

**European Values as Criteria for Accession to the European Union: The Effectiveness of
Sanction Mechanisms on Member States and non-Member States**

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Abstract

Breaching the fundamental European values stated in Article 2 TEU has become more frequent in recent years. The Union has only one mechanism to deal with Article 2 TEU breaches of Member States and that is Article 7 TEU. However, the mechanism of Article 7 TEU exists just on paper, in other words it has never been used. The aim of this paper is to compare the mechanisms available for the Union to remedy breaches of Member States and non-Member States. The effectiveness of the sanctions imposed by the Union on Member States and non-Member States will be explored through the cases of Romania, Hungary and Bosnia and Herzegovina.

Each of the cases was dealt with different mechanism, the case of Romania by the CVM reports, the case of Hungary by the infringement procedure, and the case of Bosnia by issuing recommendations which were followed by sanctions of suspension of IPA funds. The effectiveness of the sanctions mechanisms is not considered to be satisfactory in any of the cases discussed. Since the Union has the mechanism to deal with the breaches of non-Member States, which is considered to be effective, except in the case of Bosnia, and only a formal mechanism to deal with breaches of Member States I will provide the proposals for better sanctioning of Article 2 TEU breaches by Member States, offered by, Scheppele, Muller and Commissioner Reding.

To my parents Admira and Elvir Mustafic.

Introduction

The Copenhagen criteria were introduced in 1993. The reasons triggering the establishment of the Copenhagen criteria were applications for membership by Central Eastern European countries.¹ By introducing the Copenhagen criteria the European Union aimed to prepare these undemocratic countries through the criteria for the accession to the Union. The criteria are composed of political and economic criteria and criteria requiring adoption of the *acquis communautaire*.² The most important criteria for this thesis which will be discussed is political criteria. The political criteria include “democracy, rule of law, human rights, and respect and protection of minorities.”³

As the aim of introducing the Copenhagen criteria, especially political criteria, which includes values from Article 2 of the Treaty on the European Union, was to ensure that Central Eastern European countries comply with European values before their integration to the Union, there was a need for assuring that once these states achieved compliance with the Copenhagen criteria, they would keep respecting and promoting it after the accession. What was derived from this need was Article 7 TEU which was introduced by the Treaty of Amsterdam in 1997.⁴ Since the Treaty of Nice the Union’s mechanism to fight the breaches of the European values includes both a preventive and sanctions mechanism. The preventive mechanism is initiated if there is a *clear risk of a serious breach* of the European values. This is when there is a threat, not actual breach that

¹ *European Council in Copenhagen 21-22 June 1993 Conclusions of the Presidency* (European Council, June 21, 2013), http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCKQFjAA&url=http%3A%2F%2Fwww.consilium.europa.eu%2FueDocs%2Fcms_Data%2Fdocs%2FpressData%2Fen%2Fec%2F72921.pdf&ei=WbAZU-bIGsiAyAOr2YCIaw&usg=AFQjCNHJiutlNS-JYmLp_ZZGmGKG2LJPhA&bvm=bv.62578216,d.Yms.

² Tanja Marktler, “The Power of the Copenhagen Criteria,” *Croatian Yearbook of European Law and Policy* 2, no. 2. (2006): 343–63.

³ *Ibid.*

⁴ Cesar Pinelli, “Protecting the Fundamentals: Article 7 of the Treaty on the European Union and beyond,” *JCMS: Journal of Common Market Studies* 39, no. 2 (September 25, 2012): 197–219.

some of the values such as democracy and rule of law could be endangered, but the risk is still not materialized.⁵ The sanctions mechanism does not depend on the preventive one. That is the preventive mechanism does not have to be initiated before the sanctions. The sanctions mechanism is initiated only when there is *a serious and persistent* breach of the values on which the Union is founded.

However, while the Union has many ways to sanction breaches of the values of Article 2 TEU for non-Member States, which will be discussed later, Article 7 TEU is the only mechanism to fight against the breaches of the Member States. Even though it is the only mechanism to safeguard the values on which the Union was formed and which the Member States are obliged to promote and respect, Article 7 mechanism has not been used so far. The main reasons why it has not been used is the majority which has to be achieved in the institutions, the reluctance of the Member States to initiate the mechanism against each other and the lack of a monitoring instrument.⁶ There are a few proposals which will be discussed later, on how to finally efficiently deal with Article 2 TEU breaches of Member States, by adding some other mechanisms.

In order to compare the effectiveness of sanctions mechanisms against Member States and non-Member States I will use the examples of Romania, Hungary and Bosnia and Herzegovina. The case of Romania happened in 2012 and was considered as a breach of rule of law when Prime Minister Victor Ponta tried to illegally impeach President Traian Basescu. However, the case was

⁵ "Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union.," October 15, 2003, <http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Feur-lex.europa.eu%2FLEXUriServ%2FLEXUriServ.do%3Furi%3DCOM%3A2003%3A0606%3AFIN%3AEN%3APDF&ei=gPgeU-6GK-GBypX7IKADw&usq=AFQjCNHQS-c-8imEuRbfSpkjbD4Rshk9zQ&bvm=bv.62788935,d.Yms>.

⁶ Vera van Hüllen and Tanja A. Börzel, "The EU's Governance Transfer: From External Promotion to Internal Protection?," June 2013, http://edocs.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FUDOCs_derivate_000000002747/wp56.pdf?hosts=local.

not dealt with Article 7 TEU, but under the Cooperation and Verification Mechanism (CVM)^{7,8}. The case of Hungary included a law restricting freedom of the media and also acts endangering rule of law through constitutional reforms. However, neither of these examples no matter how serious they were, were enough to trigger the sanctions under Article 7 TEU. After exploring these two examples I will then look at the Bosnian example. Bosnia is only a potential candidate, but in order to become a serious candidate it has to fulfill the first of the Copenhagen criteria, the political one. Besides motivation for the accession to the Union, BiH has bilateral agreements in form of the Stabilization and Association Agreement by which the Union helps political and economic development of the country while saving the right to terminate the agreement and also to suspend financial aid awarded in case of breach of the European values. Therefore, I will explore the sanctions imposed on Bosnia so far, especially sanctions related to the decision of *Sejdić and Finci*, in which Bosnia violated one of the values of Article 2 TEU and the Copenhagen criteria, namely respect for the rights of minorities.

The primary focus of this paper is to explore the sanction mechanisms against breaches of values under Article 2 TEU, which exist in the European Union against EU Member States and non-Member States and compare them through jurisdictions. The aim is to show that the Union is less willing to activate existing mechanisms against Member States than those against states which are potential Member States or candidate states. Furthermore, the thesis will explore the proposals offered to make the mechanism under Article 7 really effective.

⁷ In 2007, Bulgaria and Romania joined the Union even though they were not ready to join it. In order to proceed with the reforms started during the accession process, mainly rule of law and justice, the Union decided to introduce a monitoring mechanism. "Euinside.eu," *Euinside.eu*, accessed March 14, 2014, <http://www.euinside.eu>.

⁸ van Hüllen and Börzel, "The EU's Governance Transfer: From External Promotion to Internal Protection?"

The paper will try to provide an answer how effective the sanction mechanisms are under Article 7 TEU imposed on the Member States for breach of fundamental values in comparison to sanctions imposed on non- Member States. That is whether the sanctions imposed on Member States are less frequent and less harsh than those imposed on non- Member States.

In the first chapter I will explore the values of Article 2 TEU on which the Union is founded which have to be respected and promoted by Member States and the Copenhagen criteria which is necessary to be fulfilled in order to become a candidate for joining the EU. Then I will introduce Article 7 TEU and its mechanisms and how it goes along with the requirement that the Union is obliged to respect national identity under Article 4(2).

In chapter two I will present the cases of Hungary, Romania and Bosnia as already mentioned above. The purpose of this is to see is which mechanism the Union opted to use and how efficient it was in sanctioning these breaches of the European values in each country. I will use various reports, such as Progress Reports, or Cooperation and Verification (CVM) Reports, and other European Commission's documents, and various texts describing the breaches, in order to explore and explain the situation in countries during a breach in question and after sanctioning the breach.

The third chapter will provide comparison between jurisdictions and further elaboration on the how successful these sanctions are in Member States and in non-Member States. In this chapter I will also use various reports as in Chapter II to present the situation in the countries after the sanctions, and therefore use it to support my conclusion whether or not such sanctions were effective. This chapter will also provide the proposals which would transform Article 7 TEU from a theoretical mechanism to a real one to fight breaches of fundamental values by Member States. For this purpose I will use an article written by Kim Lane Scheppele, *What can the European*

Commission do When Member States Violate Basic Principles of the European Union? In which she proposes the systematic infringement procedure. Furthermore, I will also provide the proposals presented by Commissioner Reding.

Chapter I: European values and mechanisms available to fight breaches of the values

Introduction

This chapter will serve as an introductory chapter necessary to explain the terms that will be used later on in this thesis. The chapter will introduce and explain the European values under Article 2 TEU, the Copenhagen criteria, Article 7 TEU as a mechanism to fight breaches of Member States and introduce sanctions that could be imposed on non-Member States.

The European Values

In order to discuss the mechanism provided in Article 7 TEU it is necessary first to state what is considered under the European values. The Treaty on the European Union (TEU) in Article 2 provides for the values on which the European Union is founded. According to Article 2 the fundamental European values include “respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights including the rights of persons belonging to minorities.”⁹ The fundamental rights referred in the Article 2 TEU as values are according to Article 6(1) TEU fundamental rights stated in the Charter and the rights from Member States’ constitutions included in the European Convention and are according to Article 6(3) TEU general principles of the European Union.¹⁰ Equality as a value is important in equality of states before the Treaties and equality of European citizens before its institutions.¹¹

The values stated above from the Article 2 TEU were not included in treaties until the Treaty of Lisbon in 2007. These democratic values were necessary as “a common basis of values to secure

⁹ “Consolidated Version of the Treaty on European Union,” accessed March 6, 2014, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT>. Article 2

¹⁰ Ibid., Article 6(3).

