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**PROTOCOL ON THE APPLICATION OF THE
CHARTER OF FUNDAMENTAL RIGHTS OF THE
EUROPEAN UNION TO POLAND AND THE UNITED
KINGDOM – POLISH PERSPECTIVE**

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LIST OF ABBREVIATIONS

CFR	Charter of Fundamental Rights of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

Fundamental rights protection within the EU has its roots in the case-law of the European Court of Justice (ECJ), starting with the *Stauder*¹ case (1969.), where fundamental rights as general principles that the ECJ protects were mentioned for the first time. In its subsequent case-law two sources of such concept were identified – constitutional traditions common to the Member States² and international human rights treaties to which Member States are parties³, first of all, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). Similar definition was later inserted in the Treaty on the European Union (Article 6) and still exists within the same article after entering into force of the Treaty of Lisbon, with some new determinants in the fundamental rights protection, considering the Charter of Fundamental Rights (hereinafter: CFR) that, although separate document, became legally binding and with the same legal value as the Treaties.⁴

The limits and the use of Union's competences are governed by three principles: principle of conferral, principle of subsidiarity and principle of proportionality (Article 5 TEU).⁵ Since the CFR raised a concern about the possibility of widening Union's competences, additional safeguards were inserted in the Treaties. When defining the legal value of the CFR, the Article 6 of the TEU states that „the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties“ and that rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions

¹ Case 29/96 *Erich Stauder v. City of Ulm* (1969) ECR 00419.

² Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr* (1970) ECR 01125, § 4.

³ Exact wordings of the ECJ were: „...international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories...“ (§ 13).

Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission* (1974) ECR 00491.

This seems to be connected with the fact that not all of the Member States were parties to the ECHR at that time. For example, France did not accede the Convention until 1974 (exact date of ratification was 3 May 1974). Although the ECJ's judgment dates from 14 May 1974, we should bear in mind that it was formulated before.

⁴ Article 6(1) TEU: „The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.“

⁵ According to the principle of conferral the Union acts only within the limits of the competences conferred upon it by the Member States in the Treaties (while competences not conferred upon the Union remain with the Member States) (§ 2). The principle of subsidiarity provides that when the Union does not have exclusive competence in certain area, that it acts „only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States..., but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level“ (§ 3). The third principle asks from The Union not to exceed with its actions what is necessary for achieving the aims of the EU (§ 4).

It is also worth noting that the Treaty of Lisbon introduced division of competences in three categories: exclusive competences of the Union (Article 3 TFEU), shared competences (Article 4) and competence to support, coordinate or supplement the actions of the Member States (Article 6).

(Chapter VII of the Charter) and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions (Paragraph 1, Subpara. 2 and 3).

From Article 51 (Title VII) of the Charter follows that provisions of the Charter are addressed to the institutions and bodies of the EU (with due regard for the principle of subsidiarity) and to the Member States when they are implementing Union law.⁶ Similarly to the introduced safeguards within Article 6 of the TEU, Paragraph 2 of Article 51 of the CFR provides that the Charter does not establish any new power or task, neither does it modify powers and tasks as defined by the Treaties (so-called standstill clause).

However, neither the defining of the aim in the CFR (from the preamble it can be seen that the reaffirmation of fundamental rights in six chapters of the Charter has the aim of making those rights more visible in order to strengthen their protection, what is found to be necessary in the light of changes in society), nor above mentioned safeguards did influence the decision of some Member States to “opt out” from the Charter by signing the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom (so called British-Polish Protocol)⁷ or making similar declarations on it⁸. Since every Member State has its own reasons for such actions and in compliance with the aim of this work, further analysis will be focused on the Polish perspective of the fundamental rights protection in the EU and the Protocol itself.

⁶ Same requirement of the connection to the EU law can be withdrawn from the case-law of the ECJ. For example, in *Wachauf* case (Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* (1989) ECR 02609) it is stated that: “...requirements of the protection of fundamental rights in the Community legal order ...are also binding on the Member States when they implement Community rules...the Member States must, as far as possible, apply those rules in accordance with those requirements.” (§ 19). It seems, however, that requirement of the fundamental rights protection is necessarily respected also in cases where Member States derogate from Union law (see, for example p. 43. in the *ERT* case (Case 260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (1991) ECR I-02925)).

