

# PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

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## **Abstract**

*In order to ensure the respect of the values that the European Union is based on, provided for in art. 2 of the Treaty on European Union, Article 7 of the same Treaty, provides for a mechanism of the European Union that allows to determine if serious and persistent violations of the values of the European Union by a Member State have taken place and possibly to sanction such violations. The European Union is obliged to respect the Charter of Fundamental Rights of the European Union. The Charter sets out the rights that both the European Union and the Member States must respect when implementing EU Law.*

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**JEL Classification:** K33, K38

## **1. Prior details**

Through the Maastricht Treaty, the European Union respects the fundamental rights, as guaranteed by the European Convention on Human Rights and results from the common constitutional traditions of the Member States [Article 6 (2)]. The Maastricht Treaty establishes a series of categories of rights for citizens of the Union, complementary to national citizenship, through which the protection of their interests is strengthened<sup>2</sup>.

According to the Treaty of Amsterdam (TA), signed in 1997, which entered into force in 1999, as a guarantee of recognition of citizenship, it is reaffirmed that the European Union is founded on the principles of freedom, respect for fundamental rights and freedoms, as well as the state, by law, principles common to all Member States, respect for human rights being a condition of belonging to a State in the Union (Article 49 TEU)<sup>3</sup>. The TA also provides that the Union respects both the fundamental rights guaranteed by the European Convention on Human Rights, signed in Rome in 1950, and those resulting from the common constitutional traditions of the Member States as general principles of Union law. Through the TA, a political guarantee is established regarding the respect by the Member States of the fundamental<sup>4</sup> rights, imposing sanctions for non-observance of these rights. Therefore, if a member state of the U.E. in serious and persistent violation of the principles on which the Union is based, the Council may decide to suspend certain rights deriving from the application of the TEU, (as amended by the TA) for the Member State concerned, including the right to vote in the Council of the representative of that government Member State (art. 7 TEU). In the TEU, in the Preamble, amended by the TA, the attachment of the Member States to the fundamental social rights

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<sup>2</sup> These are: 1. the right to move and establish freely within the territory of the Member States (Article 18 TC); 2. the right to choose and to be elected at the local elections in the Member State in which he resides, under the same conditions as the citizens of that state (Article 19 TEC); 3. the right to benefit from the protection of the diplomatic and consular authorities of any Member State, in the territory of a third State in which the Member State to which it belongs as a citizen is not represented under the same conditions as the citizens of that State (Article 20 TEC); 4. the right to petition the European Parliament (Article 21 TEC); 5. Any citizen of the Union can contact the European Ombudsman to examine cases of maladministration on the part of the Community institutions and bodies (Article 21 TEC); 6. any citizen of the Union may write to any institution or community body/union, in one of the languages mentioned in the Treaty, and be answered in the same language.

<sup>3</sup> Radu Stefan Pătru, *Certain considerations regarding the legal personality of the European Union following the Lisbon Treaty*, „Revista Consilier European” no. 1, 2010, p. 12; Cătălin-Silviu Săraru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 61; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 806.

<sup>4</sup> See, E. Dragomir, D. Niță, *European Citizenship*, Lumina Lex Publishing House, Bucharest, 2010, p. 107.

as defined in the European Social Charter of 196, revised in 1996<sup>5</sup>, is confirmed. The aforementioned charter is considered a political instrument that guarantees certain social rights, including those related to the labor market, vocational training, equal opportunities. The Member States of the European Union guarantee the respect of fundamental rights and democratic values, provided for both in their constitutions and in the regulations of international law, that is, in the conventions to which they are parties: The European Convention on Human Rights<sup>6</sup> (1950), the Universal Declaration of Human Rights (1948), European Social Charter (1961, revised 1996), Community Charter of Fundamental Social Rights of Workers (1996).

## 2. The need for legal protection of fundamental rights through the Treaties of the European Union

The European Communities were initially established with an area of economic competence, mainly<sup>7</sup>, the reason why the observance of fundamental rights were not mentioned in the treaties<sup>8</sup>, these rights being guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in 1950 Member States.