¹¹ Koen Lenaerts and Piet Van Nuffel, *European Union Law*, Third (London: Sweete & Maxwell, 2011), 107.

a degree of homogeneity amongst the Member States” in the Union for successful integration.¹² According to Poptcheva, the European values “enjoy two-fold protection,” being a requirement that must be fulfilled for the accession to the Union and after accession to the Union being promoted and respected by the Member States.¹³ While the Union imposes these values as a requirement for the accession to the Union on candidate states and potential candidate states, which is the first requirement to be fulfilled in order to file an application for membership, states which accede to the Union usually fail to observe these values as a result of lack of an effective mechanism for their protection in Member States, that is Article 7 TEU.

Copenhagen Criteria and Article 49 TEU

There was always a presumption that states which want to accede to the Union should respect the values of the Union even though for a long time it was not included in the Treaties. The Commission, the Council and the European Parliament in the Declaration of April 5, 1977 stated that it was important for states which want to accede to the Union to protect fundamental rights stated in the states’ constitutions and from the Convention.¹⁴ The Lisbon Treaty introduced the requirement that the potential and candidate states respect and protect the values of the Union.¹⁵ According to Article 49 TEU, “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.”¹⁶

¹² Eva-Maria Poptcheva, “Breach of EU Values by a Member State,” October 15, 2013, http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fbibliotheque%2Fbriefing%2F2013%2F130633%2FLDM_BRI%282013%29130633_REV2_EN.pdf&ei=DusYU5icB4Xq4gSlloBg&usg=AFQjCNGXTarX2f4Nil0hU_YShz5wr0IFrQ&bvm=bv.62578216,d.bGE.

¹³ Ibid.

¹⁴ Lenaerts and Van Nuffel, *European Union Law*, 92.

¹⁵ Ibid.

¹⁶ “Consolidated Version of the Treaty on European Union,” Article 49.

Kochenov in his book stated that the introduction of Article 49 TEU, referring to Article 6(1) TEU, can be seen as “partial codification of the Copenhagen political criterion.”¹⁷ The criteria developed from the necessity of the Union to prepare Central and Eastern European countries for the accession to the Union. The Presidency in its Conclusions in Copenhagen in 1993, when discussing the accession of the Central and Eastern Countries to the Union stated that

“Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.”¹⁸

So, initially the Copenhagen criteria were composed of three criteria: political criteria, economic criteria, criteria requiring adoption of the *acquis communautaire*. The fourth criterion was adopted in 1995, which requires establishment of administrative agencies which would work on better adoption of *acquis communautaire*.¹⁹ As can be seen from the Presidency Conclusions, the political criteria is the most important. According to Kochenov, candidate states have to meet all Copenhagen criteria, while it is enough only to fulfill the political criteria in order to open the negotiations for the states which want to join the Union.²⁰ This is what made the political criteria the most important of those stated under the Copenhagen criteria and shows that there is some kind of hierarchy of the Copenhagen criteria.

In order to assure the fulfillment of the Copenhagen criteria there should be some instruments for tracking the status of the potential candidate and candidate states’ compliance with criteria. Such

¹⁷ Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (The Netherlands: Kluwer Law International, 2008), 36.

¹⁸ *European Council in Copenhagen 21-22 June 1993 Conclusions of the Presidency*, 13.

¹⁹ Marktler, “The Power of the Copenhagen Criteria.”

²⁰ Kochenov, *EU Enlargement and the Failure of Conditionality*, 55–56.

instruments for reviewing situations in states are called Copenhagen-related Documents.²¹ The Copenhagen related documents may be divided in two groups; one referring to only one specific state and its compliance with the Copenhagen criteria and the other referring to a number of states.²² Such documents include “opinions, progress reports, composite papers, strategy papers and regular reports, all referring to the Copenhagen criteria to some extent.”²³

Article 7 TEU as sanctions mechanism for Member States

While the Copenhagen criteria imposed certain requirements for states which want to join the Union there was no requirement on the states already members of the Union to respect such values. Such a requirement was introduced by the Amsterdam Treaty in 1997, under Article 6(1) and sanctions for failing to fulfill requirements were introduced in Article 7. This Article provided for the sanctions mechanism, describing the procedure of sanctioning of a Member State’s breach in detail, from initiation of the mechanism to penalties that would be imposed. As the values on which the Union is founded should be respected on both national level and the Union level, Article 7 applies not only to breaches covered under the Union law but also to such breaches which are covered by national laws.²⁴

The need for Article 7 mechanism also appeared after Central Eastern European countries expressed their wish to join the Union. After the Copenhagen criteria was introduced in order to prepare Eastern European states for the accession to the Union, there was a need for a mechanism which could guarantee that the progress achieved during the accession would continue to exist and

²¹ Ibid., 67–70.

²² Ibid.

²³ Marktler, “The Power of the Copenhagen Criteria.”

²⁴ “Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union.”

develop after the accession.²⁵ Therefore Article 7 sanctions mechanism was introduced by the Amsterdam Treaty. When it was introduced by the Treaty of Amsterdam Article 7 included only a sanctions mechanism, which was initiated when there already is serious breach of the values. However, after the *Haider case*,²⁶ the European Presidency stated that Article 7 should be changed so.²⁷ While the Treaty of Amsterdam introduced a sanctions mechanism, the preventive mechanism under Article 7(1) TEU was introduced in 2001 by the Treaty of Nice.²⁸ Amendment of Article 7 TEU by the Treaty of Nice provided a chance for mechanism of finding out and suppressing potential breaches, instead waiting until a serious breach of the values happens and then remedying it.²⁹ So, Article 7(1) should be initiated as soon as a *clear risk of breach* of the values appears.³⁰

Article 7(1) as a preventive mechanism provides that the Council after hearing the Member State which is allegedly in breach of the values and with the consent of the European Parliament “may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.”³¹ If it establishes that there was a breach of values by the Member State, the Council then issues recommendations to the Member State with which the Member State should comply in order to correct the breach of values. The preventive mechanism is initiated “on a reasoned

²⁵ van Hüllen and Börzel, “The EU’s Governance Transfer: From External Promotion to Internal Protection?”.

²⁶ In 2000, a right party the Austrian Freedom Party joined the Austrian government through a coalition with Austrian People’s Party. The party was considered as a threat to democracy and rule of law. There was no serious breach necessary under Article 7 to impose sanctions on Austria. For lack of such mechanism which would prevent potential breaches, fourteen Member States first threatened and then imposed diplomatic sanctions on Austria. Ibid. These sanctions were lifted the same year after a report stating that the Constitutional Court exercises control over “the respect for fundamental rights and democratic standards.” Ibid.

²⁷ Pinelli, “Protecting the Fundamentals: Article 7 of the Treaty on the European Union and beyond.”

²⁸ Poptcheva, “Breach of EU Values by a Member State.”

²⁹ “Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union.”

³⁰ Ibid.

³¹ “Consolidated Version of the Treaty on European Union,” Article 7(1).

proposal by one third of the Member States, by the European Parliament, or by the European Commission.”³²

It is not necessary to initiate first the preventive mechanism under Article 7(1) in order to initiate the sanctions mechanism under Article 7(3) and (4). Rather the sanction mechanism is “independent of the preventive one.”³³ Unlike the preventive mechanism, the sanctions mechanism cannot be initiated by the European Parliament. However, the consent of the European Parliament is necessary as in the preventive mechanism. After initiation of the mechanism by one third of the Member States or by the Commission, obtained consent of the European Parliament, and allowing the Member State in breach of values to introduce its side of the story, the Council by unanimity determines “the existence of a serious and persistent breach.”³⁴ This is known as the first phase of the sanctions mechanism.³⁵

Article 7(3) as a second phase of the sanctions mechanism³⁶ provides that after determining “the existence of a serious and persistent breach”³⁷ the Council may by a decision of a qualified majority³⁸ “suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.”³⁹ During the suspension of the right to vote in “the European

³² Ibid.

³³ Poptcheva, “Breach of EU Values by a Member State.”

³⁴ “Consolidated Version of the Treaty on European Union,” Article 7(2).

³⁵ Poptcheva, “Breach of EU Values by a Member State.”

³⁶ Ibid.

³⁷ “Consolidated Version of the Treaty on European Union,” Article 7(3).

³⁸ Qualified majority for the purpose of Article 7(3) and (4), as defined by Article 238(3) (b) TFEU is defined as “at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.” “Consolidated Version of the Treaty on the Functioning of the European Union,” 2010, Article 238(3)(b), http://link.springer.com/chapter/10.1007/978-3-642-19507-5_2.

³⁹ “Consolidated Version of the Treaty on European Union,” Article 7(3).

Parliament, the European Council and the Council,”⁴⁰ Member States’ representatives in these institutions will not be able to vote, and they will not be included when calculating “one third or four fifths of Member States.”⁴¹ Furthermore, suspension of the votes will not prevent these institutions from a voting decision. Article 354 TFEU will regulate the voting procedure, while suspension is in power.⁴² While the suspension of the right to vote in the EU institutions, the qualified majority in the Council as from November 1, 2014⁴³ will be determined by Article 238(3)(a) TFEU and Article 238(3)(b) TFEU.⁴⁴ If after the sanctions under Article 7(3) TEU were imposed, it is established that the Member State in question is no longer in breach of the values from Article 2 TEU, “the Council, acting by a qualified majority, may decide subsequently to vary or revoke measures.”⁴⁵

Defining ‘clear risk of a serious breach’ and ‘serious and persistent breach’

As already stated above the prevention mechanism under paragraph 1 can be invoked only if there is ‘*a clear risk of a serious breach*’ and the sanctions mechanism under paragraph 2 to 4 can be initiated if there is ‘*a serious and persistent breach*’ of the values stated under Article 2 TEU. The mechanism under Article 7 cannot be initiated for any serious breach of one individual’s fundamental rights. Rather such breach should be made through certain political actions.⁴⁶ According to the Commission, a clear risk means “excluding purely contingent risk” and a serious breach “requires the risk to have actually materialized.”⁴⁷ Sanctions mechanism besides requiring

⁴⁰ Ibid., Article 7(5).

