A Draft Commentary to Article 7 TEU

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1. Introduction

One may be surprised but the amount of scholarly literature discussing Article 7 of the Treaty on the European Union (thereafter: TEU) is rather modest compared to the high political and constitutional relevance of this provision. Manuals of European Union law present it in a descriptive manner[1] whereas scholarly articles focusing on either particular EU constitutional problems or dilemmas approach it from their own, specific perspective.[2] A *sui generis* study of Article 7 TEU is still missing from the academic discussion.

I argue that this Article deserves stronger attention – although it has never been applied in practice – since it symbolizes, among others, how dangerous it is when politics overcomes law and tries to assign it to an essentially political task. Indeed, owing to its manifest peculiarities, Article 7 TEU is to be studied with an interdisciplinary method alloying various fields of legal studies – constitutional theory, public international law and European Union law – and international relations. Unfortunately, the coupling of these disciplines is not self-evident in contemporary legal studies. Contrary to these, this paper aims at analyzing Article 7 TEU by transcending the boundaries of the descriptive approach by a method of connecting the insights of the above mentioned disciplines, since this interdisciplinary analysis may reveal such insights and dilemmas that would remain invisible under a strict doctrinal approach.

The structure of this endeavor may be comparable to the system of constantly growing concentric circles surrounding a stone that has just been thrown into water. It starts with the discussion from the farthest circle – the suspension of certain rights of member states in international organizations or the expulsion of member states from international organizations – then progressively heads to the very center: the doctrinal discussion of Article 7 TEU. As a last step, the paper criticizes Article 7 TEU from various aspects, then it tries to come to certain well-founded conclusions. This unusual approach may contribute to the better understanding of the main thesis of the paper: Article 7 TEU is a provision of a clear political nature, therefore it can only be analyzed through a method with a broader legal and political scope than the simple doctrinal analysis.

2. Beyond public international law: sanctions against recalcitrant member states in international organizations

2.1. Suspension of voting rights or expulsion of member states

[1] For example: Koen Lenaerts-Pieter Van Nuffel: *European Union Law*. Sweet and Maxwell, London, 2011. 100-101.; Alina Kaczorowska: European Union Law. Routledge, London-New York, 2011. 67-68.; Ian Fairhurst: *Law of the European Union*. Pearson, Essex, 2010. 47.

[2] For example: as one of the guarantees of human rights protection in the EU: Gràinne de Burca: The Evolution of EU Human Rights Law. In: Paul Craig and Gràinne de Burca (ed.): *The Evolution of EU Law*. 2nd ed. Oxford University Press, Oxford, 2011. 465–497.; from the aspect of the protection of rule of law on the level of EU: Armin von Bogdandy-Michael Ioannidis: Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can be Done? 51 *Common Market Law Review*, 2014/1. 59-96. spec. 65-67.; as a point when discussing the possible ways of expulsion from the EU: Boyko Blagoev: Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality. 16 *Tilburg Law Review*, 2011. 191-237.

One of the main problems of international organizations is how to force member states to comply with the charter or, in more problematic situations, how to force members to cooperate with the organization itself. The main impetuses of institutional cooperation have an undeniably political nature[3] – these are mostly parts of institutional bargains stemming from various interests – but some international organizations attempt to strengthen it by introducing legal mechanisms as these may also enhance its effectivity.[4] This international practice is essential for the understanding of Article 7 TEU since the relevant norms of international organizations preview the mechanisms of European Union in this field; moreover, the experiences coming from either the application or the non-application of these provisions may also contribute to the better understanding of Article 7 TEU.

Public international law forged out two main solutions in order to normalize the position of a member state breaching certain basic rules, as well as fundamental interests of an international organization. Besides conflict management, these solutions may also contribute to the restoration of the full capacities of international organizations. First of all, the members of an international organization may rely on Article 60 of the Vienna Convention on the Law of Treaties between states in general. This Article provides the opportunity for the member states to suspend the operation of a treaty entirely or in part with respect to the member state that committed a material breach of the charter.[5] A material breach of the treaty means "the violation of a provision essential to the accomplishment of the object or the purpose of the treaty".[6] This provision covers a broad range of state behavior: state acts that may be qualified as a material breach of a treaty cannot be completely enumerated. In addition, the logic of this norm should be highlighted. It is based on the assumption that solely the breach of essential provisions being strongly connected to the object or the purpose of the treaty may invoke such serious sanctions; that is, a random violation of the charter cannot trigger this consequence. Some examples detailed later will point out that the various institutional solutions precisely follow a similar logic, since they generally connect sanctions against the member states with the breach of basic charter provisions. In sum, the violation of the basic principles, -values and -interests may result in imposing sanctions against a recalcitrant member state. Thus, all these provisions go back to the same goal: protecting the foundations of an international organization's identity.

In case the charter of an international organization contains certain provisions against a member state violating the fundamental interests of the organization,[7] which is relatively rare, then these rules can be grouped around two patterns. The first group of rules tries to force the member state departing from the settled norms to comply within the given international

[3] Scholarly studies on the basis of empirical research argue that membership in international organizations positively contributes to inter-state conflict management; therefore, this positive impact can be considered as a main political reason justifying various international organizations membership. Cf.: Sara McLaughlin Mitchell-Paul R. Hensen: International Institutions and Compliance with Agreements. 51 *American Journal of Political Science*, 2007/4. 726.

[4] Empirical analysis also points out that the existence of certain legal measures – for example binding agreements, judicial mechanisms – further enhances the effectivity of dispute settlement in international organizations. See: ibid. 730–735.

[5] Art. 60.2. (c).

[6] Art. 60.3. (b). The International Law Commission argue that a material breach of a treaty may cover the violation of those provisions that directly touch the central purpose of the treaty or are essential for the effective enforcement of the treaty. See: Sir Ian Sinclair: *The Vienna Convention on the Law of Treaties*. Manchester University Press, Manchester, 1984. 188-190

[7] Pl. League of Arab States Charter Article 18.; Common Market for Eastern and Southern Africa Treaty Article 171.; Agreement of the International Monetary Fund Article XXVI. (2). For more examples: Christian Tams: Article 6. In: Bruno Simma et al.: *The Charter of the United Nations. A Commentary*. Oxford University Press, Oxford, 2012. 374-386. fn. 62.

organization. These provisions, which may appear in various forms, target the suspension of certain membership rights or privileges, mostly related to institutional decision-making processes. In essence, these provisions attempt to influence the problematic member state to behave in harmony with the interests of both the other member states and the organization. This can be done by limiting its assertion of interest through sanctions, depriving it from various voting rights. These solutions are always coupled with specific situations and they are also revocable if the member state complies with the orders of the organization. Furthermore they have no effect on the institutional obligations of the member state.[8] Article 5 of the Charter of the United Nations (thereafter: UN Charter) and Article 8 of the Statute of the Council of Europe (thereafter: CoE Statute) are typical examples of such provisions.