Moreover, some authors distinct the scope of application of EC law (as well as binding force of fundamental rights protection) and the scope of implementation of Union law, emphasising the much broader scope of the first one; and find that the necessary link to the Community law is being more and more weakened in the jurisprudence of the ECJ. Continuous weakening of the link with Community law is found particularly in cases that concern non-discrimination principle on grounds of nationality, like Case 186/87 *Ian William Cowan v Trésor public* (1989) ECR 00195, Case C-85/96 *María Martínez Sala v Freistaat Bayern* (1998) ECR I-02691, and Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* ECR I-07637. For more about it see pages 4 and 5 in:

Vranes, E., *The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention* in: European Integration online Papers (EIoP) Vol. 7, No. 7, 2003; at: <http://eiop.or.at/eiop/pdf/2003-007.pdf>.

⁷ OJ C 306/157.

⁸ Since it was too late to join the British-Polish Protocol, the Czech Republic made the Declaration No.53 on the CFR whose content is similar to the Protocol, but without the same legal value, since it is only a unilateral declaration and thus can be used only as an interpretative document. More about it in:

Wyrozumska, A., *Incorporation of the Charter of Fundamental Rights into the EU Law: Status of the Charter, Scope of its Binding Force and Application, Interpretation Problems and the Polish Position* in: Fundamental rights protection in the EU, Jan Barcz (et al). Warszawa, 2009., pages 100-101.

After a short overview of the political context of signing of the Protocol, more attention will be given to its legal significance and the question whether the Protocol really is an opt-out from the CFR or just an interpretative instrument. In subsequent analysis, reasons that motivated Poland to join the Protocol will be presented through the prism of current EU law and legal standards that are binding upon Poland outside the EU framework, in order to answer the question of (un)justified scepticism in State's approach toward the Charter (or some of its provisions). Finally, a discussion will focus on the consequences that Protocol may have on the protection of rights of individuals. In concluding remarks, certain problems that showed significant within the "Protocol context" will be pointed out as well; particularly, the efficiency of EU fundamental rights protection within the diversities that exist among the Member States.

2. SIGNING , CONTENT AND LEGAL SIGNIFICANCE OF THE PROTOCOL

For introductory remarks it might be interesting to mention that in the mandate concerning negotiations of the new Reform Treaty that the Polish parliament – Sejm, granted to the Polish Government, joining the “British Protocol” was not mentioned. Moreover, on the basis of “fulfilment of the Polish *raison d'état*” (to which mandate concerns), professor M.Wyrzykowski, judge of the Constitutional Tribunal of the Republic of Poland, discusses the constitutionality of such action of the Government. According to Wyrzykowski, *raison d'état* consists in striving for development of rights and freedoms and their effective protection; it is based on the constitutional norms and, thus, cannot be undermined by any form of relativisation (political, idealistic, moral or religious), which seems to be present in the case of the Protocol.⁹

Although the reasons for joining the Protocol will be discussed later, few remarks should be given before the analysis of its content and legal significance. First of all, the fact that the Polish Government did not create its own protocol or even negotiated on its content, but purely joined the British version of it and, second of all, that the Protocol appears to be more a political compromise than the intentional act of the current Government.¹⁰ That is important for two Declarations - on the CFR (No.61.) and concerning the Protocol (No.62.)¹¹, that were made by Polish Government and which will be analysed together with the Protocol, for better understanding of what was its intentional content from the Polish point of view.

2.1. AN OPT-OUT OR AN INTERPRETATIVE INSTRUMENT?

The Protocol is an international agreement, an amendment to the Treaty of Lisbon, and although often referred to as an opt-out, it has also considered to be an interpretative

⁹ The mandate concerned the following issues: compromising character of the Treaty - improving the functioning of the Union, while guaranteeing Poland a strong position; weighing voices in the Council; accomplishment of the Polish *raison d'état* through its presence in the EU.

Wyrzykowski, M., *Introduction: Limitations of Power and Limits of Interpretation* in: Fundamental rights protection in the EU, Jan Barcz (et al). Warszawa, 2009, pages 25-28.

¹⁰ The initiative to opt out from the CFR came from the previous Government of Jaroslaw Kaczynski and his party Law and Justice („conservatives“). New Government („liberals“) with Donald Tusk as a Prime Minister decided to uphold the position of the former Government, in order to get their support in the Parliament (Sejm) for the ratification of the Treaty of Lisbon. More about political background of the joining the Protocol on: <http://www.statewatch.org/news/2008/jan/01eu-poland.htm>

¹¹ Both Declarations were annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. They are published with other annexed declarations in: OJ C 83/355.

instrument in both, academic and political circles.¹² When we take a look at the Preamble of the Protocol where it is said that contracting parties are desirous of “*clarifying the application of the Charter* in relation to the laws and administrative action of Poland and of the United Kingdom *and of its justiciability*” and that “references in this Protocol to the operation of specific provisions of the Charter *are strictly without prejudice to the operation of other provisions of the Charter*” (italics added), we can conclude that the opt-out is not the aim of the Protocol. It seems that the will of the Member States was to ascertain the limits of interpretation of the Charter; more precisely, the interpretation of only certain provisions of the Charter to which the Protocol refers.

