental rights, as repeatedly underlined by the EP<sup>1</sup>. **Article 2 TEU** spells out the Union values of fundamental rights, democracy and the rule of law, equality and protection of minorities. These values correspond to the "Copenhagen criteria" for accession and are at the very basis of the EU. Should a Member State violate these values, the EU has the power, the right and the duty to take action on the basis of article 7 TEU. The fact that Article 2 on values is accompanied by the procedure provided for in Article 7 is a further demonstration of the importance of implementing it properly.

The rapporteur believes that the EU has failed to take Article 2 into proper consideration, with the results that are under our eyes today and the criticism recalled in Working Document I, and it is high time to redress this situation, making full use of the potential of the Treaties, and **set up a new mechanism to ensure the respect, the protection, and the promotion of fundamental rights and the EU values of article 2 TEU at large** by:

- 1) developing indicators;
- 2) monitoring the situation in the EU, as well as in the Member States;
- 3) making evaluations by topic and by Member State, in relation to all human rights instruments (ECHR, CoE, UN, etc); and
- 4) developing and deciding on a set of recommendations and sanctions to address Article 2 TEU violations.

The Commission could adopt a decision on these issues, as it did for the reporting on corruption in the EU and in the Member States<sup>2</sup>, and propose further policy developments, in collaboration with the EU expert body, the Fundamental Rights Agency (FRA). Such decision would finally allow overcoming the criticism on lack of indicators and criteria for evaluation, double standards and political bias and would be a powerful instrument to ensure that Article 2 is applied properly and that any decision taken on the basis of Article 7 is based on objective criteria and evaluation.

Article 7 was inserted in the Amsterdam Treaty in 1997 and modified by the Treaties of Nice and Lisbon<sup>3</sup>. **Article 7(1) TEU** establishes a procedure that is not “nuclear” at all: it simply provides for the opening of a *formal* and *institutional* dialogue between EU institutions and a Member State where there is a clear risk of a serious breach of EU values and the possibility for EU institutions to make recommendations.

Article **7(2) TEU** – which unreasonably denies to the EP the right of initiative - foresees that sanctions (“certain of the rights deriving from the application of this Treaty to the Member

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<sup>1</sup> Among others, in the fundamental rights reports, in the report on media freedom and in the draft report on the situation in Hungary.

<sup>2</sup> On the model of the Commission decision of 6.6.2011 Establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report") [http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/com\\_decision\\_c\(2011\)\\_3673\\_final\\_en\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/com_decision_c(2011)_3673_final_en_en.pdf)

<sup>3</sup> The Lisbon Treaty took off the possibility for the Council to “call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question”.

State in question, including the voting rights of the representative of the government of that Member State in the Council”) can be decided against a Member State breaching seriously and persistently Art. 2 TEU.

The fact that it has not been used until now, and notably in relation to Hungary, is due to the lack of political willingness of the Member States, of the Commission and of the EP and to the high majority thresholds to activate it. Furthermore, the procedure is mainly political (also due to the lack of proper implementation of Art. 2 TEU), the FRA does not play any role in it<sup>4</sup>, while sanctions are only spelled out in the framework of the article 7(2) TEU.

The rapporteur believes that while **a number of important issues could and should be already addressed and solved under the current Treaties** (including for instance previous calls of the European Parliament for the creation of a “European fundamental rights policy cycle” and a “yearly interinstitutional forum” on the protection of fundamental rights, the development of “fundamental rights indicators in cooperation with the FRA” or a yearly report monitoring of the founding values enshrined in Art.(2) TUE, better exploitation of the FRA and revision of its mandate, implementation and further development of the Commission communication on Article 7 TEU and detailing of sanctions, development by the Commission of its annual report on the application of the Charter of Fundamental Rights into a report on the situation of fundamental rights in the EU and its Member States, enlargement of the Commission scoreboard on civil justice into a scoreboard on fundamental rights, democracy, the rule of law and criminal justice, development of an EU mechanism to ensure implementation of the ECtHR judgments in the EU, implementation by the Council of Article 70 TFEU to conduct evaluations on fundamental rights, democracy and rule of law in the Member States, etc), **others necessitate a revision of the Treaties** (for instance: splitting of Article 7 TEU into two separate articles, de-politicization and further development of the existing procedures, lowering of the Article 7 TEU’s thresholds, EP, FRA or wise men formal involvement, explicit mention of sanctions in Art. 7(1)TEU, possible insertion of a new article inspired to Art. 121 TFEU<sup>5</sup>, etc).

Having said this, the rapporteur believes that postponing decisions and actions that can be enacted today to a “future reflection”<sup>6</sup> on a Treaty reform is not the appropriate way of addressing the urgent need to ensure that fundamental rights and the Union’s founding values are respected, protected and promoted within the EU. As illustrated above, there are a plethora of measures already available that can contribute to maintaining and fostering Article 2 values

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<sup>4</sup> The Council adopted a declaration stating that it may seek the assistance of the Agency as an independent person if it finds it useful during a possible procedure under Article 7 TEU, notwithstanding the fact that the FRA will not carry out systematic and permanent monitoring of Member State for the purposes of Article 7 TEU (see Declaration by the Council on proceedings under Article 7 of the Treaty on European Union, 6396/07 ADD 1, 27 February 2007, p. 3). At the same time, the Commission has underlined that any “legal and political framework for the application of Article 7 ... requires ... thorough and effective monitoring of respect for and promotion of common values” (see Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect and promotion of the values on which the Union is based, COM (2003) 606, final, page. 8, 15. 10.2003).

<sup>5</sup> This possibility was mentioned by Commissioner Reding during her intervention in the civil liberties committee on 19 June 2013. The EP report on fundamental rights adopted in 2012 also hinted in the same direction, see par. 1.

<sup>6</sup> VP Reding, Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism, General Affairs Council, April 2013.

and mutual trust that can be activated immediately.

Faced with the economic and financial crisis, the EU has been capable of developing new instruments to deal with it and coordinate its actions at EU and national level through the European Semester, in terms of indicators, objectives and priorities, evaluation and assessment, country-specific recommendations, monitoring and alert-system and sanctions. At least the same courage and determination should be shown in the fields that touch upon European citizens' freedoms and rights and the values upon which the European Union and project are founded.

The rapporteur would welcome a debate on the issues raised in the two Working Documents, which will serve as a basis for the development of the more institutional part of the report on fundamental rights and for the public debate to be launched by the Commission upon request of the Council.