⁴¹ “Consolidated Version of the Treaty on the Functioning of the European Union,” Article 354.

⁴² “Consolidated Version of the Treaty on European Union,” Article 7(5).

⁴³ “Consolidated Version of the Treaty on the Functioning of the European Union,” Article 238 (3).

⁴⁴ Ibid., Article 354.

⁴⁵ “Consolidated Version of the Treaty on European Union,” Article 7(4).

⁴⁶ “Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union.”

⁴⁷ Ibid.

serious breach for its initiation also requires that the breach is persistent. According to the Commission, in order for a breach to be persistent it has to “last for some time.”⁴⁸ Furthermore, as the Commission stated in its Communication, “the risk or breach identified must therefore go beyond specific situations and concern a more systematic problem.”⁴⁹

Article 4(2) on protection of national identities

One of the excuses mostly invoked by the Member States against Article 7 mechanism is the protection of national identity. Article 4(2) TEU provides that “the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”⁵⁰ Article 4(2) TEU gives the Member States a way out of compliance with the European law as well provides a possibility not to comply with Article 7 TEU, under the justification of protection of the national identity. The concept of national identity is differently understood by each state and depends from one state to another. According to von Bogdandy, “the content of national identity in Article 4(2) TEU is linked to concepts found within domestic constitutional law.”⁵¹ Uniqueness of a Member State may be considered as falling under the national identity. However, not all uniqueness should fall under the national identity. Even though, Member States could invoke Article 4(2) TEU in order not to comply with European law, specifically Article 7 TEU, there are limitations on what could be considered to fall under the concept of national identity, as already said everything that is unique cannot be a factor of national

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ “Consolidated Version of the Treaty on European Union,” Article 4(2).

⁵¹ ARMIN Von Bogdandy and Stephan Schill, “Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty,” *Common Market Law Review* 48, no. 5 (2011): 1417–53.

identity. By providing for limitations on national identity components the Union precludes Member States from an exemption of the values under Article 2 TEU.⁵²

Failure to activate Article 7 TEU

Even though there are a number of breaches and potential breaches of the European values, Article 7 TEU mechanism has never been activated. France's extradition of Roma, Romanian violations of rule of law, Italian laws restricting freedom of press, Hungarian laws restricting freedom of media and constitutional reform, are some examples of breaches of European values. In all these cases, except for constitutional reform in Hungary, the Commission rejected any violation of Article 7 and decided to use the infringement procedure.⁵³ Therefore, the mechanism provided by Article 7 is only a theoretical one, and is considered to be "a nuclear option" or a mechanism used as "a last-resort solution."⁵⁴ One of the reasons behind this is that in order for the mechanism to be initiated, as already stated above, besides the proposal to be made by the Member States, by the European Parliament or the Commission, in order to determine whether there is breach or not the European Parliament has also to give its consent. In order to issue the proposal and to give consent the majority has to vote for it. The high majority threshold in the Parliament and the Council⁵⁵ and unwillingness of the Member States to act against each other fearing that those same Member States could invoke it against themselves one day are the main reasons why Article 7 mechanism

⁵² Ibid.

⁵³ The infringement procedure is regulated by Article 258 TFEU. The European Commission is under obligation to issue opinion about a Member State not complying with the EU Treaties. The Member State in question is then allowed to provide observations, and if the State does not agree with the opinion issued by the Commission, the Commission may bring proceedings before the European Court of Justice.

⁵⁴ The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU- Towards an EU Copenhagen Mechanism," n.d.

Sergio, Guild, Elspeth Carrera, Nicholas Hernanz, and Belgium) Centre for European Policy Studies (Brussels, *The triangular relationship between fundamental rights, democracy and the rule of law in the EU: towards an EU Copenhagen mechanism*, 2013, 1, <http://www.ceps.eu/ceps/dld/8617/pdf>.)

⁵⁵ van Hüllen and Börzel, "The EU's Governance Transfer: From External Promotion to Internal Protection?".

has never been used. The other two obstacles to activation of Article 7 are not clear definitions of what constitutes serious breach and absence of monitoring instruments.⁵⁶ Since 2007, the Fundamental Rights Agency (FRA) has mandate to monitor compliance of the Member States with Article 2.⁵⁷

Sanction mechanisms against non-Member States

The European Union uses the following instruments in order to assure that the non-Member States will comply with the values which are fundamental to the Union and on which the Union is formed: political dialogue, financial assistance, positive conditionality and negative conditionality.⁵⁸ While political dialogue, financial assistance and positive conditionality is used often to encourage states to respect the values; rule of law, democracy, human rights, the negative conditionality is not used so often. It is usually used when it is necessary to safeguard democracy and its process.⁵⁹

In 1997 the Luxembourg European Council introduced a pre-accession strategy which was composed of the Accession Partnerships and financial aid during the pre-accession process.⁶⁰ The European Union concludes agreements either with potential and candidate states or any third state, through which it provides support for political and economic development of states. One of the requirements that the state to which the Union provides its support is obliged to respect is the principles on which the Union is founded.⁶¹

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Kochenov, *EU Enlargement and the Failure of Conditionality*, 74.

⁶¹ Ilaria Vianello, "Maastricht Centre for European Law Research Seminar 25.01.2012. Conditionality in EU Law: The Example of EU Enlargement," January 25, 2012, <http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.maastrichtuniversity.nl%2Fweb%2Ffile%3Fuuid%3D361eb4c8-8538-406e-9620-0ef640ce62a2%26owner%3D848e5266-b8f2-4877-aac8->

The agreements concluded between potential and candidate states include Pre-Accession Assistance (IPA) and Stabilization and Association Agreements (SAA).⁶² These agreements contain clauses which provide for termination of aid provided by the Union in case of a breach of the European values. The two provisions inserted in the agreements between the Union and third states are “the essential element clause” and “the non-execution clause.”⁶³ According to Vianello, the essential element clause provides for the fundamental values of the Union. Van Hüllen and Börzel also provide that essential element clause is a positive conditionality instrument “rewarding compliance with human rights, democracy, and the rule of law, political Copenhagen criteria, by opening accession negotiations and ultimately offering membership.”⁶⁴ The non-execution clause closely relates to the essential element clause, providing that breach of fundamental values stated in the essential elements clause can result in termination of the agreement by the damaged party to the agreement.⁶⁵

Furthermore, besides the essential element and non-execution clause, there is also provision regarding “suspension of Union support”⁶⁶ which as an instrument of negative conditionality was introduced in 1998 through Accession Partnerships.⁶⁷ The suspension clause provides that if a state does not comply with the values, specifically democracy, human rights and rule of law, a state may be denied pre-accession financial assistance.⁶⁸ As Vianello stated, the suspension of Union support

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⁶² Ibid.

⁶³ Ibid.

⁶⁴ van Hüllen and Börzel, “The EU’s Governance Transfer: From External Promotion to Internal Protection?”.

⁶⁵ Vianello, “Conditionality in EU Law: The Example of EU Enlargement.”

⁶⁶ Ibid.

⁶⁷ van Hüllen and Börzel, “The EU’s Governance Transfer: From External Promotion to Internal Protection?”.

⁶⁸ Ibid.

which ensures protection of European values developed through the agreements “from political preconditions to legally binding conditions subject to sanctions.”⁶⁹

Besides sanctions restricting the use of financial aid or depriving states financial aid for a certain period of time or for good, the Union may also impose sanctions regarding integration to the Union. If it happens that a state fails to fulfill requirements set in Article 49(1) TEU, in that case the state’s application for membership can be denied or its accession process may be deferred, by postponing negotiations.⁷⁰ The instruments used in the pre-accession process having as a goal the membership to the European Union are very effective instruments.⁷¹

The Accession Partnerships through which the suspension clause was introduced were created in order to lay down objectives, goals, priorities that needed to be fulfilled in order to meet the Copenhagen criteria and state financial aid to be awarded to states in order to fulfill all requirements from the Accession Partnership.⁷² So, if a state achieves objectives stated in the Accession Partnership it is allowed financial resources for such achievements. However, if a state fails to comply with the requirements stated in the Accession partnership and also with the requirements of the Copenhagen criteria it will be denied any financial assistance.⁷³ The provision stating that states which fail to fulfill requirements from the Partnership will be denied financial aid is found in Article 4 of the Regulation 622/98.⁷⁴ According to Kochenov, the provision of

⁶⁹ Vianello, “Conditionality in EU Law: The Example of EU Enlargement.”

⁷⁰ van Hüllen and Börzel, “The EU’s Governance Transfer: From External Promotion to Internal Protection?”.

⁷¹ Marloes Spreeuw, “Double Standards in the Application of the EU Values and Principles: Member States versus Potential Candidate and Candidate Countries,” accessed March 13, 2014, http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CckQFjAA&url=http%3A%2F%2Fwww.pravo.unizg.hr%2F_download%2Frepository%2FPaper_M._Spreeuw.pdf&ei=x0c3U5rPK4qM5ASLjIDYcG&usg=AFQjCNEsolh5tYqppyh2SQBtXF6z3wzYOW&bvm=bv.63808443,d.bGE.