Article 1(1) of the Protocol seems to substantiate the same:

“The Charter *does not extend* the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.” (italics added).

The use of words “does not extend” can hardly justify the interpretation that the ECJ or national courts in Poland or the United Kingdom can never find that their laws or practices are inconsistent with the fundamental rights. “Does not extend” implies that the ECJ and national courts have such competence, but as it follows from the current EU law, excluding the possibility that the CFR widens that competence. When we compare it to the already mentioned safeguards that EU law provides (the principles of conferred competences and of subsidiarity, Article 6 TEU, Article 51 CFR), the question that arises is: what are the novelties that the Protocol introduces for the position of the contracting parties, comparing to other Member States?

¹² Prof. Dashwood sees it as a „part of the belt-and-braces approach of the Government“, in line with the negation of creation of new rights in the Charter or enlarging the possibility of act being challenged on grounds of fundamental rights, concluding that the Protocol provided „additional, but unnecessary protection“; Jane Golding considers that the main aim is „a certainty that all the angles are covered“; prof. Shaw defines the Protocol as „a Declaration masquerading as a Protocol“; Martin Howe QC questions even special position of the United Kingdom or Poland, discussing the possibility that it is simply declaratory act of the consequences Charter has across the whole EU; even British Government discussed if it is only an „interpretative guide“ that just reaffirms the safeguards already provided within the CFR. For more about the discussion on the interpretative character of the Protocol see The Tenth Report of the House of Lords' Committee on European Union at: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/6209.htm>

2.2. CHAPTER IV OF THE CFR (“SOLIDARITY”) – CONTRADICTORY ATTITUDES OF THE REPUBLIC OF POLAND

Second paragraph of Article 1 of the Protocol states as follows:

“In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.”.

A first look at the provision gives us another confirmation of “not exclusion, but not-extension” interpretation of the meaning of the Protocol. Indeed, saying that only those rights from the Chapter IV that are recognized in Polish law will be justiciable in Poland is only putting limits to potential, more extensive application of the CFR (not excluding its application in that field completely). But before we make any conclusions about consequences of such limitation for the protection of individual’s fundamental rights in practice, we should take a look at another document made by Polish Government that refers to the same Chapter – Declaration No.62 concerning the Protocol:

“Poland declares that, having regard to the tradition of social movement of “Solidarity” and its significant contribution to the struggle for social and labour rights, it *fully respects social and labour rights*, as established by European Union law, *and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.*”¹³(italics added).

What appears to be illogical is the striking difference to the explained meaning of Article 1(2) of the Protocol. Not only that the Declaration confirms that social and labour rights are respected in Poland in accordance to Union’s standards, but also emphasises respect for those of them that are set out in the Charter (to which Protocol’s limitations refer to). Despite the fact that Declaration doesn’t have the legal significance as the Protocol, its completely contrary content to the one expressed in Article 1(2) of the Protocol is useful for comprehending that exclusion or even limitation of the application of Chapter IV of the CFR was not the intention of the Republic of Poland (but of the author of the Protocol’s text, the United Kingdom).¹⁴

¹³ OJ C 83/358.

¹⁴ Declaration No. 61 on the CFR confirms that Polish reasons for an „opt-out“ were related to other fields of law. They will be analysed in the following chapters of the work.

But no matter was it intentional or not, or what are the real motives by which the Republic of Poland was guided in joining the Protocol, the fact is that certain limitations have been put and that they will have certain impact on the protection of those rights in practice.

