



LIBE MEETING

09 FEBRUARY 2011, BRUSSELS

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Ladies and gentlemen,

Thank you for inviting the EU Agency for Fundamental Rights to this hearing on “*The situation in Hungary*”. The Agency was invited to address the EU context by speaking about the overall implications of the values enshrined in Article 2 of the EU Treaty.

Article 2 both protects and determines national constitutional identities.

Within the EU, the different layers of governance are all interrelated and mutually interdependent. In the area of fundamental rights, the respective competences are shared between the European Union and its Member States. Thus the Union cannot offer fully-fledged and overall control and protection of fundamental rights.

Article 51 of the EU Charter of Fundamental Rights reminds us that fundamental rights do not extend the field of application of Union law beyond the powers the Member States have entrusted the Union with. Also, Article 4 of the EU Treaty states that the Union shall respect the national identities of its Member States, including their political and constitutional structures.

However, at the same time values as democracy, equality, fundamental rights or the rule of law are established as core values which underpin the European Union. According to Article 2 of the EU Treaty: “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.”

These core values apply also in areas far beyond the scope of European Union law. In fact, these core values apply to *any* public authority at Member State level. This general obligation is thought to guarantee a minimum degree of unity amongst the diversity of national identities.

The EU as a multi-layered system has to rely on Member States that respect the European core values.

What does this mean? The EU Treaty expresses full respect for national constitutional values and identities. At the same time, EU law depends on a certain degree of constitutional homogeneity across the EU Member States. In fact, the principle of mutual respect within the EU system but also concrete rights flowing for instance from EU citizenship are in need of a certain degree of unity. This interdependence is reflected in the core values that are common both to the Union as well as to its Member States.

In that sense, the margins defining the underlying concept of a pluralist society are defended in both directions: as leaving room for and preserving diverse constitutional cultures of Member States; but also as margins not to be transgressed by the Member States. In this latter sense Article 2 is clearly prescriptive. “United in diversity” is a coin with two sides: While diversity is protected, so is unity.

Moreover, there is an additional important distinction in Article 2. There is a difference between respect for specific fundamental rights instruments of the EU acquis on the one hand, and respect for the founding values in broader terms on the other.

For instance, the EU data protection directive is a specific EU law instrument in the area of fundamental rights. It is preserved through a variety of means, including infringement procedures vis-à-vis Member States or preliminary rulings before the Court of Justice.

This does not apply to the same degree to the control of the more general and overarching values as listed in Article 2. In spite of the wide scope of the obligation to respect core values, the legal means available to the EU in order to uphold these values are very restricted. The sanctioning procedure in Article 7 of the EU Treaty is a *political* procedure – not a *legal* procedure. For instance, the European Court of Justice cannot be called upon to assess whether or not a specific situation qualified for an Article 7 procedure. Neither is the Agency for Fundamental Rights entitled to deal

with Article 7 -related instances on its own initiative; however the Council made clear that it can seek assistance from the Agency in this context.

The rule of law and the independence of justice

All of the Article 2 values are equally relevant in this regard. However, the rule of law is an umbrella principle that links to all the other core values. In European constitutional traditions, the rule of law is generally understood by courts as requiring that the exercise of public power be subject to procedural *as well as* substantive limitations. It requires, amongst others, that certain basic conditions, including a separation of powers and the legality of administration are guaranteed. The state must respect the principle of legal certainty, the principle of reliability, the prohibition of retroactive acts, and the principle of proportionality. If these conditions are absent, there exists the risk that fundamental rights are limited to be part of the law in the books without becoming part and parcel of social reality on the ground.

Robust and independent institutions of justice are a crucial prerequisite of a functioning human rights system and, more generally, for a democratic society based on the rule of law.

When assessing the independence of the judiciary various elements have to be taken into account, including

- the procedures of appointment and dismissal of the members of the judiciary,
- the ways by which courts are set up and organised,
- the ways of allocating cases to chambers or individual judges.

The concept of independence precludes any external influence, whether direct or indirect, which could call into question the performance of justice. Therefore, it is not enough that courts and judges act independently; they must also be perceived by the public to act independently. Confidence in the judiciary will grow once the public see courts and judges functioning and passing judgement without interference from State administration. In this context the way the appointment of judges, the organisation of the judiciary and its oversight, the establishment or abolition of courts, and the attribution of cases to the courts' bodies is organised, is of central relevance.

Of equal relevance are other authorities who monitor compliance with human rights standards and which also have to be trusted to perform their tasks in a manner independent of external influence. Given the crucial importance of data protection to a liberal information society it is one of the significant achievements of the EU Charter

of Fundamental Rights to guarantee that compliance with the rules of data protection is subject to control by an independent authority.

The overall structure has to be looked at: If the independence of the judiciary and of monitoring bodies is weakened in favour of the government this has significant repercussions on the balance of powers.

In addition, as already mentioned, the EU relies on efficient judicial systems at national level. This is not only a systemic feature of a multi-layered system but comes along with clear legal obligations for the Member States. In fact, the right to an effective remedy and to a fair trial are laid down in Article 47 of the Charter and are complemented by Article 19 of the EU Treaty obliging Member States to “provide remedies sufficient to ensure effective legal protection”. A lack of effective remedies at the national level cannot be made up for by courts at the European level.

When assessing a system, one has to recognise that the whole is greater than the sum of its parts

When assessing whether or not a Member State is at a clear risk of seriously breaching core values, it is important to look not only at one single development. For instance, it would not be sufficient to look in isolation at the appointment of judges. Other developments such as the introduction of new majorities to elect public officials, *or* new standard terms of public officials, *or* new electoral laws should be included in the assessment. Hence, we have to look at the combined effects of many developments. In this sense, the whole is greater than the sum of its parts.

Such an assessment is not an easy exercise. It requires an EU-wide approach characterised by three “C-s”, namely a comparative, comprehensive and continuous analysis of various developments.

Having this in mind for *all* the 27 EU Member States might help to guarantee a European Union in which human rights are secured.