⁷² Kochenov, *EU Enlargement and the Failure of Conditionality*, 74.

⁷³ Ibid.

⁷⁴ Ibid.

Article 4 is what made “the Copenhagen criteria legally enforceable”⁷⁵ providing it with legal grounds instead of being only political.

Conclusion

The chapter has provided an overview of the mechanisms and criteria which are necessary for further development of this thesis. The values provided in Article 2 TEU have to be respected by Member States, candidate states, potential candidate states, and also by other states which conclude agreements with the Union. While sanctions for non-Member States are provided in the agreements concluded between the Union and states, sanctions against Member States are found under Article 7 TEU. However, as stated above Article 7 TEU has not been used yet. The next chapter will provide two recent examples of Member State’s breach of values which were not sanctioned by Article 7 TEU, and an example of a potential candidate and how its breaches are being sanctioned.

⁷⁵ Ibid., 75.

Chapter II: The cases of Romania, Hungary and BiH

Introduction

This chapter will provide an overview of cases in Romania, Hungary and Bosnia and Herzegovina. The cases of Romania and Hungary present threats to rule of law and the independence of the judiciary, while the case of Bosnia and Herzegovina presents non-compliance with respect and protection of rights of minorities. The chapter will explore the breaches made by these two Member States and BiH as a potential candidate. After separately presenting the cases of these three countries I will also present the Union's actions into these cases. The purpose of presenting these cases is to show the double standards applied to Member States and non-Member States; that is failure by the Union to act by its only mechanism, Article 7 TEU, for breach of union values, while it uses its mechanisms against non-Member States in order to bring them into compliance with Union law.

Romania

The leading party in Romania until May 2012, was the Democratic Liberal Party. After it lost a vote of no-confidence, the Social Liberal Union in coalition with some smaller parties entered Parliament and was the dominant party. The entry of the Social Liberal Union to Parliament resulted in cohabitation⁷⁶ since the President of Romania came from the opposition party.⁷⁷ President Traian Basescu and Prime Minister Victor Ponta were fierce opponents. The first conflict appeared on the question who would be representative of Romania at the Council meeting, the

⁷⁶ Cohabitation occurs when a President and Prime Minister come from two different, opposing parties.

⁷⁷ Corina Stratulat and Paul Ivan, "Romania's Democracy in Reverse Gear- En Garde, EU!," July 6, 2012, http://www.epc.eu/pub_details.php?cat_id=4&pub_id=2788.

President or the Prime Minister.⁷⁸ The usual practice on this issue was that the President of the country represents it, but Prime Minister Ponta wanted to strengthen his position. In order to succeed in his plan the Prime Minister used his influence and majority he had in parliament and asked for permission to go to the Council meeting. The majority in Parliament of course issued a declaration allowing the Prime Minister to go to the meeting and releasing the President from such an obligation “calling on the President to attend only summit meeting dealing with matters of foreign policy and defence.”⁷⁹ After Parliament’s declaration the President asked the Romanian Constitutional Court to decide on this issue. The Court ruled that the one who should attend the meetings was the President. However, the Prime Minister did not obey this decision and still went to the meeting. Moreover, he again used his majority in the parliament to prolong the time period of making the decision effective by not publishing it in the Journal.⁸⁰ Taking the control over the Journal “via emergency ordinance”⁸¹ was a clear attack on the independence of the judiciary.

The next action he did through the parliament was to fire the judges who voted for the President on the issue who would attend the Council meeting. By this the Prime Minister and Parliament violated the Constitution, specifically Article 125 stating that “The judges appointed by the President of Romania shall be irremovable, according to the law.”⁸² Another action that was an attack on the judiciary was the decision by the Parliament that the Constitutional Court will no longer be able to review the parliamentary acts.⁸³ This was considered as another breach of the

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² “Constitution of Romania,” Article 125(1), accessed March 16, 2014, <http://www.cdep.ro/pls/dic/site.page?id=371>.

⁸³ Stratualdt and Ivan, “Romania’s Democracy in Reverse Gear- En Garde, EU!”.

Constitution providing that “Emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State.”⁸⁴

However, the attacks on the judiciary were not all the Prime Minister did. He also dismissed members of the Democratic Liberal Party who were occupying positions of speakers in Parliament’s chambers and gave their positions to members of the Social Liberal Union party members.⁸⁵ The Prime Minister also replaced the Ombudsman and started a procedure in Parliament to suspend the President⁸⁶ and submitted the question of his impeachment to referendum.⁸⁷ He also changed the rules of the referendum in his favor.⁸⁸

The result of the referendum was in favor of the President. Even though 87.5% voted for the impeachment of President Basescu,⁸⁹ the referendum results were not valid. The reason was that the turnout to the referendum did not reach the needed threshold of 50%. Thanks to the turnout of 46.13%⁹⁰ the President stayed in power.

Even though President Barosso stated that the European values are endangered in Romania, Article 7 TEU was never initiated.⁹¹ Romania was also criticized by the Commission for the violations of the rule of law⁹² and by the Council’s President Herman Van Rompuy who “urged Romania’s

⁸⁴ “Constitution of Romania,” Article 115(5).

⁸⁵ Stratualdt and Ivan, “Romania’s Democracy in Reverse Gear- En Garde, EU!”.

⁸⁶ Gerda Falkner, “Is the EU a Non-Compliance Community? Towards ‘Compliance for Credibility’ and EU Action for the Protection of Democracy in Europe,” November 2013, n°01/2013, <http://www.cee.sciences-po.fr/fr/publications/les-cahiers-europeens/2013.html>.

⁸⁷ Stratualdt and Ivan, “Romania’s Democracy in Reverse Gear- En Garde, EU!”.

⁸⁸ Falkner, “Is the EU a Non-Compliance Community? Towards ‘Compliance for Credibility’ and EU Action for the Protection of Democracy in Europe.”

⁸⁹ “EU Warns Romania PM over Crisis,” *BBC News*, July 12, 2012, <http://www.bbc.com/news/world-europe-18822790>.

⁹⁰ Ibid.

⁹¹ Falkner, “Is the EU a Non-Compliance Community? Towards ‘Compliance for Credibility’ and EU Action for the Protection of Democracy in Europe.”

⁹² van Hüllen and Börzel, “The EU’s Governance Transfer: From External Promotion to Internal Protection?”.

Prime Minister to safeguard judicial independence and the rule of law.”⁹³ Rather the Union exerted it pressure on Romania through CVM reports. The CVM report dated July 18, 2012 presented recommendations and instructions for Romania how to settle its political crisis. The recommendations are known as “the 11 commandments”⁹⁴ by President Barroso. Only those specifically referring to the elements of political crisis mentioned above will be explored.

The eleven commandments by President Barroso were published in the Commission’s CVM report on Romania. The first requirement called for nullification of emergency ordinances issued by the Parliament. The first Emergency Ordinance 38/2012 providing that the Constitutional Court has no longer power to review parliamentary act and the second 41/2012 amending the law regulating referendum had to be repealed.⁹⁵

The second requirement set by President Barroso relies on the first requirement of nullifying the ordinance 38/2012. It stated that the Parliament when issuing emergency ordinances should obey the Constitution and not change job description of state institutions such as Constitutional Court.⁹⁶ The third and fourth requirements were in relation with the Parliament’s refusal to print the decision of the Constitutional Court ruling that the President should attend the Council meetings not the Prime Minister. The requirement was that all Constitutional Court decisions have to be published in the Journal in order to become effective.⁹⁷ Furthermore President Barroso also

⁹³ “EU Warns Romania PM over Crisis.”

⁹⁴ Georgi Gotev, “Commission Slams Romania with Scathing Report,” *EurActiv.com*, July 18, 2012, <http://www.euractiv.com/justice/commission-slams-romania-scathing-news-513980>.

⁹⁵ *Report from the Commission to Te European Parliament and the Council* (European Commission, July 18, 2012).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

required that all parties respect independence of judiciary which was closely related to what the Prime Minister did, that is exercising pressure on judges and unconstitutionally dismissing them.⁹⁸

Since the Prime Minister fired the Ombudsman for, what he claimed, being at the disposal of President Basescu and his party, and appointed a person who was friendly to his Social Liberal Union, the report also introduced the requirement regarding the Ombudsman. The President required Romania to “appoint an Ombudsman enjoying cross-party support, through a transparent and objective process, leading to the selection of a personality with uncontested authority, integrity, and independence.”⁹⁹

After the requirements were introduced in the CVM report the Prime Minister in a letter of July 16 and 17, 2012, promised to fulfill all eleven requirements related to the political crisis in the country.¹⁰⁰ The CVM report published in January 2013 shows that Romania complied with the commandments referring to the Constitutional Court. The constitutional role of the Court, primarily role of reviewing parliamentary acts has been respected. The commandment providing that the Parliament cannot exercise control over judiciary by deciding which decisions it would publish in the Journal in order to become effective was also fulfilled.¹⁰¹ However, the Commission expressed its dissatisfaction with the measures affecting independence of judiciary.¹⁰²

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Dennis Deletant, “Testing the Parameters of Democracy: Romania in 2013,” March 21, 2013, http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFkQFjAF&url=http%3A%2F%2Fjournal.ispri.ro%2Fwp-content%2Fuploads%2F2012%2F03%2F105-116-Dennis-Deletant.pdf&ei=5hM3U6TDBaSS7AbFh4HICg&usg=AFQjCNH-A6WE2mVR-V1_a5K8UJeEwpNu6g&bvm=bv.63808443,d.bGE&cad=rja.

¹⁰² Ibid.