Another option is the expulsion of the rouge member state.[9] Expulsion is a single act that terminates the membership of the member state under scrutiny including its institutional obligations.[10] The use of expulsion as an instrument of international politics can be tracked back to the era of League of Nations.[11] The existence of expulsion in law is backed by a basic finding of social life: if someone seriously threatens the community then – although it can be regarded as a very drastic measure – the best solution is to expel him or her.[12] In this sense, expulsion is of a twofold nature. It is both a severe sanction against a deviant member state and a final – *ultima ratio* – instrument to protect the international organization.[13] International organizations apply expulsion only in exceptional cases; it only occurred four times in international politics in the post-World War II era before 1987.[14]

A relevant legal problem is whether those international organizations whose charter does not contain any provisions on expulsion may also expel their members when their principles are violated. One cannot argue on a strict legal basis that an international organization may have competence to expel a member state in the absence of an explicit charter provision. However, one may find proper arguments for grounding such an implicit right in special situations such as self-defense, material breach of either a basic provision or a principle, or *clausula rebus sic stantibus*.[15] It can be assumed that in hard situations endangering the effective functioning or even the existence of the international organization one may rely on strong arguments when declaring that expulsion is among certain implied powers.[16]

Upon discussing these norms of public international law on the suspension of certain rights and expulsion, the readers should be warned that by this analysis we only partially confronted the reality of these norms. They have never existed in a vacuum but they have always been a

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[8] Henry G. Schermers-Niels M. Blokker: *International Institutional Law*. Unity within Diversity. Martinus Nijthoff, Leiden, 2003. 106.

[9] This study does not discuss those sanctions that are directed toward the member states being late in the payment of financial contributions to the organization since their purpose and logic is different from those of the rules on suspension of voting rights or expulsion. Sanctions related to member states being in arrears in payment regulates a simple situation having no explicit political nature. For example, Article 19 Un Charter.

[10] Schermers-Blokker: *op. cit.* 106.

[11] Article 16 (4) Covenant of the League of Nations made it possible to expel a member state that violated the covenant or other rules of the organization by unanimous vote in the Council. In 1939, the Soviet Union was expelled from the League of Nation due to the aggression against Finland.

[12] In the words of Pollock and Maitland: "who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him (…)". Cited by: Louis B. Sohn: Expulsion or Forced Withdrawal from an International Organization. 77 *Harvard Law Review* 1964. 1424.

[13] Schermers-Blokker: *op. cit.* 106-108.

[14] Czechoslovakia was expelled from the IMF and the World Bank in 1954, while South Africa was also expelled from the UPU (Universal Postal Union) and ITU (International Telecommunication Union) in the sixties because of the apartheid system. Schermers-Blokker: *op. cit.* 105.

[15] *Ibid*. 114-115.

[16] Jan Klabbers: *An Introduction to International Institutional Law*. Cambridge University Press, Cambridge, 2002. 123-124.

part of the reality of international organizations extensively shot with political and financial interests. Both political and economic interests may influence or distort their functioning even by modifying them in practice. Post-World War II International politics offer crucial lessons.

The first one is that expulsion from an international organization has considerably been limited by pragmatic views rooted in the multi-colored reality of international politics. In a political sense, it is much favorable to preserve member states within the institutional framework than to expel them, although certain basic provisions are certainly violated. This is especially true for those international organizations that establish cooperation in sensitive fields such as disarmament or the use of special sort of weapons. As long as a state is a member of an international organization, there is definitely some chance to influence its behavior through the institutions of the organization. However, when it leaves the organization, the control of both the international organization and the other member states come to an end immediately. This may imply unpredictable consequences, and eventually it may also contribute to the instability of international relations.[17] That is, pragmatism in international politics considerably restricts the use of these clauses even in legally unambiguous cases.

In addition, international organizations are also disposed to act pragmatically when they made a decision to expel a member state. In such a case international organizations are inclined to do practically anything to convince the deviant member state to leave the organization on its own in order to preserve their international reputation. This solution is called forced withdrawal in the academic discussions,[18] and one may find numerous examples for it in the post-World War II period of international politics.[19] "Voluntary" withdrawals that could not be regarded as expulsion in a strict legal sense, since they were not grounded in these provisions, may further shade the minimal number of expulsions after 1945.

From the perspective of Article 7 TEU the earlier analysis, although it may seem to be rather far from the core of this study, revealed relevant findings. (i.) The law of international organizations contains special provisions aimed at limiting or suspending the membership rights or making the expulsion of recalcitrant member states possible. All these go back to Article 60 of the Vienna Convention of the law of treaties regulating the reactions of the parties in cases of the material breach of a treaty. Thus, Article 7 TEU is not without predecessors but it is linked, loosely or strictly, to a settled mechanism of public international law. (ii.) The application of these suspension or expulsion clauses is coupled with the breach of some basic provisions of the charters defining both the values and purposes of the organization. Hence, these clauses provide an opportunity to retaliate the serious violation of the political identity of the organization. (iii.) A black-letter reading of these clauses do not lead to a proper understanding, as the reality of international politics forms and distorts their practice. In certain situations, which look to be black or white from a legal point of view, – for instance an overt breach of the basic provision of the charter – political or economic pragmatism may override or even disregard their application.

2.2. Schemata: Articles 5 and 6 of the UN Charter, Article 8 of the CoE Statute

[17] Cf. Tams: Article 6. *op. cit.* 376.; Klabbers: *op. cit.* 121-122.

[18] Cf. Schermers-Blokker: *op. cit.* 110-111. For a general discussion of forced withdrawal with the presentation of case studies see: Sohn: *op. cit.* 1381-1425. spec. 1420-1425,

[19] For example: Spain whitdrew from the ICAO (International Civil Aviation Organization) following such a modification of the charter that opend up the possibility of expulsion in 1947; South-Africa left FAO when other members tried to expel it unsuccessfully in 1963; while it also left ILO since it invoked sanctions against it in 1964.

The design of the original version of Article 7 TEU was influenced by similar provisions of the United Nations and the Council of Europe – though documents of European Union institutions do not refer to them explicitly[20] – since their structural similarity is far from obvious. The provisions of these two international organizations createda regulatory framework – one may even argue that this is similar to what is called "architext" by Genette in literature[21] – that inspired the member states of the European Union when incorporating the predecessor of Article 7 TEU into the Amsterdam Treaty.