2.3. NATIONAL FRAMEWORK OF THE CFR APPLICATION

Similarly as second paragraph of Article 1 provides for the Chapter IV of the CFR, Article 2 of the Protocol stipulates for those provisions of the Charter that refer to national laws and practices that they will be applied to contracting parties “to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”. Referral to national laws and practices in the Charter can be found in its Preamble, when saying that “the Union contributes to the preservation and to the development of these common values while respecting the diversity of cultures and traditions of the people of Europe as well as the national identities of the Member States...”. More particularly, some Articles in the Charter explicitly provide that rights and principles they refer to shall be guaranteed in accordance with the national laws governing exercise of those rights (right to marry and right to found a family (Article 9), right to conscientious objection (Article 10(2)), right to education (Article 14(3)), health care (Article 35)¹⁵). There are also some provisions that refer both, to Community law and national laws.¹⁶ The CFR refers to national laws and practices once more in its general provisions. As the amended Paragraph 6 to Article 52 (comparing to its version from the year 2000) provides, “full account shall be taken of national laws and practices as specified in this Charter“.

From Article 2 of the Protocol that refers to such provisions we can draw two conclusions: first, for the application of those provisions it is necessary that they are confirmed in Polish law or practices and, second, that the application is possible only within the scope of protection as defined by Polish law and practices (this concerns also the Chapter IV of the CFR, since Article 1(2) of the Protocol provides similar limitations). It may seem that intention of the Protocol was to clarify that the Charter does not recognise any new rights, and, that in cases of referral to national laws scope of protection provided by Member State is to be strictly respected. Practical implication of such limitation is that, concerning the citizens

¹⁵ Article 35 specifies that exercise of that right will be guaranteed „under the conditions established by national laws and practices“.

¹⁶ See for example Article 16 (freedom to contact a business), Article 27 (workers' right to information and consultation within the undertaking), Article 28 (right of collective bargaining and action), Article 30 (protection in the event of unjustified dismissal), Article 34 (social security and social assistance) and Article 36 (access to services of general economic interest).

of contracting parties who seek for the protection of their rights that are allegedly violated in some situation connected to the EU law, they will have to prove that the invoked (Charter's) right exists in their national law and get the protection within the provided (national) framework.

However, all the above mentioned consequences have little significance when we take into consideration the differences between the Polish and CFR system of protection. We should bear in mind that, on the one hand, the CFR reaffirms the rights which can be found in different international treaties and constitutions of the Member States and that, on the other hand, the Republic of Poland is a party of many international treaties concerning human rights protection (and, unlike the United Kingdom, accepts monistic approach towards international law). Indeed, comparisons of the Polish legal system (especially constitutional provisions and of the international treaties which it is a party to) with the one introduced with the CFR shows little differences.¹⁷

Described application of the "national framework" takes into account only the situation where the CFR is invoked, in order to emphasise that even in such case imposed limitations will not have significant consequences in practice. The application of the Union's standards outside the Charter (which seems to be even more important from the point of view of the Protocol's significance in practice) will be described later in this work.

¹⁷ Roman Wieruszewski compared those systems by adopting standards stemming from the European Convention on Human Rights, other treaties adopted within the Council of Europe, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as the most representative ones. Comparing those international standards and the Polish Constitution with the CFR he found that there are mostly in compliance. Few exemptions concern, for example, the definition of a „family life“ (important for the right for private and family life and the right to marry and right to found a family), which standard is much narrower when the Polish Constitution is considered. For that and other examples see: Wieruszewski, R., *Provisions of the Charter of Fundamental Rights in the light of the 1997 Constitution of RP and international agreements which are binding upon Poland* in: *Fundamental rights protection in the EU*, Jan Barcz (et al). Warszawa; Wydawnictwo C.H. Beck, 2009, p. 114-144.

3. REASONS FOR SIGNING THE PROTOCOL – Are they justified?

3.1. MORALITY ISSUES

The Declaration No.61 on the CFR indicates the real reasons that motivated Poland to join the Protocol:

“The Charter does not affect in any way the right of the Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.”¹⁸

In other words, they feared that, through the CFR, the EU will impose on them standards that are contrary to what is represented as Polish attitudes toward the questions as abortion, euthanasia and, which seems to be the most invoked one, same-sex marriages. Such fears were expressed more times by “conservative” politicians¹⁹ and the representatives of the Catholic Church²⁰ that has big influence on social and political life of the Poland.

Since the most attention was given to the same-sex marriages, further analysis will focus on the comparison of current situation in Poland with EU law (and international law standards) in that field, as well as on the question whether the fears of imposing wider standards on Poland are justifiable.

3.1.1. THE QUESTION OF HOMOPHOBIA IN POLAND

Maybe the best indicator on the question of homophobia in Poland are the research made by the European Union Agency for Fundamental Rights (FRA)²¹ : “Homophobia and

¹⁸ OJ C 83/358. Polish reasons for joining the Protocol will be discussed later in this text.