Hungary

Threats to the European values from Article 2 TEU in Hungary appeared after the Fidesz in coalition with KDNP (Christian Democratic People's Party) gained the majority in the parliament in 2010. Since then the Fidesz, together with its leader, Prime Minister Victor Orban, introduced twelve amendments to the Constitution and finally replaced it with a new one on April 18, 2011¹⁰³ which entered in force on January 1, 2012.¹⁰⁴ One of the most controversial laws introduced by the Fundamental Law from 2011 was the one concerning the Constitutional Court. The power of the Constitutional Court was reduced by the Constitution to only reviewing laws concerning budget and tax¹⁰⁵ and the "Court can no longer rule on the constitutionality of legislation in abstract."¹⁰⁶ The other problem was the forced retirement of the Constitutional Court judges by lowering the retirement age from 70 to 62.

Just before the Fundamental Law entered into force, the Fidesz introduced another group of amendments to the Law. One of those amendments contained provisions that officials of the Supreme Court and the National Judicial Council would lose their mandates as soon as the Fundamental Law entered in force.¹⁰⁷ This amendment stated that judges retirement age was decreased from 70 to 62 years, and all judges qualifying for retirement had to leave their offices

¹⁰³ Tamas Boros, "Constitutional Amendments in Hungary: The Government's Struggle against the Constitutional Court," February 2013, http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.fesbp.hu%2Fcommon%2Fpdf%2FNachrichten_aus_Ungarn_februar_2013.pdf&ei=SlE3U4HsOumr4ATToYCYAQ&usg=AFQjCNGCCpOSIGLS04Cnia9hWf6rmP6Ptg&bvm=bv.63808443,d.bGE.

¹⁰⁴ Sophie Duxson and Greg Weeks, "A Constitutional Crisis or Just the Work of a Sovereign Parliament?: The Case of Hungary," *UK Constitutional Law Association*, January 17, 2012, <http://ukconstitutionallaw.org/2012/01/17/sophie-duxson-and-greg-weeks-a-constitutional-crisis-or-just-the-work-of-a-sovereign-parliament-the-case-of-hungary/>.

¹⁰⁵ Boros, "Constitutional Amendments in Hungary: The Government's Struggle against the Constitutional Court."

¹⁰⁶ Duxson and Weeks, "A Constitutional Crisis or Just the Work of a Sovereign Parliament?: The Case of Hungary."

¹⁰⁷ Boros, "Constitutional Amendments in Hungary: The Government's Struggle against the Constitutional Court."

by January 1, 2012.¹⁰⁸ In this was the president of Supreme Court was taken his mandate earlier, and instead of being the president of the Court until 2015, his mandate was removed in 2011.¹⁰⁹ Furthermore, the President of the National Judicial Office, gained huge power of moving judges to other courts, decide who will be appointed to the places of retired judges, and assign the cases to judges.¹¹⁰ The problem with the National Judicial Office was that as an independent body once it is elected to perform all activities already stated, no other state body would be in position to monitor it.¹¹¹

The Temporary provisions were invalidated by the Constitutional Court in 2012 which provided that “the provisions lacked a temporary character.”¹¹² After this decision, the amendments of Temporary provisions were stated to be part of the Fundamental Law, by the Fourth Amendment in March 2013.¹¹³

After the new Fundamental law was introduced the Venice Commission issued recommendations on the amendments introduced to the Constitution by the Fidesz. The recommendations issued by the Venice Commission referred to media laws, judiciary independence and laws regarding central bank. The Commission expressed the fear of endangering democracy, rule of law and fundamental rights.¹¹⁴ The response of Hungarian government was that it will review the laws which the Venice

¹⁰⁸ *Democracy at Stake in Hungary: The Orban Government's Constitutional Revolution* (Norwegian Helsinki Committee), accessed March 18, 2014, <http://www.euinside.eu>.

¹⁰⁹ “European Commission Launches Accelerated Infringement Proceedings against Hungary over the Independence of Its Central Bank and Data Protection Authorities as Well as over Measures Affecting the Judiciary” (European Commission Press Release, January 17, 2012), http://europa.eu/rapid/press-release_IP-12-24_en.htm.

¹¹⁰ *Ibid.*

¹¹¹ Otto Faludi, “Dismantling Democracy: How Hungary Is Turning Its Back on the EU (Part II),” *Freedom Observatory*, April 30, 2012, <http://www.freedomobservatory.org/dismantling-democracy-how-hungary-is-turning-its-back-on-the-eu-part-ii-2/>.

¹¹² Boros, “Constitutional Amendments in Hungary: The Government's Struggle against the Constitutional Court.”

¹¹³ *Ibid.*

¹¹⁴ Margit Feher, “Hungary's Constitutional Changes Threaten Democracy, Venice Commission Says,” *WSJ Blogs - Emerging Europe Real Time*, June 15, 2013, <http://blogs.wsj.com/emergingEurope/2013/06/15/hungarys-constitutional-changes-threaten-democracy-venice-commission-says/>.

Commission criticized, among them law that the President of National Judicial Office can move judges between courts.¹¹⁵ The European Parliament also published a report on Hungary on July 3, 2013 based on its resolution from February 16, 2012, stating that the amendments introduced must be in compliance with the European values.¹¹⁶ The Parliament stated that the independence of the judiciary was endangered by the possibility to remove judges from their offices for any reason and before their terms end, and the fact that the judiciary, its organization and administration, are no longer regulated by the Constitution.¹¹⁷

The case against Hungary for making judiciary less independent was brought in 2012. Before the case was initiated three Letters of Formal Notice on different breaches were sent to the Hungarian government to which the Government never responded. So, instead of initiating the mechanism under Article 7 TEU, the Commission decided that it would be better to use the infringement procedure under Article 258 TFEU. The case was raised on the basis of Directive 2000/78 EC which provides for non-discrimination among other grounds also on the ground of age. The Court of Justice in this case ruled against Hungary, stating that there was “unjustified discrimination on grounds of age.”¹¹⁸

The resolution provides Parliament’s support for the Act of 2011, which adopted some of the recommendations from the Venice Commission report. Even though the Resolution supports the new retirement age of 65 for judges introduced by the Act 2011, the Parliament is not happy with

¹¹⁵ Ibid.

¹¹⁶ Eurocentric, “European Parliament Passes Resolution on Hungary’s Constitution,” *The European Citizen*, July 4, 2013, <http://theeuropeancitizen.blogspot.com/2013/07/european-parliament-passes-resolution.html>.

¹¹⁷ “European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary,” July 3, 2013, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-315>.

¹¹⁸ Ibid.

the decision that the judges should be returned to their positions only if they are still available.¹¹⁹ In its Resolution, Parliament also provided for recommendations regarding the Constitution and the Constitutional Court. Parliament requires that the provisions invalidated by the Constitutional Court are excluded from the Fundamental Law.¹²⁰ Furthermore, Parliament also requires Hungary to return all the initial powers to the Constitutional Court, firstly the power of the Court to review the amendments to the Constitution.¹²¹ Parliament in the recommendations also included the requirement of the independent judiciary which, as already stated above consist of “ensuring that the principles of irremovability and guaranteed term of office of judges, the rules governing the structure and composition of the governing bodies of the judiciary and the safeguards on the independence of the Constitutional Court are enshrined in the Fundamental Law.”¹²² As stated above, Parliament expressed its dissatisfaction regarding the Act of 2011 providing that the judges who were retired due to decreasing retirement age be returned to their positions only if they are not already occupied. In its recommendations the Parliament requires Hungary to return all judges to their offices even if the positions are already occupied by new personnel and respect the decision of the European Court of Justice which ruled that dismissal was unjustified discrimination.¹²³

According to Gall, the European Commissioners, Kroes and Reding stated that the Union should be ready to initiate Article 7 TEU mechanism against Hungary.¹²⁴ However, Parliament was reluctant to initiate Article 7 TEU.¹²⁵ While Parliament, the Commission and other European institutions were engaged in the situation in Hungary, providing comments, recommendations,

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Lydia Gall, “Response to Hungary Is Test for EU,” May 16, 2013, <http://euobserver.com/justice/120145>.

¹²⁵ Ibid.

resolutions, the Council has been criticized for being silent.¹²⁶ Even though the breach of the values by Hungary was so serious Article 7 was not triggered, rather as already stated the infringement procedure was initiated against Hungary. The infringement action initiated in January 2012, as already mentioned above for the retirement of judges was closed in November, 2013.¹²⁷ In the Press Release the Commission expresses its satisfaction about introducing the Act 2011 providing that the retirement age of judges is 65.¹²⁸

Bosnia and Herzegovina

Bosnia and Herzegovina did not officially apply for the European Union membership. In 2000, Bosnia and Herzegovina was declared a potential candidate by the European Council. The relationship between BiH and the Union is mostly regulated through bilateral agreements, such as the Stabilization and Association Agreement signed between the Union and Western Balkan states, and the Interim Agreement on trade and trade-related issues in force since 2008.

During the Stabilization and Association Process BiH has to fulfill 18 steps in order to start negotiating the Stabilization and Association Agreement. The Report on SAP from 2003 shows, that BiH is a democratic country with a Constitution providing for the rule of law and democracy.¹²⁹ The Commission was not satisfied with the legislature and executive, and legislative process. Another aspect which was not satisfactory was the public administration. According to the report, “if BiH is to make progress towards a SAA, it must develop a stable public

¹²⁶ Ibid.

¹²⁷ “European Commission Closes Infringement Procedure on Forced Retirement of Hungarian Judges” (European Commission, November 20, 2013), http://europa.eu/rapid/press-release_IP-13-1112_en.htm.

¹²⁸ Ibid.