From its birth in 1945, the UN Charter established a legal way to suspend the voting rights of a member temporarily or to expel it from the organization if the basic principles are breached. Since the UN Security Council has a broad competence to impose various sanctions – from economic ones to armed measures – grounded in Chapter VII UN Charter, these provisions may be applied solely in exceptional situations.[22] Article 5 UN Charter declares that the membership rights and privileges of a member state being already sanctioned by the Security Council – "against which preventive or enforcement action has been taken by the Security Council"[23] – may be suspended temporarily by the General Assembly upon the recommendation of the Security Council.[24] If this exceptional measure cannot reach the desired result and if principles incorporated in Article 2 UN Charter[25] are "persistently" violated, then Article 6 UN Charter guarantees that the General Assembly upon the recommendation of the Security Council may expel the recalcitrant member. It should be noticed that on the basis of these Articles, the behavior or the acts of the major powers of world politics – the five permanent members of the Security Council – cannot be influenced, since they can veto the recommendations aiming at suspending certain rights of them or expelling them in the Security Council.[26] In conclusion, Articles 5 and 6 UN Charter are, in fact, sanctioning mechanisms against those members of the United Nations that are granted no permanent membership in the Security Council.

In essence, the mechanism of the United Nation establishes a typical solution for sanctioning a deviant member state. This schema is based on linking three legal and factual points: (i.) the codification of the possibility of suspending membership rights or expulsion from the organization; (ii.) the limitation of the sanctioned state acts to serious violations of the basic principles or values;[27] and (iii.) the establishment of a complex decision-making process based on the cooperation of the main organs. This has two consequences: first, it provides the final decision with a strong legitimacy; second, it also maintains the possibility of last-minute diplomatic bargains.

However, Articles 5 and 6 UN Charter have no considerable practice. Neither Article 5 UN Charter, nor Article 6 UN Charter have ever been applied: no member was suspended from membership privileges or expelled from the UN on this ground. Members of the UN tried to use Article 6 UN Charter against Israel (1955) and South-Africa (1960, 1969 and 1974),

[20] There is one exception: the Commission's communication on Article 7 TEU mentions these expulsion clauses. Communication from the Commission to the Council and the European Parliament. On the Article 7 of the Treaty on European Union. Respect for and the promotion of the values on which the Union is based. COM (2003) 606 final. Brussels 15.10.2003. 6.

[21] Cf. Gérard Genette: Transztextualitás. *Helikon*, 1996/1-2. 84-85.

[22] Cf. Christian Tams: Article 5. In: Bruno Simma et al.: *The Charter of the United Nations. A Commentary.* Oxford University Press, Oxford, 2012. 363.

[23] For an in-depth discussion and interpretation see: Konstantinos D. Magliveras: *Exclusion from Participation in International Organizations*. Kluwer, The Hauge, 1997. 106–122.

[24] For a detailed analysis: Tams: *op. cit.* 375-386.

[25] In sum: sovereign equality; fulfillment of obligations in good faith; peaceful settlement of disputes; prohibition of aggression; cooperation; prohibition of intervention into internal affairs.

[26] For a comprehensive analysis of decision-making in the Security Council see: Sulyok Gábor: *Az Egyesült Nemzetek Szervezetének Biztonsági Tanácsa: összetétel, szavazás, reform.* Complex, Budapest, 2009.

[27] Cf. Tams: Article 6. *op. cit.* 378.

however these motions could not reach the level of official decision-making or they failed in the Security Council.[28] Furthermore, the General Assembly declared[29] that the Federal Republic of Yugoslavia is not a successor of the Socialist Federal Republic of Yugoslavia in 1992, and when debating this controversial decision, Articles 5 and 6 UN Charter also emerged as valid points. However, since these Articles were not mentioned at all in the text of a resolution, they could not play a real role.[30] In sum, because of the fact that the Security Council has broad competences to impose sanctions on rouge member states based on Chapter VII UN Charter and due to the pragmatism of international politics, these provisions have never been applied and it is not likely that they will ever be. However, contrary to all these, their existence offers valuable experienc about the phenomenon to what extent political pragmatism is capable of distorting or even precluding the application of a sanctioning mechanism based on a complex decision-making procedure in problems with high relevance in world politics.[31]

The Statute of the Council of Europe (1949) also contains both a suspension and an expulsion clause. Article 8 CoE Statute is considered as a final guarantee of the fulfilment of statutory obligation with special regard to the enforcement of the judgments of the European Court of Human Rights.[32] This provision has to be interpreted in harmony with Articles 3 and 20 CoE Statute, since Article 3 CoE Statute defines the main principles, while Article 20 CoE specifies the procedural requirements for such a decision.

The Council of Europe may act against a member disregarding or breaching its basic principles as follows. The legal condition of such a reaction is the serious violation of the principles codified in Article 3 CoE Statute (rule of law, guaranteeing of human rights and fundamental freedoms, sincere and effective cooperation).[33] It may be questionable what kind of state act can be qualified as serious, but due to the lack of relevant experience and in harmony with the interpretation of the UN Charter one may argue that it means any decisive state political actions. Compared to Article 6 UN Charter the sanctioning mechanism of the Council of Europe is more refined since it makes it possible to take three steps: the Council of Europe (i.) may suspend the rights of representation of the recalcitrant member state, (ii.) it may request this member to withdraw voluntarily and if the member does not comply with request (iii.) it may even expel it from the organization.[34] The Committee of Ministers, composed of the members' foreign ministers, is entitled to make such a decision, which requires a unanimous vote of the representatives and the presence of the majority of the representatives.[35] This mechanism is in essence similar to that of the United Nations, as it may be applied if the basic principles are violated. Further, it also creates a gradual process in order keep up the possibility of diplomatic negotiations and bargains to solve the dispute within the framework of the Council of Europe.

The Council of Europe wanted to apply this mechanism only once until these days, however, the reality of international politics impeded it in doing so. In Greece, a group of

[28] Ibid. 382-383.
[29] G. A. Res 47/1 (1992).
[30] Tams: Article 6. *op. cit.* 383-384. For details: Vladislav Jovanovic: The Status of the Federal Republic of Yugoslavia in the United Nations. 21 *Fordham International Law Journal* 1998/5. 1719-1736.
[31] It should be mentioned that the application of Article 6 UN Statute has one historical precedent. In 1939, the Council of League of Nations expelled unanimously the Soviet Union because of the aggression against Finland. This course of events points out that the application of such clauses cannot be excluded totally, since such a serious international crisis may occur which may ground such a drastic measure. See: Magliveras: i. m. 22-26.
[32] Cf. Elisabeth Lambert-Abdelgawad: *The Execution of Judgments of the European Courts of Human Rights*. Council of Europe Publishing, Strasbourg, 2008. 44-45.
[33] Statute of the Council of Europe Article 3.
[34] Statute of the Council of Europe Article 8.
[35] Statute of the Council of Europe Article 20.

colonels committed a coup d'état to take over the democratically elected government and they justified their intent by trying preclude a possible Communist advance in 1967. Following their success, they started to establish an authoritarian regime; their first measure included the suspension of certain fundamental freedoms as well as the abolishing some democratic institutions. Undoubtedly, this politico-social transformation went openly contrary to the principles of the Council of Europe, and the Committee of Ministers initiated the expulsion of Greece from the organization. However, before the final vote in the Committee of Ministers the minister of foreign affairs of the colonels' regime informed the Committee that Greece intended to withdraw voluntarily from the Council of Europe. Therefore, no vote on the expulsion of Greece took place.[36] Greece reentered the organization in 1974 immediately after the collapse of the authoritarian regime. No similar crisis has occurred in the Council of Europe so far, but the prospective application of Article 8 CoE Statute appeared in resolutions and recommendations of the Parliamentary Assembly with respect to Russia and Ukraine around the millennium.[37] However, these resolutions and recommendation were disregarded by the Committee of Ministers.