The Court of Justice of the European Union (CJEU) has affirmed, in its case-law, the principles of direct effect and the supremacy/priority of European Union law<sup>9</sup>, but has refused to examine the compatibility of judgments with the national and constitutional law of the Member States<sup>10</sup>. This refusal was viewed with concern by certain national courts, considering that such case law could affect the defense of constitutional values, such as fundamental rights. In conclusion, if European Union law were to prevail even with regard to domestic constitutional law, this could have violated fundamental rights. This risk, considered theoretically<sup>11</sup>, initially, was met by the judgments of the constitutional courts of Germany and Italy, which each issued a decision in 1974 stating their competence to revise European law in order to guarantee its compatibility with constitutional rights (according to the cases, *Solange I*<sup>12</sup>; *Frontini*<sup>13</sup>). These decisions have brought to light a conflict of law between a national legal system and European Union law. In response to this conflict, the CJEU affirmed, in its case-law, the principle of respect for fundamental rights, stating that fundamental rights are enshrined in the general principles of Community law (of the Union, today) protected by the Court<sup>14</sup>. They are inspired by the constitutional traditions common to the Member States<sup>15</sup> and the international human rights treaties to which the Member States are parties<sup>16</sup>, one of which is the

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<sup>5</sup> The European Social Charter was signed at the European Council, in Italy, in Turin, on October 18, 1981; entered into force on February 26, 1965, being revised in Strasbourg, on May 3, 1996. Romania ratified it by Law no. 74/1999 (Official Gazette no. 193 of May 4, 1999).

<sup>6</sup> Signed at the Council of Europe, in Rome, on November 4, 1950, entered into force on September 3, 1953, was ratified by Romania by Law no. 30/1994 (Official Gazette no. 135 of May 31, 1994).

<sup>7</sup> See, Ioana-Nely Militaru, *European Union Law*, 3<sup>rd</sup> edition, revised and added, Universul Juridic Publishing House, Bucharest, 2017, pp. 47-67; Elena Gabriela Militaru, *The Character of the European Construction*, „Legal and administrative studies”, www.jlas.upit.ro., No. 1 (20), Year XVIII, 2019, pp. 99-110.

<sup>8</sup> Here we consider the treaties originating the establishment of the European Communities, respectively, the ECSC Treaty, the EEC Treaty, the Euratom Treaty, *Idem*, pp. 14-20.

<sup>9</sup> *Costa v. ENEL*, CJCE judgment of July 15, 1964, [https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0006-1964-200802145-05\\_00.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0006-1964-200802145-05_00.pdf), consulted on 1.10.2019.

<sup>10</sup> *Stork*, case 1/58; *Ruhrkohlen-Verkaufsgesellschaft*, related cases 36, 37, 38-59 and 40-59, [https://www.europarl.europa.eu/ftu/pdf/en/FTU\\_4.1.2.pdf](https://www.europarl.europa.eu/ftu/pdf/en/FTU_4.1.2.pdf), consulted on 1.10.2019.

<sup>11</sup> *Idem*.

<sup>12</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) Case 11/70, [https://en.wikipedia.org/wiki/Internationale\\_Handelsgesellschaft\\_mbH\\_v\\_Einfuhr-\\_und\\_Vorratsstelle\\_f%C3%BCr\\_Futtermel](https://en.wikipedia.org/wiki/Internationale_Handelsgesellschaft_mbH_v_Einfuhr-_und_Vorratsstelle_f%C3%BCr_Futtermel), consulted on 1.10.2019.

<sup>13</sup> *Frontini v Ministry of Finance* [1974] 2 CMLR 372 (Italian Constitutional Court), [https://oup-arc.com/static/5c0e79ef50eddf00160f35ad/casebook\\_99.htm](https://oup-arc.com/static/5c0e79ef50eddf00160f35ad/casebook_99.htm), consulted on 1.10.2019.

<sup>14</sup> Judgment of the Court of 12 November 1969, *Stauder*, Case 29/69. <http://ier.gov.ro/wp-content/uploads/rezumat-cjue/61969J0029.pdf>, consulted on 1.10.2019.

<sup>15</sup> *International Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) Case 11/70.

<sup>16</sup> Judgment of the Court of 14 May 1974, Case 4/73, *J. Nold, Kohlen und Baustoffgroßhandlung v Commission of the European Communities*, <http://ier.gov.ro/wp-content/uploads/rezumat-cjue/61973J0004.pdf>, consulted on 1.10.2019.