¹²⁹ *Report from the Commission to the Council on the Preparedness of Bosnia and Herzegovina to Negotiate a Stabilisation and Association Agreement with the European Union* (European Commission, November 18, 2003), http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=503DC0692.

administration based on a clear legal framework and characterized by efficiency, professionalism and independence.”¹³⁰ Furthermore, the report expresses the Commissions dissatisfaction with rights of minorities.¹³¹ While the report done in 2003 was quite negative, the one thing that the Commission emphasized for future progress of BiH is internal consensus, through which the country would be united and as such be dealing with the Union’s challenges.¹³²

Even though the Stabilization and Association Agreement was signed in 2008 and ratified in 2011, it is not yet in force. The main reason why the SAA is not in force is BiH’s failure to implement decision of *Sejdić and Finci v. Bosnia and Herzegovina*.¹³³ The Constitution of Bosnia and Herzegovina is included in Annex 4 of the Dayton Peace Agreement. The aim of the Dayton Agreement and therefore the Constitution was to end the war in BiH. The Constitution provides that there are three constituent people, Bosniaks, Serbs and Croats, and minorities declared as others. The case was raised on the basis of two provisions of the Constitutions providing that only constituent people can stand for election for the Presidency and the House of Peoples. Article IV of the Constitution of Bosnia and Herzegovina provides that the House of Peoples and the House of Representatives shall be composed of constituent people, Bosniaks, Serbs and Croats, each constituent people making one third of members of the Houses.¹³⁴ According to Article 5 the

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ *BOSNIA AND HERZEGOVINA 2013 PROGRESS REPORT* (Brussels: European Commission, October 16, 2013), http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCKQFjAA&url=http%3A%2F%2Fec.europa.eu%2Fenlargement%2Fpdf%2Fkey_documents%2F2013%2Fpackage%2Fba_rapport_2013.pdf&ei=uz43U5SkKsTw4QTzv4HoDA&usg=AFQjCNEUfg2rw7dF5XcrhrzY6D3feMFDpQ&bvm=bv.63808443,d.bGE.

¹³⁴ “Constitution of Bosnia and Herzegovina,” Article IV, accessed March 21, 2014, http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCKQFjAA&url=http%3A%2F%2Fwww.ccbh.ba%2Fpublic%2Fdown%2FUSTAV_BOSNE_I_HERCEGOVINE_engl.pdf&ei=7IE3U-LAJcfJ4gTEzIHwAg&usg=AFQjCNEOS0g7HCjs3K7T_ukgozs25xvBnA&bvm=bv.63808443,d.bGE.

Presidency of BiH is also to be composed of the constituent people, one Bosniak, one Serb, and one Croat.¹³⁵

The case of *Sejdić and Finci*, which was decided by the European Court of Human Rights (ECtHR), was brought by Mr. Dervo Sejdić and Jakob Finci, persons belonging to Roma and Jewish population in BiH who claimed to be discriminated based on their race/ethnicity¹³⁶ and therefore were denied to stand for elections to the Presidency and the Houses of Peoples.¹³⁷ The ECtHR in 2009, stated that while in war times such provisions were necessary to establish peace in BiH after all progress that BiH did through which it voluntarily obliged itself to bring the Electoral Law and the Constitution in compliance with the Convention, provisions such as Article 4 and 5 of the Constitution can no longer be present in the Constitution. Moreover, the Constitution of Bosnia and Herzegovina includes the Convention, which according to the Constitutional Court has priority over all laws and also over the Constitution.¹³⁸ Therefore BiH is obliged to respect all the rights guaranteed by the Convention.¹³⁹ The Court stated that there was discriminatory treatment by providing that anybody else except from the constituent peoples cannot stand for elections to the House of Peoples and the Presidency.¹⁴⁰

According to Commissioner Füle, three formal initiatives for resolving the issue of Sejdić and Finci were sent to Bosnian institutions and since these were sent in 2010, there was no progress.¹⁴¹

¹³⁵ Ibid., Article V.

¹³⁶ *CASE OF SEJDIĆ AND FINCI v. BOSNIA AND HERZEGOVINA*, App. nos. 27996/06 and 34836/06 2009 ECtHR (Grand Chamber), accessed March 21, 2014., [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491#{%22itemid%22:\[%22001-96491%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491#{%22itemid%22:[%22001-96491%22]}) para. 32. In the case of *Timishev v. Russia* the European Court of Human rights held that discrimination based on ones' ethnicity is considered to be racial discrimination.

¹³⁷ Ibid., para. 26.

¹³⁸ Ibid., para. 14.

¹³⁹ "Constitution of Bosnia and Herzegovina," Article 2(2).

¹⁴⁰ *CASE OF SEJDIĆ AND FINCI v. BOSNIA AND HERZEGOVINA*, App. nos. 27996/06 and 34836/06 2009 ECtHR (Grand Chamber), accessed March 21, 2014., [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491#{%22itemid%22:\[%22001-96491%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491#{%22itemid%22:[%22001-96491%22]}) paras.42-56

¹⁴¹ "Bosnia-Herzegovina - EU: Deep Disappointment on Sejdić-Finci Implementation" (European Commission Press Release, February 18, 2014), http://europa.eu/rapid/press-release_MEMO-14-117_en.htm.

Since the initiatives did not result in any progress the Union organized meetings with Bosnian politicians to try to reach agreement between representatives of the three constitutive people, but so far such meetings did not produce any solution.

Bosnia and Herzegovina as a potential candidate for the Union membership falls under the Pre-accession Assistance (IPA). The IPA's goals are to provide funding for "implementing the political, institutional, legal, administrative, social and economic reforms required to bring the countries closer to Union values and to progressively align to Union rules, standards, policies and practices with a view to Union membership."¹⁴² The IPA funds are granted to the beneficiaries among which is BiH and objectives of granting the funds are "to strengthen democratic institutions, reform public administration, carry out economic reforms, develop their civil society and advance in regional cooperation and reconciliation, with the ultimate aim of acceding to the EU."¹⁴³

The financial assistance under the IPA for the period of 2011-2013 had objectives of supporting "strengthening the rule of law, improving the capacity and efficiency of the public administration and supporting social and economic development."¹⁴⁴ The 2013 Progress Report on Bosnia and Herzegovina shows that Bosnia and Herzegovina was granted 87 million Euros for "projects including support for judiciary, law enforcement, transport, education, refugees and displaced persons, and demining."¹⁴⁵ As a result of its failure to implement the decision of *Sejdić and Finci* after the Union held numerous meetings with Bosnian politicians, without reaching the solution

¹⁴² "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the Instrument for Pre-Accession Assistance (IPA II)," December 7, 2011, ec.europa.eu/enlargement/pdf/highlight/20111207_ipa_final_en.pdf.

¹⁴³ "Instrument for Pre-Accession Assistance (IPA) Multi-Annual Indicative Planning Document (MIPD) 2011-2013 Multi-Beneficiary," accessed March 22, 2014, http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fec.europa.eu%2Fenlargement%2Fpdf%2Fmipd_multibeneficiary_2011_2013_en.pdf&ei=hlotU7iIJoH-ygP18oHQCw&usg=AFQjCNGmy1t0AtX8YRoRPHLaMFjxVw-jKA&bvm=bv.62922401,d.bGQ.

¹⁴⁴ *BOSNIA AND HERZEGOVINA 2013 PROGRESS REPORT*.

¹⁴⁵ *Ibid.*

for implementing *Sejdić and Finci*, on October 11 2013, BiH lost part of the IPA financial assistance. The Union canceled 54% of the IPA funds assigned to it, or 47 million Euros.¹⁴⁶ Moreover, BiH might in future lose 80 million Euros per year.¹⁴⁷ Besides losing 54% of the fund the Commission suspended another 5 million Euros for two agricultural projects which can no longer be realized.¹⁴⁸ After the Third Round High Level Dialogue between BiH and the Union, it was stated that if BiH could solve the problem of *Sejdić and Finci* in couple of days, that is agree to amend the Constitution or the election Law, the IPA funds would not be suspended.¹⁴⁹ However, since the solution was not reached the IPA funds were suspended.

Conclusion

Chapter II provides an overview of breaches of the European values in Romania, Hungary and Bosnia and Herzegovina. While the Union has Article 7 TEU as a mechanism to fight such breaches committed by Member States, it has not used it so far, as can be seen from these two cases, but the Union is not so reluctant when it comes to sanctioning breaches of non-Member States. As can be seen from the case of Bosnia and Herzegovina, the Union can provide the funds for non-Member States and impose requirements which the state in question has to fulfill. In all agreements by which the Union regulates its relations with non-Member States, it requires respect for the Copenhagen criteria or European values stated in Article 2 TEU. If a non-Member State does not respect and fulfill those requirements then the Union may impose sanctions. BiH is an

¹⁴⁶ Ibid.

¹⁴⁷ Esmir Milavić, "Bosnia Lost 45 Million Euros from IPA Funds - Funding Transferred to Kosovo," *From Bosnia to Canada*, December 10, 2013, <https://esmirmilavic.wordpress.com/2013/12/10/bosnia-lost-45-million-euros-in-ipa-funds-funding-transferred-to-kosovo/>.

¹⁴⁸ *BOSNIA AND HERZEGOVINA 2013 PROGRESS REPORT*.

¹⁴⁹ "EU-BiH: After the 3rd Round of High Level Dialogue on Accession Process" (European Commission Press Release, October 10, 2013), http://europa.eu/rapid/press-release_MEMO-13-874_en.htm.

example, where the Commission canceled more than a half of the funds granted by the IPA financial assistance for failure to respect and protect the rights of minorities.

On the other hand, while there were enough reasons to initiate Article 7 TEU mechanism against Hungary and Romania the Union failed to do so. While in the case of Romania after all the things that the Prime Minister did, threatening rule of law and the independence of the judiciary, the Union did nothing. President Barroso issued 11 requirements that had to be fulfilled by Romania. There were no further sanctions and recommendations because the Prime Minister of Romania agreed to comply with President Barros's requirements. On the other hand, the Hungarian case was more serious than the case of Romania and while Commissioner Reding called for activation of Article 7 TEU, it was not activated. Rather the case of Hungary was solved through the infringement procedure for changing the retirement age for judges and through recommendations of the Commission.