Having analyzed the mechanisms of suspension and expulsion of both the United Nations and the Council of Europe, one may be familiarized with the public international law tradition – (i.) a precise codification of the legal basis, (ii.) serious violations of basic principles or values as a trigger mechanism, (iii.) a complex decision-making procedure providing strong legitimacy and a broad room for negotiations – that provides the legal background for Article 7 TEU. In addition, it can also be seen that these clauses are applied only in exceptional cases. Therefore, their role is not to ground legal sanctions, but to help in taming a rogeu member state by their very existence or by their prospective application. Paradoxically, even though they are legal provisions, their nature is essentially political. In other words, these clauses are to be regarded as strong arguments in the hands of either the organization or the member states when settling high level political controversies within an international organization.

3. Article 7 TEU: history

The forerunner of Article 7 TEU (Article F.1 TEC as amended by the Amsterdam Treaty) was incorporated into the Treaty on the European Union by the Amsterdam Treaty. Although the Amsterdam Treaty is not considered as the most outstanding treaty amendment affecting the future of the European integration, as its main result was the consolidation of the earlier amendments and modifications, by inserting this provision it impressively improved the constitutional architecture of the European Union.[38]

The idea of creating constitutional mechanisms being able to impose sanctions on member states violating the basic values and principles of the European Union originated in the agenda of the Reflection Group of 1995. This preparatory committee backed the activities of the Intergovernmental Conference of 1996 responsible for the preparation of the Amsterdam Treaty in 1998.[39] It was the first time when the question of ensuring the protection of human

[36] Heinrich Klebes: Membership in International Organizations and National Constitutional Law: a Case Study of the Law and Practice of the Council of Europe. *Saint Louis-Warsaw Transatlantic Law Journal*, 1999. 77-78. 28. lj.

[37] For ex.: Council of Europe Parliamentary Assembly Resolution 1179 (1999) 15.2.; Council of Europe Parliamentary Assembly Recommendation 1456 (2000) 24.2.

[38] On the Amsterdam Treaty: Philippe Manin: The Treaty of Amsterdam. 4 *Columbia Journal of European Law* 1998/1. 1-26.

[39] It should be mentioned that in the first resolution of *Comité d'études pour la Constitution européenne* working in 1952 proposed the establishment of a mechanism that would enable the "Community Government" to intervene in a member state until the normalization of the situation if "the constitutional order, democratic institutions or man's fundamental liberties have been seriously violated". The original French text is accessible

rights and democratic values, as they are the principles of the European Union, even against the member states came up in the official discourse of the Union. In order to manage this problem, the Reflection Group suggested that a new provision had to be incorporated into the treaties providing legal grounds for either imposing sanctions or expelling a member state breaching fundamental principles.[40] Obviously, at the birth of the concept of Article 7 TEU, it was impossible to disregard the future plan of the Central and Eastern European enlargement that became more and more real in the mid-1990s. The prospective new entrant states would arrive at the European Union with different historical experiences and political traditions as compared to the general Western setting,[41] therefore, the establishment of a new constitutional mechanism with the intention to protect the values of the European Union did not seem irrational. Thus, the reason behind the introduction of the new clause was twofold; first, it was intended to enhance the protection of human rights on a Union level; second, it was also aimed at "taming" prospective new members arriving from Central and Eastern Europe.[42]

Furthermore, the report of the Reflection Group is also relevant when studying the genesis of Article 7 TEU since some key components of the final provision had already appeared therein. As a sanction of those member states that violate the basic principles of the European Union, the Reflection Group proposed the suspension of membership rights; furthermore it described the sanctioned state behavior as "a serious and repeated breach of fundamental human rights or basic democratic principles".[43] In harmony with the tradition of public international law (Articles 5 and 6 UN Charter, Article 8 CoE Statute), the possibility of expulsion[44] as a final measure was also debated, however the great majority of the Reflection Group disapproved it. They mostly did so as they supposed that the suspension of membership rights may already have the proper effect on the recalcitrant member state, moreover they also agreed that the option of exclusion would have endangered the concept of "irreversible" Union membership.[45] One may assume that in the "expulsion" of the option of expulsion, political pragmatism – that was already discussed as for the functioning of public international law provisions – played an important role on a European level, since it is more practical and efficient to keep a country in an organization than to simply expel it. Moreover, we should also bear in mind, if the suspension of membership rights covers the suspension of voting rights, it practically equals to temporary expulsion in a functional sense.[46] In sum, although there were no as precise regulations of expulsion as it is elaborated in public international law, in this early draft it remained certainly at the disposal of the European Union in a temporary and more sophisticated form behind the scenes.

The Intergovernmental Conference preparing the Amsterdam Treaty modifications generally supported the proposals of the Reflection Group, and the idea to sanction those

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here:
http://www.cvce.eu/obj/resolutions_du_comite_d_etudes_pour_la_constitution_europeenne_bruxelles_novembre_1952-fr-10dc589d-943b-47b1-ad37-8814f49ab355.html
Fir the English translation and discussion see: de Burca: *op. cit.* 470.

[40] *Reflection Group Report*. For the complete text: http://europa.eu/rapid/press-release_DOC-95-8_en.htm

[41] From a historical perspective see: George Schöpflin: The Political Traditions of Eastern Europe. 119 *Daedalus* 1990/1. 55-90. és Péter László: Autokrácia Kelet-Európában. In: Péter László: *Az Elbától keletre.* Osiris, Budapest, 1998. 37-59.

[42] This position is represented by Vojciech Sadurski in his study on the history of Article 7 TEU, see: Vojciech Sadurski: *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School Legal Studies Research Paper. No. 10/01, January 2010. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531393

[43] *Reflection Group Report*. 33. For the complete text: http://europa.eu/rapid/press-release_DOC-95-8_en.htm

[44] On the conceptual framework of the expulsion from the European Union and the possible role of Article 7 TEU as a ground for it see: Blagoev: *op. cit.* 193-206.