European Convention on Human Rights<sup>17</sup>. The European Union represents a new stage in the process of European integration, promoted by the creation of the European Communities, so that from the Treaty of Maastricht (1993, entered into force) to the Treaty of Lisbon (2009, entered into force), there have been gradually expanded the European Union's powers to policies that have a direct impact on fundamental rights, for example Justice and Home Affairs (JHA)<sup>18</sup>, and then a Freedom of Security and Justice Area was created. The extremely important steps, in this regard, the Treaty of Maastricht and Amsterdam, as we have shown. In conclusion, the treaties have been modified so that the European Union expressly guarantees the protection of fundamental rights.

### 3. EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>19</sup>

As the European Convention on Human Rights is the main instrument for the protection of fundamental rights in Europe, to which all Member States have acceded, the accession of the European Communities to it seemed a logical solution to the need to bind the EC to fundamental rights obligations. The European Commission has proposed the accession of the European Communities to the Convention (in 1979, 1990 and 1993). The Commission also asked the Court of Justice for an opinion to that effect. The Luxembourg court, in its opinion 2/94, stated that the EC Treaty does not provide any competence for the EC to adopt rules on human rights or to conclude international conventions in this field, which made accession impossible legally.

The Lisbon Treaty covered this gap by introducing Article 6 para. 2, which provides for the "accession of the European Union to the European Convention on Human Rights. Therefore, respect for human rights by the European Union is controlled by the European Court of Human Rights (ECHR), which means that EU citizens, but also third-country nationals in the EU, have the right to challenge the acts before the ECHR, based on the convention. adopted by the EU, in the same way that they can challenge the legal acts adopted by the EU Member States. Following the entry into force of the Lisbon Treaty, negotiations began with the Council of Europe in 2010 with a view to concluding an accession agreement<sup>20</sup>.

The Commission asked - in July 2013 - the CJEU for an opinion on the compatibility of this agreement with the treaties<sup>21</sup>. In 2014 (December 18), the CJEU issued a negative opinion stating that the draft agreement (between the EU and the Council of Europe) is likely to adversely affect the specific features and autonomy of EU law. Discussions are currently underway on how to overcome the issues raised by the CJEU in order to continue negotiations<sup>22</sup>.

### 4. The Charter of Fundamental Rights of the EU

The Charter of Fundamental Rights originates from the European Convention on Human Rights. It presents itself as a true compromise of the rights enjoyed by the citizens of the Union, comprising, both the fundamental rights and freedoms generally contained in the European Convention, but also social rights, inspired by the European Social Charter adopted under the aegis of the Council of Europe, as well as "new rights". Which relate to the evolution of European societies in various fields such as bioethics, the environment or the rights of the child. The Charter also establishes access to documents, data protection and good administration among fundamental rights,

<sup>17</sup> Judgment of the Court of 28 October 1975 Roland Rutili, Case 36/75, <http://ier.gov.ro/wp-content/uploads/rezumate-cjue/61975J0036.pdf>. See Ottavio Marzocch, *EU fact sheets, Protection of fundamental rights in the EU*, 05-2019, <https://www.europarl.europa.eu/factsheets/en/sheet/146/protection-fundamental-in-ue-rights>, consulted on 1.10.2019.

<sup>18</sup> See Elise Valcu, *Brief Considerations on the Area of Freedom, Security and Justice and Applicability in the Union's Legislature Procedure According to the Lisbon Treaty*, „Journal of Legal Studies”, issue 3, year VII, no. 1-2, 2012.

<sup>19</sup> See Ottavio Marzocch, *op. cit.*, p. 2.

<sup>20</sup> The negotiation ended in 2013.

<sup>21</sup> See Iulia Boghirnea, *The special procedure of the "referral for opinion" of the Court of Cassation of France. The legal and important basis*, „Journal of Legal Studies” no. 3-4, 2018, p. 4; Iulia Boghirnea, *Interpretation - Obligation of the judge imposed by the imperative of the application of the law*, „Legal and administrative studies”, no. 2, 2018, p. 50-57.

<sup>22</sup> See Ottavio Marzocch, *op. cit.*, p. 2.

prohibiting discrimination based on disability, sexual orientation or age.

The EU Charter of Fundamental Rights of 7 December 2000, as adapted on 12 December 2007, in Strasbourg, has, according to art. 6 paragraph 1 TEU, the same legal value as the treaties. The provisions of the Charter are addressed to the Union institutions, bodies, offices and agencies of the Union (in compliance with the principle of subsidiarity) and to the Member States, only if they implement Union law (Article 52 of the Charter). This provision draws boundaries between the scope of the Charter and that of national constitutions and the European Convention on Human Rights. Insofar as it concerns individual acts of individuals, the Charter is also binding on the citizens of the Union<sup>23</sup>.