Chapter III: The effectiveness of the mechanisms

Introduction

Chapter III will provide an overview of the cases of Hungary, Romania and BiH explored in Chapter II with emphasis on how these cases were resolved and how effective they were. It will explore the willingness of the European Union to trigger the mechanism under Article 7 TEU against Member States for breach of the values on which the Union is founded and which are supposed to be common for all Member States. Since Article 7 TEU mechanism has never been activated, I will discuss the effectiveness of other sanctions used in the cases of Romania and Hungary together with the effectiveness of the sanctions imposed on BiH and in general sanctions against non-Member States for failure to comply with the Copenhagen political criteria. Moreover, I will explore the proposals offered to deal with breaches of the European values by Member States.

Willingness of the European Union to activate sanctions against Member States

The European Union in 2000 had no mechanism to act against Austria for the potential breach of rule of law and democracy,¹⁵⁰ however the question appears even if it had such a mechanism to prevent potential breach of the fundamental Union values, would it trigger it. As already stated above, the *Haider affair* was resolved through diplomatic sanctions by 14 Member States¹⁵¹ and later on the prevention mechanism was introduced in Article 7 TEU in 2001 by the Treaty of Nice. Even though the Union has an available sanctions mechanism to act against breaches of fundamental values by Member States, and also to act in case of potential breaches by the

¹⁵⁰ van Hüllen and Börzel, "The EU's Governance Transfer: From External Promotion to Internal Protection?".

¹⁵¹ Ibid.

preventive mechanism, it has not so far resorted to triggering the mechanism in spite of many breaches of the values, for example breaches by France, Italy, Hungary and Romania. Despite the fact that Commissioner Reding called for triggering Article 7 TEU against Hungary¹⁵² this case was dealt with under Article 258 TFEU infringement procedure. The cases of Italy and France were also dealt with the infringement procedure which was not initiated by the Commission, and the case of Romania was dealt with through CVM, instead of invoking Article 7 TEU mechanism.¹⁵³

The Effectiveness of sanctions mechanisms against non-Member States

The sanctions imposed on states which have not yet joined the Union are considered to be very effective, mainly because of the fact that the states which want to join the Union are willing to fulfill requirements set by the Union and therefore respect the values stated under Article 2 TEU and included in the Copenhagen criteria, with the hope that one day they will join the Union. The states tend to fulfill the conditions set by the Union, but in the case of non-compliance with those conditions, after triggering sanctions they are willing to correct the violation to get back on track to accession.

One of the reasons why the pre-accession mechanism is effective are the instruments through which the compliance with the Copenhagen criteria is followed. As already stated, the Copenhagen criteria instruments are Copenhagen related papers, including many forms of the reports which follow the situation in each acceding country separately,¹⁵⁴ for example Bosnia and Herzegovina Progress Report 2013. Such reports provide with an overview of the current situation in one state

¹⁵² Gall, "Response to Hungary Is Test for EU."

¹⁵³ van Hüllen and Börzel, "The EU's Governance Transfer: From External Promotion to Internal Protection?".

¹⁵⁴ Marktler, "The Power of the Copenhagen Criteria."

or a group of states, emphasizing actions which do not comply with the Copenhagen criteria and also issuing recommendations to bring those actions into compliance with the criteria. If such action is not in compliance with the Copenhagen conditionality then the Union may provide for sanctions against the state in question. So, the first and very important reason why the sanctions against non-Member States are so effective is that the mechanism of sanctioning includes many documents trying to prevent breaches by presenting breaches or potential breaches and providing the recommendations on how to circumvent a potential breach or how to solve an already existing breach.

If a state fails to react in accordance with the recommendations then the Union imposes sanctions. The very nature of the sanctions imposed on non-Member states, that is canceling financial assistance and stopping the accession process, is another reason why these sanctions are effective. As already stated the goal of the non-Member states is to accede to the Union. Mostly they will comply with all the conditions set by the Union, but there are cases when such compliance is not possible, or is not possible at the time set by the Union. Then the Union activates its mechanism and the state in question does everything in order for the Union to lift the sanctions imposed. The pre-accession financial aid presents a strong incentive to comply with the Union's requirements. The pre-accession financial assistance can be in two forms the positive conditionality that is promising financial aid for compliance with the Union's conditions and negative conditionality of suspension of the assistance. The financial pre-accession assistance is provided for the purpose of fulfilling the Copenhagen criteria, primarily the political criteria providing for "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection

of minorities.”¹⁵⁵ As can be seen from the case of BiH, after failure to implement the decision of *Sejdić and Finci*, which was brought to stop discrimination on the basis of ethnicity regarding the right to stand for elections, the Union canceled part of the financial assistance granted under the IPA funds for BiH’s disrespect of the rights of minorities.

However, while the most of states act in accordance with the recommendations of the Union to correct or avoid potential breaches and avoid sanctions the situation in BiH is somewhat different. The decision was issued in 2009, and since then it has not implemented. All attempts to reach an agreement on how to implement the decision were unsuccessful. The reason behind non-implementation of the decision is the political instability in the country, which is a result of disagreement between Serbian, Bosniak and Croatian representatives. Such situation prevents BiH from implementing the decision, by bringing amendments to the Constitution or passing a law, which would enable minorities in BiH to stand for elections for the Presidency and House of Peoples. The instability is the reason why discrimination created by the Constitution cannot be corrected even though the Union imposed sanctions on BiH. So, the sanctions imposed, that is canceling of approximately half of the IPA funds will not be effective because of the lack of constructive dialogue between Bosnian politicians. Even though the Union provides for an effective mechanism for sanctioning breaches of non-Member States, such mechanism will not be helpful in the case of Bosnia.

The effectiveness of sanctions mechanisms against Member States

In spite of a number of breaches of Article 2 TEU by Member States, Article 7 TEU sanctions have not yet been invoked. Instead of triggering this mechanism the Union always found a way to

¹⁵⁵ “Glossary: Accession Criteria (Copenhagen Criteria),” *Europa: Synthesis de La Legislation*, accessed March 20, 2014, http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm.

avoid it. The above presented are two cases of breaches of the values dealt with two different ways, by judicial intervention in the case of Hungary and dealing with the breach of Romania under the post-accession compliance mechanism, CVM.

The Union refused to invoke Article 7 TEU mechanism against Hungary and decided to use infringement procedure under Article 258 TFEU. Therefore the question on effectiveness of this way of sanctioning the breach of Article 2 TEU should be asked. As already stated in Chapter II the Court decided that there was unjustified discrimination based on age contrary to Equality Directive 2000/78 and ordered that judges be returned to work. However, while Hungary promised to return judges to work it took some time to implement decision.¹⁵⁶ What it did was to wait while the newly introduced National Judicial Office appointed judges to the empty positions and then promised that they would comply with the decision of the Court to the extent that they would return judges to work, but not to those positions that they previously held if they were occupied. Furthermore, for judges who did not accept to be returned to lower judicial offices by the National Judicial Office there was an option to retire and get compensation which some of them accepted.¹⁵⁷ However, as stated in Chapter II, changing the mandate of judges by lowering their retirement age was attack on independence of the judiciary. Instead of dealing with it as attack on judiciary the Union chose to act under the Directive and to protect judges' right not to be discriminated on the basis of their age.¹⁵⁸ The results of such action are listed above, all judges were not able to return to their positions and the judiciary stayed under total control of the National Judicial Office.

¹⁵⁶ Kim Lane Scheppelle, "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions," *Hungarian Spectrum*, November 27, 2013, <http://hungarianspectrum.wordpress.com/2013/11/27/kim-lane-scheppelle-what-can-the-european-commission-do-when-member-states-violate-basic-principles-of-the-european-union-the-case-for-systemic-infringement-actions/>.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

However, some sort of willingness to comply with the decision of the Court of Justice, no matter how long the time period for compliance Hungary took and no matter that it did not fully comply with the decision, was enough to satisfy the Union claiming success. But the question is what they have achieved and whether this will allow Hungary to continue to violate the fundamental values on which the Union was formed and which should be common to both Union and its Member States.

The CVM Report on Romania for 2013 shows that there are some improvements regarding constitutional order and judicial independence, however such improvements are not really satisfactory.¹⁵⁹ The attacks on the independence of the judiciary are still seen through attacks on the personnel and refusal to implement judicial decisions.¹⁶⁰ The dissatisfaction of compliance of Romania with CVM Report for 2012, can be seen from the recommendations by the Commission, one of them including a provision in the Code of Conduct for members of Parliament, obliging them to respect judicial decisions, and therefore stop attacks on the independence of the judiciary.¹⁶¹

On the one hand the sanctions against non-Member States are usually more effective than those against Member States for the simple reason that states which have not yet acceded to the Union can lose the perspective membership. So, non-Member States have a lot to lose while Member

¹⁵⁹ *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL On Progress in Romania under the Co-Operation and Verification Mechanism* (European Commission, January 22, 2014), http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDEQFjAB&url=http%3A%2F%2Fec.europa.eu%2Fcvvm%2Fdocs%2Fcom_2014_37_en.pdf&ei=bNY0U9uUD6mN7QbGk4GgCg&usg=AFQjCNEdVeXyCHyhjC12fwSQ0n9C9x-84Q&bvm=bv.63808443,d.bGE.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

States do not lose anything, since as provided in Article 50 TEU Member States can only voluntarily withdraw from the Union.¹⁶²

Proposals for new mechanisms to fight the breaches of Article 2 TEU

There are three proposals on how to deal with breaches of the European values by Member States. Commissioner Reding proposed the following instruments; enforcement of Article 2 through judiciary, extending the FRA's mandate and making Article 51 of the European Charter applicable to all Member States instead of only to the Union.¹⁶³ The first proposal includes judicial intervention that is Commission or Member States initiating infringement proceedings against Member States provided under Article 258 TFEU, and as proposed by Kim Lane Scheppele grouping of infringement procedures raised under Article 2 TEU against a particular Member State into a systematic infringement action initiated.¹⁶⁴

Systematic infringement procedure

Commissioner Reding proposes that the breaches of the fundamental values be dealt through infringement procedure under Article 258 TFEU. If this proposal was adopted it would increase the power of the Commission. The Commission could instead of invoking a specific law breached by a Member State, "accuse a Member State of not respecting a given law."¹⁶⁵ Somewhat different than Commissioner Reding's proposal, Kim lane Scheppele proposed sanctioning Member States through systematic infringement action. In Schappele's words the complaints initiated against one Member State would be grouped together as breaches of Article 2 TEU and a systematic

¹⁶² Alina Kaczorowska, *European Union Law* (Routledge, 2012), 48.