[45] *Reflection Group Report*. 33. For the complete text: http://europa.eu/rapid/press-release_DOC-95-8_en.htm

[46] Sadurski: *op. cit.* 5.

member states that violate the Union's basic principles was not among the most vehemently debated topics.[47] Only four member states reflected on this issue (Spain, Belgium, Austria and Italy), and solely the opinions of Austria and Italy contained substantive remarks. These two countries submitted a common textual proposal, as well.[48] The official draft of the new provision was submitted by the Italian presidency in June 1996. This proposal was partially modified by the member states in order to guarantee a broader surveillance over the functioning of this new sanctioning mechanism. Due to these "last minute" changes, the autonomous right of the European Parliament to initiate the mechanism was annulled and it was replaced by the option to give "assent" when starting the application of the mechanism.[49]

The first version of Article 7 TEU[50] set forth a procedure composed of two main phases: the determination of the violation of the basic principles and the imposition of the sanctions. The condition for initiating the procedure was a "serious and persistent" breach of values as laid down by Article 6 (1) TEU,[51] and one-third of member states or the European Commission had the right to initiate it. Having obtained the assent of the European Parliament the Council was entitled to determine the existence of the violation of the basic values by disregarding the vote of the member state under scrutiny; then the Council could also decide on the suspension of membership rights with special regard to the voting rights by a qualified majority. The treaty emphasized that the suspension had no effect on the obligations of the member state, they all remain binding.[52] If the situation that triggered the mechanism substantially changed in the given member state, the Council might revoke the sanctions.[53] As a procedural guarantee for the member states, this Article also required that the government of the member state had to be invited to submit its observations, furthermore, in order to ensure a certain proportionality of the sanctions, this Article also obliged the Council "to take into account the possible consequences (…) on the rights and obligations of natural and legal persons" when deciding on the suspension of specific voting rights.[54]

The structure of Article 7 TEU introduced in 1998 was significantly affected by the consequences of the so-called "Haider-affair". The Austrian social-democrats (SPÖ) won the general election in October 1999, but they were incapable of forming either a coalition or a minority government. Following this stalemate, in January 2000, the Austrian people's party (ÖVP) begun negotiations with the rightist-populist Austrian freedom-party (FPÖ) led by the infamous Jörg Haider, and the new government was formed at the beginning of February. The FPÖ sent six ministers into the government, while its emblematic leader, Haider, did not assume a position in the government. In parallel with the formation of the new, ÖVP-FPÖ government, fourteen member states of the European Union, strongly influenced by the French president, declared the imposition of bilateral sanctions against Austria, preeminently because of the xenophobic statements of the FPÖ's leader. These measures limited bilateral relationships with Austria to a technical level.[55] In the course of the events the question to what extent the formation of the new Austrian government was in harmony with the basic

[47] *Ibid*. 7.
[48] For details: *Ibid*. 8.
[49] *Ibid*. 9.
[50] This article was originally an amendment to the Article F setting forth the Union's values and the respect for human rights and the national identity of member states (article F.1).
[51] Article 6 (1) TEU: The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to Member States.
[52] Article 7 (2) TEU.
[53] Article 7 (3) TEU.
[54] Article 7 (2) TEU.
[55] For the analysis of the sanctions: Sara Larsson-Jenny Lundgren: *The „EU 14" and the Sanctions against Austria*. CRISMART Report.
http://www.fhs.se/Documents/Externwebben/forskning/centrumbildningar/Crismart/Forskning/Fallbanken/EU_AND_1.PDF

values of the European Union also came up. Furthermore, the options of the European Union to intervene were also harshly disputed. The crisis was closed down by the report of "three wise men" (Martti Ahtisaari, Jochen Forwein, and Marcelino Oreja) which found out that the Austrian legal system meets the general European standards with respect to minorities, refugees and immigrants. In addition, the report also stated that the FPÖ could not be considered as a national-socialist party, although many controversial statements were made by its leader and officials. In fact, the report proposed the termination of the sanctions that happened swiftly thereafter.[56]

In the course of the "Haider-affair" the European Parliament supported the retailoring of Article 7 TEU and the report of "three wise men" also proposed some improvements. The experts argued that a situation similar to the Austrian crisis where no violation of basic values occurred but only a future threat emerged might have effectively been managed by preventive and monitoring mechanisms. In essence, by these mechanisms the controversial situation may be settled through a dialogue between the given member state and the European Union, and it may even lead to finding a proper solution for both parties. This proposal created an intense discussion among the European Union institutions as well as the member states,[57] and a new proposal was submitted at the end of November 2000 that formed the basis of the Nice amendment of Article 7 TEU.

The main novelty of the Nice Treaty as for Article 7 TEU was the addition of a new, so-called preventive mechanism focusing on the precondition of "the clear risk of a serious breach". That is, this amendment provided the European Union with the possibility to act not only when the violation of basic values already happened, but also when "a clear risk" emerged in a given member state. In addition, this proposal set forth that the Council may determine this "clear risk" by the majority of the four-fifths of its members, so the requirement of unanimity – a main guarantee of the specific interests of the member states – was not present at this early phase anymore.[58] If the Council determined the situation of "clear risk" then it could formulate recommendations for the member state under scrutiny and it might monitor to what extent the given member state implemented these.[59] Interestingly, this draft requested the Council to involve independent experts to report on the contested situation; however, this obligation disappeared from the novel versions since the draft constitutional treaty.

In conclusion, Article 7 TEU got its final shape by the Nice Treaty; the sole modification brought about by the Lisbon Treaty was the annulment of the role of independent experts in the preventive procedure. This brief assessment of the changes in Article 7 TEU clearly points out that various factors influenced the emergence of the Article, such as the motive of strengthening of the human rights commitments in the European Union and fears raised by the future enlargement in the Central and Eastern European region. Furthermore, the "Haider-affair" offered valuable experience about the practical (in)applicability of the sanctioning mechanism. In general, it can be argued that the previous versions of Article 7 TEU were subject to vehement political debates but no legal arguments came up that referred to the already existing public international law tradition.

4. Article 7 TEU: a doctrinal understanding

4.1. Purpose and context

[56] For an extensive discussion of the "Haider-affair" from the perspective of the European Union see: Sadurski: *op. cit.* 11-21.
[57] For details: Sadurski: *op. cit.* 21-24.
[58] Treaty of Nice Article 1. 1.
[59] For a detailed comparison: Sadurski: *op. cit.* 24-25.

The following part of the paper will present the actual setting of Article 7 TEU since I am convinced that a descriptive and doctrinal analysis of this complex provision being closely linked to the other parts of the treaty is indispensable. Article 7 TEU should be read together with three other provisions: Article 2 TEU determines the basic values to be protected; Article 354 TFEU sets forth special rules for the decision-making by precluding the member state under scrutiny; while Article 269 TFEU limits the jurisdiction of the Court of Justice to procedural issues, that is, it practically excludes the court from the application of Article 7 TEU.