## 5. European Union instruments for the protection of fundamental rights

### 5.1. The mechanism provided for in Article 7 of the Treaty on European Union

According to the Treaty of Amsterdam, the European Union is given the power to intervene in areas which, otherwise, are left to the Member States, in situations of "serious and persistent violation" of fundamental rights, but also of other European principles and values, towards for example, democracy and the rule of law. The Treaty of Nice added a preventive phase in the event of a "clear risk of serious breach" of EU values in a Member State. This procedure concerned those criteria from Copenhagen, for the accession of the new states - the protection of fundamental rights, democracy, the rule of law and the rights of minorities - which will be respected even after accession.

The article 7 para. 1) of the TEU provides for a "preventive step", such as "On a reasoned proposal by a third of the Member States, the European Parliament or the European Commission and with the approval of the European Parliament, the Council, acting by a four-fifths majority of its members, may establish the existence of a clear risk of serious violation of the values provided in art. 2 of the TEU (respect for human rights, human dignity, freedom and equality and the rights of persons belonging to minorities) by a Member State".

Before proceeding to this finding, the Council<sup>24</sup> shall hear the Member State concerned and may make recommendations to it, acting in accordance with the same procedure. According to art. 354 par. 4 of the TFEU, the European Parliament must approve by a two-thirds majority of the votes cast and by an absolute majority of its members. The preventive procedure was activated by the Commission in connection with Poland and the European Parliament in connection with Hungary<sup>25</sup>.

Article 7 (2) and (3) TEU provide that the "sanctioning mechanism" provided in par. 1, can be activated by one third of the Member States or the European Commission, with the approval of the European Parliament<sup>26</sup>, if it finds a serious and persistent violation of the values provided in art. 2 TEU to a Member State. The preventive procedure consisted of inviting the Member State concerned to submit its comments.

The effects of this finding, on which the Council decides by a qualified majority, are:

- the suspension of certain rights vested in the Member State concerned following the application of the Treaties;

- suspension of voting rights in the Council of the representative of the government of that Member State; The Council may decide to amend or revoke sanctions, also by a qualified majority, if it finds that the situation which caused it to impose the respective measures has changed.

- the obligations incumbent on the Member State concerned under the Treaties are maintained, in any case for the Member State concerned, the Commission launched, in 2014, an "EU Framework for the consolidation of the rule of law", in order to eliminate the gap between difficult activation in

<sup>23</sup> See, A. Popescu, I. Diaconu, *European and Euro-Atlantic Organizations*, Universul Juridic Publishing House, Bucharest, 2009.

<sup>24</sup> See, Ileana Voica, *Considerations regarding the functions of the European Council*, in M. Elvira Méndez-Pinedo, Jakub Handrlica, Cătălin-Silviu Săraru (eds.), *Practical Aspects Regarding the Role of Administrative Law in the Modernization of Public Administration*, ADJURIS – International Academic Publisher, 2019, p. 62-76.

<sup>25</sup> See Ottavio Marzocch, *op. cit.*, p. 3.

<sup>26</sup> As in the case of paragraph 1 (art. 7 TEU), the European Parliament must approve by a two-thirds majority of the votes cast and by an absolute majority of its members.

politically, the procedures provided for in Article 7 TEU (used to deal with situations that fall outside the scope of EU law) and the procedures for finding breaches, with limited effect (used in specific situations that fall within the scope of EU law)<sup>27</sup>.

The framework aims to ensure the effective and coherent protection of the rule of law, this being a prerequisite for ensuring respect for fundamental rights in situations of systemic threat to them; the framework precedes and completes Article 7 TEU and provides for three stages: the Commission's evaluation, namely a structured dialogue between the Commission and the Member State, followed, where appropriate, by an opinion on the rule of law, a recommendation by the Commission on the rule of law, and the measures subsequent to the recommendation, taken by the Member State<sup>28</sup>. This framework was recently applied for the first time in the case of Poland.

## 5.2. Protection of fundamental rights through mechanisms other than Article 7 TEU<sup>29</sup>

A mechanism for the protection of fundamental rights is triggered when a new legislative initiative is proposed. In this case, the Commission analyzes the compatibility of the proposal with the fundamental rights through an impact assessment, this aspect being subsequently examined by the Council and Parliament.