¹⁹ K. Szymański (the Member of the European Parliament) sees as the main aim of the Protocol the avoidance of widening of the EU competences by means of the ECJ case-law, stating, for example: „No one can assure us today that...principle of non-discrimination...and lack of a clear definition of marriage in the Charter will not result in the future in a postulate of at least particular acknowledgment of chosen consequences of such relationships in a growing number of Member States.“ or that „ No one is capable of guaranteeing that the principle of human dignity...will not lead to pressures to acknowledge the right to euthanasia.“. For that and other political statements see:

Wyrozumska, A., pages 102-103.

²⁰ Beside the lack of reference to God in the Preamble, as main arguments against the Charter they also invoke issues connected to right to life and non-discrimination on grounds of sexual orientation.

Wyrzykowski, M., page 33.

²¹ The FRA was established by Council Regulation No 168/2007 as the successor of the European Monitoring Centre on Racism and Xenophobia (EUMC). According to Articles 3 and 4 of that Regulation, the FRA tasks are focused on collecting and analysing data on fundamental rights protection and giving advice for its improvement, all within the scope of the EU law. The Multi-annual Framework for 2007-2012 prescribes as one of the thematic areas of its work also the discrimination based on sex and sexual orientation (Article 2(b)). OJ L 53/1; OJ L 63/14.

Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis”²² and a Resolution of the European Parliament on homophobia²³.

The FRA’s Report includes examples of discrimination on ground of sexual orientation in employment, acts of violence and hate speech, bans of demonstration (see, for example, the judgment before the European Court of Human Rights *Bączkowski and others v Poland* from 2007).²⁴ In the European Parliament’s Resolution, they call on Polish authorities to refrain from proposing or adopting legislation that would be inconsistent with the EU policy on LGBT’s²⁵ rights protection (§ 10); moreover, to condemn and take measures against declarations by public leaders inciting discrimination and hatred based on sexual orientation (§ 11); and finally, it is suggested that a delegation is sent which would give a clear picture of the situation in Poland and start dialogue among concerned parties (§ 13).

As far as “marriage” is concerned, it is clear from Polish law that it refers only to opposite-sex couples when defining it: “Marriage, being a union of a man and a woman...” (Article 18 of the Constitution of the Republic of Poland of 1997).²⁶ Other institutions as registered partnership, for example, are not recognised by Polish law. But not only that it is not allowed for same-sex couples to get married in Poland, but the examples from practice show that they are also being unabled (or at least they meet big difficulties) when trying to enter the marriage or registered partnership in countries whose laws allow them to. That it is not the random case shows the finding that instruction not to provide same-sex couples certificates that confirm their unmarried status (which they are usually asked to present abroad) was sent to local governments by the Ministry of Internal Affairs and Administration, with explanation that Polish law recognises only heterosexual marriages.²⁷

²² http://www.fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_Part%201_en.pdf.

²³ European Parliament resolution of 26 April 2007 on homophobia in Europe.

P6_TA(2007)0167.

²⁴ Similar report on social situation provides the information that between 2000 and 2007 the Ombudsman received 26 complaints concerning discrimination against LGBT persons (ten cases qualified for further investigation). These cases raised issues of discrimination in organising public assemblies, discrimination in employment, a lack of respect for the human dignity of LGBT persons in public debates, discrimination in the course of law enforcement activities undertaken by the police as well as discrimination regarding voluntary blood donation. For more information see:

http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-part2-NR_BE.pdf

²⁵ Lesbians, Gays, Bisexuals and Transsexuals.

²⁶ English version of the Constitution on:

<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

²⁷ More about this case:

Rzepliński, A., *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation in Poland*, FRALEX, 2008, pages 19-20.

3.1.2. IMPOSING NEW STANDARDS IN EU LAW?

When speaking about imposing new standards on Poland concerning same-sex marriages, or even euthanasia and abortion, we have to ask ourselves does the EU has such competences and what does the current EU law say about it?