The purpose of Article 7 TEU is easy to define: it gives an opportunity for the EU, in accordance with the framework of international law, to protect its values determining its political identity with constitutional tools, from the member states. One of the basic expectations from an openly political and value-based community of federal nature is that it should be able to present, represent and even protect its identity both externally from the actors of international politics[60] and from its member states as well. Presenting the history of this Article highlighted the fact that the need for the constitutional protection of political identity is not only an ad-hoc vision: the member states have already felt the potential tension coming from the traditions and different political cultures of the former socialist countries during the time of the so-called Eastern enlargement, moreover the "Haider-case" of the early 2000s has shown in practice what kind of problems might arise from stepping up against a government whose policy-making questions the fundamental values of the Union.

A systematical analysis of the provision requires the examination of the former Constitutional Treaty project, which shows the original, ideal regulatory framework that had to be modified by the creators of the Lisbon Treaty. The draft Constitutional Treaty collected the rules of EU membership under one title,[61] one of its components being the sanctioning mechanism itself. [62] This part of the draft treaty also gave space for the conditions of eligibility and accession[63] and voluntary withdrawal from the Union for member states.[64] Thus, Title 9 of the Constitutional Treaty offered a complete regulatory mechanism for the questions of EU membership, making its whole dynamics visible: it detailed the conditions of accession and possible withdrawal, and it gave possibility to the use of sanctions in the process. Title 9 suggested that EU membership is a dynamic process, which can also include conflicts between the EU and member states, and might possibly lead to ending a country's membership in an organized manner. If we look at the regulation from this point of view, it might remind us of the practice of international organizations, according to which some organizations expel a member seriously violating a basic principle not through excluding it, but through pressuring it to forced – but legally volunteer – withdrawal. So, the draft Constitutional Treaty included the sanctioning mechanism in the rules coordinating Union membership, inserting it into such a regulatory context that showed its real purpose: the constitutional protection of the EU's identity, even if it would mean giving up EU membership for some member states.

[60] Vö. Title V. TEU (General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy). Spec. Article 21 (1) TEU: The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: (…).

[61] Treaty establishing a constitution for Europe Title IX.

[62] Treaty establishing a constitution for Europe Article I-59. This article, contrary to Article 7 TEU, includes those specific procedural rules (Article I-59 5-6.) that can only be found in the TFEU actually.

[63] Treaty establishing a constitution for Europe Article I-58.

[64] Treaty establishing a constitution for Europe Article I-60.

Compared to the draft Constitution, Article 7 TEU becomes part of different systematical correlations, because it is present in the Common Provisions[65] of the TEU among other articles regulating the basic questions of the EU's functioning. The articles dealing with EU membership that provided a context for Article I-59 of the draft Constitution were to be found among the Final Provisions of TEU.[66] This solution, in light of the draft Constitution, is not coherent and Article 7 TEU has lost its real framework of interpretation due to the fact that the rules regulating accession and secession were "hidden" at the end of the treaty. Hence, the Article has kept its sanctioning nature, however it is not interlinked with Union membership, but it appears alone, which weakens its effectiveness. Handling the special procedural rules similarly – appearing in Articles 269 and 354 TFEU among the Final Provisions – only overcomplicates the regulation unnecessarily.

4.2. Procedural rules

In its current form, Article 7 TEU is outlining a procedure consisting of several steps – essentially uniting a preventive and a procedural phase – the most important characteristic of which is caution harmonized with exquisiteness. The procedure can be summarized in the following steps:

(i) If a political situation emerges in a member state which might endanger the fundamental values of the Union, firstly the Council can step up preventively. For such an action, the initiative of one-third of the member states, the European Parliament or the European Commission is needed. As a first step, the Council (more precisely the General Affairs Council with the participation of foreign ministers) acting by a majority of four fifths of its members – so not with unanimity - after obtaining 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 of the European Union.[67] They are not violating these values yet, but based on the policy-making of the Member State it can be reasonably assumed that if the situation remained unchanged, their breach could occur in the long term. The values to be protected are enlisted in Article 2 TEU: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Moreover, Article 2 refers to pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women as general social values.

(ii.) It is an important procedural guarantee that the member state in question has to be auditioned before determining the „clear risk." This ensures the possibility of solving the problem through negotiations. [68] Should the Council determine the „clear risk" of breaching the fundamental values, it is entitled to propose recommendations about how to solve the arising problems. After this, the Council continuously monitors whether the problems that caused the "risk" are still present, whether the member state is following the recommendations or if there was a positive change in the respective policy of the Member State.[69] If the situation changes according to the recommendations of the Council, then the application of Article 7 TEU is suspended.

(iii.) If the Member State does not change its former policy posing a "clear risk of a serious breach" of EU fundamental values despite the recommendations, then the European Council (that consists of heads of government and heads of state) is entitled to step up in the

[65] Articles 1-8 TEU.
[66] Article 49 TEU. (application for membership), Article 50 TEU (voluntary withdrawal).
[67] Article 7 (1) TEU.
[68] Article 7 (1) TEU.
[69] Article 7 (1) TEU.

sanctioning procedure as a second step. [70] Based on a proposal by one third of the Member States or by the European Commission - after obtaining the consent of the European Parliament - the European Council, acting by unanimity, can declare the existence of a "serious and persistent breach"[71] of the fundamental values of the Union by a Member State. So, in this second step the infringement of the basic values is determined which creates a basis for applying sanctions against the member state in question. Of course, this procedure also provides an opportunity for the member state in question to submit its observations, which gives a possibility to handle the conflict through negotiations, without retortions or sanctions.[72]

(iv.) If the "serious and persistent breach" is determined, the Council can decide, acting by qualified majority, about introducing several kinds of sanctions which can even lead to suspending the voting rights of the member state.[73] Even if the treaty does not mention proportionality as a requirement for the sanctions – which is a basic principle in European legal systems – it outlines the necessity to take into account "the possible consequences of such a suspension on the rights and obligations of natural and legal persons." [74] This means that the Council has the possibility to find a balance and the right proportion of sanctioning when deciding about suspending member state rights. In accordance with the practice of public international law, the text indicates that the suspension does not affect the member state's EU obligations.[75]

(v.) If the Member State under sanctions changes its contested policies which results in changing the value-risking circumstances that served as a basis for the procedure, then the Council can revoke the sanctions with qualified majority voting, „rewarding" the member state for its behaviour.

Article 269. TFEU is valid for the whole procedure, according to which the member state in question can turn to the European Court of Justice in case it argues that a legal decision was made disregarding the procedural requirements outlined by Article 7 TEU. The member state has one month to file this appeal, and the ECJ also has a month to decide. [76] This means that the ECJ only exerts procedural control over the legal acts born through the application of Article 7; it cannot make substantial observations about the content.