¹⁶³ "Commissioner Reding's New Power Grab," *European Dignity Watch*, November 4, 2013, <http://www.europeandignitywatch.org/it/day-to-day/detail/article/commissioner-redings-new-power-grab.html>.

¹⁶⁴ Pinelli, "Protecting the Fundamentals: Article 7 of the Treaty on the European Union and beyond."

¹⁶⁵ "Commissioner Reding's New Power Grab."

infringement action would be initiated.¹⁶⁶ The systematic infringement action, unlike infringement procedure under Article 258 TFEU, would combine a number of cases which would enable the Court to better assess the situation in a specific Member State and its compliance with Article 2 TEU.¹⁶⁷ According to Scheppele, if the ECJ declares that there was violation of Article 2 TEU, the Member State in question should remedy with breaches separately and also must work on systematic breach that is trying to remedy its actions which caused the breach of Article 2 TEU and avoid any future threat to European values.¹⁶⁸

She also suggests that the Union uses the EU funds to restrain Member States from further breaches of the European values and non-compliance with the Court's decision- that is to cut funds in cases of serious and persistent breaches.¹⁶⁹ The cancelation of EU funds might be an effective negative conditionality mechanism for restraining a country from committing further breaches of the European values and complying again with them in case the breach already happened. Fear of losing money which is already assigned to various projects can positively affect compliance with Article 2 TEU. However, the positive effect of fear of fund suspension was not the case in BiH, which lost half of the IPA funds as a result of disrespect of the rights of minorities. Nevertheless, the situation in BiH is complicated but not unsolvable.

A monitoring instrument

One of the options for monitoring compliance with European values was the European Fundamental Rights Agency (FRA). The FRA's task is to collect and analyze data on breaches of

¹⁶⁶ Scheppele, "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions."

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

the fundamental rights in Member States.¹⁷⁰ According to Margaritis, while having only an advisory role in tracking the compliance with human rights, the FRA cannot be involved “in the application of sanctions mechanism against a Member State.”¹⁷¹ Since the FRA when it was created did not include any additional task but purely an advisory role, in order to make it an instrument for following the compliance with the European values and participation in sanctions mechanism of Article 7 TEU, it is necessary to extend the mandate of the FRA. By extending the mandate and allowing the FRA to monitor Member States compliance with fundamental values, this would assist the EU institutions, the Council, the Commission and Parliament to determine whether there is a threat of clear breach or serious and persistent breach.¹⁷² A preventive measure called “freezing enforcement procedure” would be initiated when the FRA reports that a Member State has breached fundamental rights.¹⁷³ The freezing mechanism would stop any measure which is introduced by Member States, such as application of national laws infringing fundamental rights, and after this the infringement procedure would be initiated.¹⁷⁴

While Commissioner Reding proposed the expansion of the mandate of the FRA, Jan-Werner Muller proposed another instrument for monitoring which would be called the Copenhagen Commission. The Copenhagen Commission would be a “politically independent high-level expert

¹⁷⁰ Konstantinos Margaritis, “Some Thoughts on the Interrelation of Article 7 TEU with the EU Fundamental Rights Agency” 2, no. 1 (November 1, 2013), <http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDcQFjAC&url=http%3A%2F%2Fwww.businesslawconference.ro%2Frevista%2Farticol%2Fan2nr1%2F21%2520Margaritis%2520Konstantinos.pdf&ei=n1kvU4vfl8iRhQeGjYDQCA&usg=AFQjCNERKGye41MEZL-9pOzRqw32hKOcqh&bvm=bv.62922401,d.bGE>.

¹⁷¹ Ibid.

¹⁷² Poptcheva, “Breach of EU Values by a Member State.”

¹⁷³ Pinelli, “Protecting the Fundamentals: Article 7 of the Treaty on the European Union and beyond.”

¹⁷⁴ Ibid.

body.”¹⁷⁵ According to Poptcheva, the sanctioning would be through negative conditionality that is canceling funds and imposing fines on Member States which breach the fundamental values.¹⁷⁶

Article 51 of the European Charter

The third proposal by Commissioner Reding was elimination of Article 51 of the European Charter providing, “the provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”¹⁷⁷ By eliminating Article 51 the Charter’s provisions would in all cases be addressed to Member States instead of provisions being addressed only when Member States implement the Union Law. The side effect of this proposal is the increased power of the Commission by allowing it to initiate infringement procedures not limited by the application of Union law and allowing it to bring actions for breach of any right found in the Charter.¹⁷⁸ The scope of the work of the Court of Justice would also increase when allowing initiation of proceedings for breaches of any right in the Charter.¹⁷⁹

Conclusion

Therefore, non-Member States are eager to comply with the Union’s conditionality bearing in mind that the Union has an effective mechanism against them which it will willingly apply. On the other hand, Member States know that the Union in all possible ways circumvents Article 7 TEU as the only mechanism for breaches of European values. Therefore, Member States are not

¹⁷⁵ Poptcheva, “Breach of EU Values by a Member State.”

¹⁷⁶ Ibid.

¹⁷⁷ “EU Charter of Fundamental Rights,” Article 51(1), accessed March 23, 2014, http://www.eucharter.org/home.php?page_id=61.

¹⁷⁸ “Commissioner Reding’s New Power Grab.”

¹⁷⁹ Ibid.

so afraid of what the Union can do to them. As shown from the examples of Romania and Hungary, neither state managed to fully comply even with the Union's recommendations and requirements, since as seen from the Hungarian case, the Union, by filing the infringement procedure to protect judges from discrimination instead of defending the independence of the courts as state institutions, had not provided the right solution for the problem. Therefore, the sanctions imposed on non-Member States, such as BiH, with unstable political situation and institutions and sanctions imposed on Member States for breaches of the European values replacing Article 7 TEU sanctions are also not effective.

Even though, Member States are obliged to respect and promote European values, because of the lack of an effective mechanism they sometimes fail to do so. Since Article 7 TEU mechanism cannot be triggered due to many reasons mentioned in Chapter One such as high majority threshold and being purely a political mechanism, there should be a new mechanism to deal with breaches of the Union's values. The new mechanism which might be selected from the ones mentioned above would clearly be effective, since the mechanisms above do not include the majority and Member States acting against each other. So instead of waiting for the Union to finally trigger Article 7 TEU, it should introduce a new mechanism which could enable better protection of the values under Article 2 TEU and a more efficient sanctioning system.

Conclusion

In this thesis I tried to compare the sanctions imposed on non-Member States for failure to comply with the values on which the Union was founded, stated under the Copenhagen political criteria and Article 49 TEU and sanctions of Article 7 TEU imposed on Member States for failure to comply with the same values states under Article 2 TEU.

The Union is not being as reluctant to apply sanctions to states acceding to the Union as it is when applying sanctions to Member States. In fact the Union has not so far triggered Article 7 TEU mechanism even though there were few cases which could initiate both the preventive and sanctions mechanism of Article 7 TEU. For the purpose of finding out which sanction mechanism is more effective I have explored three jurisdictions: Hungary, Romania and Bosnia and Herzegovina. While Hungary and Romania have breached the values of rule of law and democracy, Article 7 TEU mechanism has not been initiated although in the case of Hungary Commissioner Reding called for invoking Article 7 TEU. Instead the Commission started infringement procedure under Article 258 TFEU against Hungary and the case of Romania was dealt under the Cooperation and Verification mechanism (CVM).

Neither infringement procedure against Hungary or CVM Report for Romania solved breaches satisfactorily. Compliance with the judgment and the Union recommendations were slow and incomplete. When it comes to BiH, it was sanctioned through suspension of the financial aid. Even though the politically unstable situation in BiH may result in further non-implementation of decision of *Sejdić and Finci*, the sanction was imposed only few months ago, in October 2013, and it remains to be seen how BiH will react to the sanctions. Will the strong negative conditionality

of suspension of funds and future positive conditionality of awarding other funds be stronger than the disagreement between Bosnian politicians?

So, are the sanctions imposed on Member States for failing to comply with the values on which the Union is founded under Article 2 TEU more effective than the sanctions imposed on non-Member States? The paper shows that the effectiveness of the sanctions mechanisms on Member States under Article 7 TEU cannot be compared since they have never been invoked. On the other hand the replacement mechanisms which were used by the Union to remedy breaches of the Member States, specifically through the infringement procedure and the CVM reports did not show to be effective enough to make the states comply with Union recommendations and respect the fundamental values. On the other hand, even though the pre-accession mechanism for dealing with breaches of European values are considered to be very effective because of the sanctions that might be imposed, termination of the accession process and suspension of Union's funds, the case of Bosnia shows that in politically unstable countries this is necessarily does not have to be the case.

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