Firstly, it has to be repeated and pointed out that the EU does not refer to questions that are not subject matter of the Community (e.g. euthanasia and abortion). The well-known case *SPUC v. Grogan*²⁸ can be given as an example of the avoidance of the ECJ to rule on such questions of high moral issues. Secondly, even when Community matters interfere with the subjects where Member States have prerogatives, national laws and practices are being respected. In the area of the family law we have examples of such reference to national standards in the so-called Free Movement Directive²⁹ and Family Reunification Directive³⁰. When defining “family members” for the purposes of its application, the first Directive refers both, to spouses and to partners with whom the Union citizens have contracted a registered partnership, but latter only if the legislation of the host Member State treats registered partnerships as equivalent to marriage and only in accordance with condition laid down by that Member State (Article 2(b)). Family Reunification Directive, on the other hand, refers only to spouses, but provides in Article 4(3) that Member States may, with respect to family reunification, decide that registered partnerships are to be treated equally as spouses.³¹ Thirdly, even for the new competences that the Treaty of Lisbon introduced the Member States consent is included in the procedure of adopting new regulations.³²

²⁸ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (1991) ECR I-04685.

²⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. OJ L 158.

³⁰ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. OJ L 251.

³¹ In the FRA Report it is discussed whether such solution violates the right to private life and the principle of non-discrimination, since it's not allowed for a durable relationship to continue by joining partners and same-sex couples are deprived of rights that are granted to opposite-sex couples in marriage when a certain Member State does not recognise same-sex marriages. Pages 106-107.

³² Speaking of possible new regulations in the field of family law in the EU, the Article 81 TFEU (ex 65 TEC) on judicial co-operation in civil matters should be mentioned. In paragraph 3 it is stated: “...The Council, on a proposal from the Commission, may adopt a decision determining *those aspects of family law with cross-border implications* which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal...shall be notified to the national Parliaments. *If a national Parliament makes known its opposition within six months* of the date of such notification, *the decision shall not be adopted*. In the absence of opposition, the Council may adopt the decision.”.

As far as the CFR is concerned, it is true that it does not provide a definition of a marriage, but when granting the right to marry and right to found a family in Article 9 it says that they “shall be guaranteed in accordance with the national laws governing the exercise of these rights”. Asking for a definition of the marriage or, more particularly, the definition which would include only opposite-sex marriages in the Charter, does not seem realistic when we take into consideration that there are 27 Member States of the EU that differently regulate that question and that some of them recognise same-sex marriages in their legislation (e.g. Spain, Belgium, Norway).

On the other hand, recent case-law of the ECJ, especially *Maruko* case³³, gave a lot of concern that the ECJ’s activism will widen the EU competences in that field. Mr. Maruko entered a life partnership and after a death of his same-sex partner, he applied for a widower’s pension. He was rejected on ground that the regulation did not provide for such an entitlement for surviving life partners, but only spouses. The ECJ found that the Directive 2000/78 in issue precludes such legislation, where the surviving partner does not receive a survivor’s benefit that is granted to a surviving spouse, although, national law places the same-sex couples in a situation comparable to that of spouses (§ 73). This finding would not be unusual for itself, because it is a confirmation that the EU respects the national regulations when same-sex partnerships or similar institutions are in question. The reason why the *Maruko* case became so well-known is finding of the ECJ that “*civil status* and the benefits flowing there from are matters which *fall within the competence of the Member States* and Community law does not detract from that competence. *However*, it must be recalled that in the exercise of that competence the Member States *must comply with Community law and, in particular*, with the provisions relating to *the principle of non-discrimination*.” (§ 59) (italics added). This part of the judgment, that asks the Member States to comply with EU law even in the matters that are not within the EU competences, may be interpreted as allowing the possibility of the ECJ to find such inconsistencies and, thus, widening the competence of the EU. However, this should not be interpreted as an imposition of standards on the Member States, so that they would need to recognise the same-sex marriages.

The proposal given in the FRA’s Legal Analysis, based on the international law standards, goes in direction of excluding completely differences in treatment between same-sex and opposite-sex couples. The idea is that Member States should, if not same-sex marriages, recognise some institution similar to it as registered partnership or de facto durable

³³ Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (2008) ECR I-01757.

relationship that leads to extending them the same advantages. This proposal is based on claiming that when there is a certain “package of rights or advantages” provided for married people, the discrimination based on sexual orientation necessarily shows, since the ratio of deliberate choice justifies the difference in treatment between married and unmarried couples, but cannot justify such treatment when same-sex couples are not allowed to get marry in certain State.³⁴ Speaking of new tendencies within the EU law, the proposal for changes in anti-discrimination law should be mentioned, especially as it concerns discrimination on ground of sexual orientation as well.