Furthermore, the Commission publishes an annual report on the application of the Charter of Fundamental Rights, which is examined and debated by the Council, which adopts conclusions in this regard. In this annual report, the European Parliament also examines the situation of fundamental rights in the European Union.

Starting with 2014, the Council organizes an annual dialogue between all Member States within the Council to promote and protect the rule of law. Each year the dialogue has a different theme, however, the issues related to fundamental rights are monitored and may be subject to country-specific recommendations. The domains concerned, within the annual dialogue, concern the justice systems (based on the Justice Scoreboard), as well as disabilities, social rights and citizens' rights (in terms of protection against organized crime and corruption). Bulgaria and Romania are also subject to the cooperation and verification mechanism, which contains elements related to fundamental rights.

The European Commission has proposed a Regulation on the protection of the Union budget in the case of widespread deficiencies in the rule of law in the Member States, linking EU<sup>30</sup> funds with the rule of law. If adopted, this instrument will allow pressure on Member States that violate fundamental rights. Actions for failure to fulfill obligations are an important tool for sanctioning violations of fundamental rights in the EU. These actions can be launched in individual and specific cases, when national law does not comply with EU law and the fundamental rights protected by it (while Article 7 applies in situations that do not fall within the scope of EU law and in which violations of rights fundamental are systematic and persistent).

In 2007, the Agency for Fundamental Rights of the European Union (FRA) was set up in Vienna. It has a major role to play in monitoring the situation of fundamental rights in the EU, having the task of collecting, analyzing, disseminating and evaluating information and data related to fundamental rights and conducting scientific research in this respect, publishing annual and thematic reports on fundamental rights.

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<sup>27</sup> See Ottavio Marzocch, *op. cit.*, p. 3.

<sup>28</sup> *Idem*.

<sup>29</sup> *Idem*.

<sup>30</sup> See, Adriana Moțatu, *Free movement of capital and payments in the European Union, the result of successive regulations*, in Kristine Strada-Rozenberga, Maria do Rosário Anjos (eds.), *Current Issues in Business Law*, ADJURIS – International Academic Publisher, 2018, p. 85-92.

## 6. Conclusions. The role of the European Parliament in the mechanisms of protection of fundamental rights in the European Union<sup>31</sup>

Parliament has always supported strengthening the respect and protection of fundamental rights in the EU. Since 1977, the Parliament, together with the Council and the Commission, has adopted a "Joint Declaration on Fundamental Rights", in which the three institutions have committed themselves to ensuring the respect of fundamental rights in the exercise of their powers. In 1979, Parliament adopted a resolution supporting the accession of the European Community to the European Convention on Human Rights.

Since 1993, the Parliament has held a debate every year and adopted a resolution on the situation of fundamental rights in the EU, based on a report of its Committee on Civil Liberties, Justice and Home Affairs. Parliament has always supported the EU in its own declaration of rights and called for the Charter of Fundamental Rights to be binding. This was finally achieved in 2009 by the Treaty of Lisbon. Parliament also made a number of suggestions for strengthening the protection of fundamental rights in the EU, proposing new mechanisms and procedures to fill existing gaps.

In 2018, the Parliament adopted a resolution welcoming the Commission decision to activate Article 7 (1) TEU in relation to Poland<sup>32</sup>, as well as a resolution launching the procedure provided for in Article 7 (1) TEU in relation to Hungary, presenting to the Council a reasoned proposal inviting it to ascertain whether there is a clear risk of serious infringement of the values referred to in Article 2 TEU and to make appropriate recommendations to Hungary in this regard<sup>33</sup>.

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<sup>31</sup> See, Ottavio Marzocch, *op. cit.*, p. 3.

<sup>32</sup> European Parliament resolution of 1 March 2018 on the Commission decision to activate Article 7 (1) of the TEU as regards the situation in Poland (OJ C 129, 5.4.2019, p. 13).

<sup>33</sup> European Parliament resolution of 12 September 2018 on a proposal inviting the Council to establish, under Article 7 (1) of the Treaty on European Union, the existence of a clear risk of serious breach by Hungary of the values on which the Union is founded [Texts adopted, P8\_TA (2018) 0340]. For information on recent EP activities related to fundamental rights, see "The protection of fundamental rights in the EU: European Parliament achievements during the 2014-2019 legislative term and challenges for the future" To the European Parliament during the 2014-2019 legislature and future challenges).