It is evident that "expelling" a member state as a sanction is not present in the provision – even if we saw that there were previous attempts to include it – however, we cannot disregard the possibility that a member state, who is not willing to change its policy despite the sanctions, might use its chance for voluntary withdrawal as outlined in Article 50 TEU. Moreover, based on the international experience, it would not be unimaginable that the EU institutions themselves suggest the possibility of withdrawal to an already sanctioned member state being in the serious and persistent breach of fundamental values. Should the voluntary withdrawal happen, it would not necessarily mean a final break-up between the EU and the member state because Article 50 TEU leaves the possibility of "re-joining" the EU open.[77] This option might remind us of the troubled relationship of the Council of Europe and Greece after the coup d'état of 1967, when Greece "voluntarily" withdrawn, but then got accepted to the organization again in 1974.

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[70] Article 7 (2) TEU.
[71] Certain factors for the determination (general political nature/specific social groups affected/one or more values are involved/legal or administrative practice): Communication from the Commission to the Council and the European Parliament. On the Article 7 of the Treaty on European Union. *op. cit.* 7-8.
[72] Cf. *ibid*. 5-6.
[73] Article 7 (3) TEU.
[74] Article 7 (3) TEU.
[75] Article 7 (3) TEU.
[76] Article 269 TFEU.
[77] Article 50 (5) TEU.

5. Article 7 TEU: critical remarks

The assessment of the earlier procedure is certainly not among the easiest tasks. There are no practical experiences at all, and it is also surprising to what extent the institutions of the European Union avoid to refer to it.[78] Due to this, the following will only be hypotheses stemming from various legal and social science standpoints.

5.1. Too sophisticated, too long and inefficient procedure

In political thinking it is a broadly accepted statement that a procedure can only be efficient if it is not too complicated, if it is composed of simple steps and offers clear standards and measures.[79] If a procedure is too complex or long and requires the cooperation of several independent institutions, then it may bring about inefficiency simply due to the interference of divergent institutional interests.[80]

The procedure outlined in Article 7 TEU cannot definitely be considered simple and fast, especially following the Nice amendment when the new preventive phase was added to the original provision. Four EU institutions participate in it: the European Council, the Council, the European Parliament and the European Commission; and even the European Court of Justice may be involved in procedural issues if the member state in question requires it. Since all of these institutions represent diverging interests (the European Council and the Council are seen to represent the interests of member states, the European Parliament represents the 'Europeans' and the European Commission protects the interests of the Union), it is not hard to imagine that the examined situation in a member state might be perceived rather differently by them.[81] The foreign ministers of the Council, for instance, might see the problem in a more sophisticated, emphatic way, knowing that their own member state might be the next target of such a procedure, while the European Parliament is more attentive to questions related to democratic problems and values. Thus, it is not guaranteed that a given situation will be assessed the same way by all the participating institutions and these conflicts of interests can significantly decrease the efficiency of the procedure.

On the other hand, the procedure consists of several different phases out of which the most important is differentiating between the situations in which there is a 'risk of breaching' or in which a 'serious breaching' of the values has already happened. Other important elements of the procedure are asking for the European Parliament's consent, providing an opportunity for the Member State to defend itself, making it possible to make recommendations in case of a 'risk' and a monitoring process; separating the determination of the serious breach and imposing sanctions from a procedural legal point of view, and the prospective procedural control of European Court of Justice. It is evident that we cannot talk about a short and swift process here, and such a thorough procedure might be justified by its political importance.

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[78] Vö. Communication from the Commission to the Council and the European Parliament. On the Article 7 of the Treaty on European Union. op. cit.; European Parliament, Committee of Constitutional Affairs. Report on the Communication of the Commission on Article 7 on the Treaty on European Union: Respect for or the Promotion of Values on which the Union is Based. (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) 1 April 2004.; European Parliament, Committee of on Civil Liberties, Justice and Home Affairs. Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012. (2012/2130(INI)) 25 June 2013.

[79] Cf. Nicoló Machiavelli: *The Prince*. The University of Chicago Press, Chicago, 1998. 7-15. (Of mixed principalities).

[80] Article 6 UN Charter is expressly criticized because of this problem Vö. Tams: Article 6. op. cit. 385-386.

[81] Herman Lelieveldt-Sebastiaan Princen: *The Politics of the European Union*. Cambridge University Press, Cambridge, 2015. 48-50.

However it is also evident that between determining the existence of a 'risk', initiating a procedure and imposing sanctions several months can pass only because of the procedural steps. It does not seem to be an exaggeration that from the first steps of initiation to the phase of imposing sanctions, including the procedural control of the European Court of Justice, more than a half year may pass.

Whether the different procedural steps on determining a situation of 'risk' or 'serious breach' can be connected is another important question. Would it be possible to start evaluating the situation in a member state commencing with the second phase, the procedure on determining the existence of the serious breach? The text does not give us an answer, but the historical (the first paragraph introducing the term of risk was inserted in the Article by the Treaty of Nice) and logical (the two phases are inserted in one part in two paragraphs in the text) analysis of the Article suggests that these phases cannot be separated from each other. Consequently, it is well-founded to argue that the phase of determining the 'risk' should definitely come before the phase about sanctions present in the second paragraph. Therefore I argue that there is no way to initiate an 'accelerated' procedure and start with determining the 'serious breach' against a member state. This does not help the efficient application of Article 7 TEU.

5.2. What exactly are the Member States risking to breach or breaching?

The purpose of the procedure described in Article 7 TEU is protecting the fundamental values of the EU. As nice as this sentence might sound in a political speech, it is as problematic from a procedural legal and value sociological standpoint.

The first important question is how the risk or serious breach of the fundamental EU values by a Member State can be proven. Although in publicist grounds this is an easily answerable question, it is a very delicate problem from a legal point of view.[82] Where to find information that legally proves the value-risking or breaching nature of a national political action, is a very hard question. It is especially problematic because in evaluating a national situation it is still the given Member State who is the most competent, simply because it possesses the most accurate and biggest amount of information. Moreover this information is usually necessary for the external observer to understand the situation.

Obviously, the EU institutions, especially the Commission, are entitled to deal with evaluating such a situation, but it is questionable whether the investigation they conduct will be thorough and accurate enough. This is also true for the European Parliament; however, in its case even the unavoidable political distortion has to be taken into account, which is the natural consequence of the political competition between the different party families.[83] Other regional international organizations or specialized NGOs might also be employed for finding the proof, but how the information or reports acquired by these organizations can be used is another question that is hard to answer.[84] To sum up, a situation belonging under the competence of Article 7 TEU can be legally evaluated, but having proof about completing the

[82] On the European Court of Justice's practice on evidence in general: Koen Lenaerts-Dirk Arts-Igance Maselis: *Procedural Law of the European Union*. Sweet and Maxwell, London, 2006. 556-558.