3.1.2.1. NEW TENDENCIES IN ANTI-DISCRIMINATION LAW OF THE EU

On the basis of Article 19 TFEU (ex Article 13 TEC)³⁵, which proscribes basis for the competences of the EU in combating discrimination, in 2000 two Directives have been enacted – Employment Equality Directive³⁶ and Racial Equality Directive (so-called RED)³⁷. Among the grounds for combating discrimination in matters related to work and employment, the first Directive includes also the sexual orientation. The RED (only the grounds of racial or ethnic origin), on the other hand, has much broader scope of application, beside work and employment.³⁸ Implementation of the Employment Equality Directive showed that some Member States extended its scope of application to all (9 Member States) or some fields to

³⁴ Pages 55-58.

³⁵ Paragraph 1 : „Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.“

³⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

OJ L 303.

³⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

OJ L 180.

³⁸ Article 3(1): „Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (g) education;
- (h) access to and supply of goods and services which are available to the public, including housing.“

which the RED applies (10 Member States³⁹), for example, social protection, education or access to and supply of goods and services. Since some Member States are showing tendency to join the first group in widening the scope of the Employment Equality Directive and since it seems unjustifiable to support current “hierarchy of grounds”⁴⁰ there is an initiative within the EU to adopt so-called “Horizontal Directive” which would prohibit discrimination on grounds of religion and belief, sexual orientation, age and disability outside of the employment sphere (in other words, to the RED’s scope of application).⁴¹

3.1.3. THE ECHR STANDARDS

While there are fears on one side (within EU law on fundamental rights) that new standards will be imposed on Poland through the CFR, there is a reality happening on the other, within the ECHR system (binding upon Poland) concerning the same issue.

First and the best example is a recent case *Kozak v. Poland*⁴² (March 2010) that issues with the discrimination on ground of sexual orientation. According to the facts of the case, the applicant had lived in a homosexual relationship in a flat rented by his partner, with sharing expenses. He was registered as a permanent resident of the flat. After the death of his partner, the applicant wanted to conclude a lease agreement in his name, but was denied consequently and ordered to vacate the flat. Since the Polish law asked for person seeking succession to a tenancy to living with the tenant in the same household in a close relationship, such as de facto marital cohabitation, Polish courts rejected the applicant’s claim on ground that under Polish law only a different-sex relationship is qualified for “de facto marital cohabitation”. The European Court of Human Rights (hereinafter: ECtHR) first stated that in principle, the protection of the family in traditional sense (“union of a man and a woman”) is a legitimate reason which might justify differences in treatment (§ 98). Before its ruling the ECtHR took into consideration that in pursuance of that aim there is a variety of measures that might be implemented by the State and that the Convention is to be interpreted in the light of “developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading

³⁹ It is interesting to notice there was a proposal in Poland on broadening the scope of Directive to almost all fields the RED covers, except the access to good and services. More about it in FRA Report, page 25-35.

⁴⁰ This term is used to show that grounds of racial or ethnic origin enjoy higher protection than others from the Article 19 TFEU, as sexual orientation, do. The practical consequence is that, for example, same-sex couple that is denied of the room in a hotel on that ground cannot get protection from Directives, while Roma couple can, because the RED covers the „access to and supply of goods and services“.

⁴¹ Commission Legislative and Work Programme 2008. COM (2007) 640, pages 25-26.

⁴² Case *Kozak v Poland*, 2 March 2010, Application no. 13102/02.

and living one's family or private life.“, what States must also take into account when choosing means to protect their legitimate interest (§ 98(3)). The ECtHR concluded that, in line with the finding that States have narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation, a measure adopted in this case (exclusion of homosexual partners from succession to a tenancy) is not necessary and, thus, contrary to Article 14 (non-discrimination) with Article 8 (right to private and family life) of the Convention (§ 99).

It should be noted that right to marry is defined in Article 12 of the ECHR, which grants that right to “men and women of marriageable age...according to the national laws governing the exercise of this right“⁴³. Not only Article 12, but also Article 8 (right to family life) was construed as excluding the same-sex relationships.⁴⁴ Even in *Kozak* case (which is in continuation with previous rulings of the ECtHR; e.g. *Karner v. Austria*⁴⁵) the ECtHR did not give a clean answer on whether the same-sex couples are entitled to protection under “family life”, but relied instead on other aspects of Article 8 (“private life” and “home”). However, more recent case-law (particularly, case *Schalk and Kopf v. Austria*⁴⁶ from June 2010) shows that changes in society are being taken into consideration, on which basis the ECtHR explicitly stated that right to family life includes same-sex relationships („cohabiting same-sex couple living in a stable *de facto* partnership“⁴⁷); but still leaving to the States' discretion the decision on the scope of the right to marry⁴⁸. Described cases are an example of new standards being

⁴³ Text of the ECHR in English at:

http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf.