[83] A main critique of the so-called Tavares report that severely criticized the new government of Hungary from the aspect of respecting the values of the European Union (European Parliament, Committe of on Civil Liberties, Justice and Home Affairs. Report on the situation of fundamental rights: standards and practices in Hungary) was its manifest one-sidedness. For example: *EP Report on Hungary. EPP Group rejects the use of double standards.* http://www.eppgroup.eu/press-release/EPP-Group-rejects-the-use-of-double-standards

[84] The European Commission refers to the use of such "outsider" reports (for instance reports of the Council of Euope, the OSCE, the Amnesty International, the Human Rights Watch and the Fédération Internationale des Droits de l'Homme). See: Communication from the Commission to the Council and the European Parliament. On the Article 7 of the Treaty on European Union. *op. cit.* 9.

requirements of the rule of law seems to be a complicated task which cannot be done by simple doctrinal-political declarations.

A more abstract but still real problem is the unclear nature of the meaning of the values present in Article 2 (both in theory and institutional practice).[85] Freedom and democracy, for instance, may have the same amount of acceptable understandings as the amount of political philosophical schools that existed in the last two and a half century.[86] One should only think about the fact that freedom means something completely different from the point of view of classical liberalism[87] (the freedom of the individual) and from the standpoint of socialism[88] (ending the social suppression). But we could also mention the populist understanding of democracy here.[89] This line of thought could be continued regarding all the other values; perhaps the respect for human dignity might be the only exception, which is clearly the cornerstone of modern European public thinking and the content of which is unquestionable. So, values are really hard to 'legalize' which can drive dealing with them towards political debates and debates of faith;[90] and this makes it consensually unfounded to make an EU decision about their breach.

Based on the thoughts presented above, I think that Article 7 can only be used in unambiguous situations (hypothetically: introducing slavery, violating equal voting rights by providing more votes to some people, concrete deprivations of right from a group etc.), but these are very unlikely to occur mainly because the states of Europe have learnt the lessons of the 20th century.

6. Conclusion

To put it bluntly, the main advantage of Article 7 TEU also equals to its main disadvantage: its existence. The fact that the architecture of the founding treaties contains a provision that enables the European Union to intervene when a member state violates basic principles is undoubtedly a highly relevant improvement. However, at the very moment when the need for the application of this Article comes up its shortcomings and problems also become noticeable immediately. One may even argue that upon explaining the textual questions of the phrasing of the Article, only problems are to be faced. If the claim of prospective application touches upon Article 7 TEU the legal framework that looked to be rather solid from a doctrinal perspective disappears rapidly, and one may point out several deficiencies (overcomplicated nature, too broad room for diverging institutional and member states interests, too abstract and imprecise protected values problematic proofing of a serious breach if rule of law is to be observed). Thus, Article 7 TEU is certainly not a success as it can properly be illustrated by the events surrounding the Union level political discussion on the European orientation of the actual Hungarian government: although certain international organizations[91] and institutions of the European Union[92] argued that Hungary may have

[85] The declarations of the Union institutions in value questions are very abstract in general, therefore they are practically useless.

[86] For a classic discussion: Benjamin Constant: De la liberté des anciens comparée à celles des modernes (1919) http://www.panarchy.org/constant/liberte.1819.html

[87] Cf. John Stuart Mill: On Liberty. In: John Stuart Mill: *On Liberty and other writings*. Cambridge University Press, Cambridge, 2014. 1-116.

[88] Cf. Manifesto of the Communist Party (1848). https://www.marxists.org/archive/marx/works/1848/communist-manifesto/

[89] Cf.: Carl Schmitt: A parlamentarizmus és a modern tömegdemokrácia ellentéte. In: Carl Schmitt: *A politikai fogalma.* Osiris-Pallas-Attraktor, Budapest, 2002. 191-204.

[90] On values in general see: Rudolf Rezsohazy: *Sociologie des valeurs*. Armand Colin, Paris, 2006.

[91] Vö. European Commission for Democracy through Law. Opinion on the Fourth Amendment to the Fundamental Law of Hungary. Opinion 720/2013 CDL-AD(2013)012, 17 June 2013. 147. (This report did not

committed breaches of the European values and these may ground the preventive procedure (Article 7 (1) TEU),[93] the Article has never officially been even mentioned.

The main reason behind this problem is that Article 7 TEU – although it is formulated in a strictly legal way – is a fundamentally political tool; similarly as it was the case in the public international tradition. Doctrinal legal analysis can point out that it fits well in the public international law tradition established by the solutions defending the political identity of international organizations against recalcitrant member states. Furthermore, it can also be argued that the placing of Article 7 TEU and the related provisions is inconsequent since it scatters certain provisions in the founding treaties – the procedure, decision-making rules, the procedural competence of the European Court of Justice and other membership rules – that should be united in one single section.

However, beyond these points, the critique transcends the traditional frame of doctrinal jurisprudence and leads to other fields of study such as political theory, political philosophy or sociology of the values.[94] Each of these understandings suggests that Article 7 TEU is a political tool, even contrary to the manifest legal setting, and it can be invoked as a strong argument during controversies and conflicts among the European Union and member states in order to ensure political obedience. Indeed, other mechanisms having no such political weight seem to be much more suitable, such as the action for infringement of European Union law,[95] the EU justice scoreboard,[96] or the new emerging mechanism to strengthen the rule of law in European Union[97] to safeguard compliance with both the values of the European Union and European Union law.

In sum, Article 7 TEU, contrary to its precise legal phrasing, is a component of the highest level European politics, and, perhaps, it would not cause serious problems if it returned there from the founding treaties by a future amendment. As long as it does not happen, it is to be considered as a nice monument to an impossible task: to realize deeply political aims by simple legal provisions, in other words, to carry out the activities of statesmen by bureaucrats.

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refer to Article 7 TEU, but it argues that the Hungarian government seriously violated the principle of rule of law by endangering judicial review and the system of checks and balances.)

[92] European Parliament, Committe of on Civil Liberties, Justice and Home Affairs. Report on the situation of fundamental rights: standards and practices in Hungary. *op. cit.* 86.

[93] In 2012, Sadurski argued that all the requirements are fulfilled to apply Article 7 (1) TEU against Hungary. Rescue Package for Fundamental Rights. Comments by Vojciech Sadurski. http://www.verfassungsblog.de/rescue-package-fundamental-rights-comments-wojciech-sadurski/#.Vc5dN_ntmkr

[94] Endre Orbán argues on the basis of game theory that Article 7 TEU cannot have consequences. See: Endre Orbán: Article 7 TEU is a nuclear bomb – with all its consequences? http://hpops.tk.mta.hu/en/blog/2015/04/article-7-teu-is-a-nuclear-bomb

[95] Articles 258-260 TFEU.

[96] The EU justice scoreboard. (Communication from the Commission to the European Parliament, the Council, The European Central Bank, the European Economic and Social Committe and the Committe of the Regions. COM(2013) 160 final.

[97] Communication from the Commission to the European Parliament and the Council. A new EU framework to strengthen Rule of Law. COM(2014) 158 final/2. 19.3.2014.