⁴⁴ See, for example the case *S. V. the United Kingdom*, where the European Commission of Human Rights declared the application inadmissible and stated, among others, that “it has already found that, despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by Article 8 (Art. 8) of the Convention“.

Case *S. v. the United Kingdom*, Commission decision of 14 May 1986, Application No. 11716/85, § 2.

⁴⁵ Case *Karner v. Austria*, 24 July 2003, Application no. 40016/98, § 40-43.

⁴⁶ Case *Schalk and Kopf v. Austria*, 24 June 2010, Application no. 30141/04.

⁴⁷ In § 93 the ECtHR found that „a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples...Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of “family”“. It continued in § 94 that „**In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life”** for the purposes of Article 8. Consequently the relationship of the applicants, **a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”**, just as the relationship of a different-sex couple in the same situation would.“.

See also the case of *P.B. and J.S. v. Austria*, where the ECtHR stated the same in § 30 (although , in line with changes in legislation in question, it did not find the violation of Article 14 and Article 8).

Case *P.B. and J.S. v. Austria*, 22 July 2010, Application no. 18984/02.

⁴⁸ It is interesting to notice that in the case *Schalk and Kopf v. Austria*, concerning the alleged violation of the Article 12, the ECtHR took into consideration the right to marry as defined by the CFR and held that it would no longer consider that Article 12 must in all circumstances be limited to marriage between opposite-sex couples. It is added, however, that „marriage has deep-rooted social and cultural connotations which may differ largely

developed on the basis of other Articles, other rights, than the right to marry, what is important for clarifying the distinction between the right of the States not to recognise same-sex marriages and their obligation to eliminate unjustified discrimination and not to violate other rights of individuals. That distinction is even more important within the EU legal system, where the Member States' competences and the discretion they enjoy in certain fields has to be taken into account, but in respect of the necessity to secure the full effectiveness of EU law. That the case-law develops in that direction shows the given example of *Maruko* case.

Second example, case *Tysic v. Poland*⁴⁹, concerns the abortion and will be presented to show that, comparing to the EU system, ECHR system has broader scope of application in such fields. According to the facts of the case, the applicant was a pregnant woman for whom numerous doctors concluded that she was facing serious health risk (blindness) if continuing pregnancy, but she was refused to issue a certificate which would allow her to terminate her pregnancy. After the delivery, her eyesight was badly damaged. Although Polish law legitimises abortion in certain cases (when pregnancy endangers mother's life or health, the one of the foetus or it is a result of criminal act) the ECtHR found that the current law makes the abortion provisions ineffective (criminalisation that doctors are facing; inappropriate retrospective measures as civil law tort or criminal proceedings; the absence of preventive procedure, with taking into account time factor, the need to consider patient's views)⁵⁰. On those findings the ECtHR concluded that the Article 8 (right to private life) was violated, because the State failed in its obligation to adopt effective measures (§ 128 and 130). When we take into consideration these two examples of developing standards within the ECHR system that is binding upon Poland, intentions to avoid imposing new standards within the EU by excluding or limiting the application of the CFR seems even more unreasonable.

3.2. SOCIAL INTEREST OF THE STATE

Some politicians and Polish Ombudsman claimed that Protocol protects Polish social interests, since otherwise employment standards would become higher.⁵¹ It is well known that

from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society" (p. 62.).

Case *Schalk and Kopf v. Austria*, 24 June 2010, Application no. 30141/04.

⁴⁹ Case *Tysic v. Poland*, 20 March 2007, Application no. 5410/03.

⁵⁰ § 116-125.

⁵¹ From his interview for the Polish newspapers and his writing to the Prime Minister, some other allegations concerning the CFR were also found: insecurity that results from number of general clauses and principles;

low employment costs in Poland are comparative advantage of that country comparing to other Member States. What is claimed is that social and labour rights and freedoms as proscribed in the CFR could jeopardize Polish position in common market. As an answer to that allegation we should take into consideration two things: first, what is already mentioned about contradictory contents of Declaration No. 62 and the Protocol about the Chapter IV⁵² and, second, that there is developed case-law of the ECJ in the field of social and labour rights which standards the Protocol does not exclude. But before the analysis of the standards that the case-law developed, something will be said about the provisions of the Treaties and the CFR in that field.

3.2.1. EU SOCIAL POLICY

Regarding the social policy of the EU, Article 151 TFEU (ex 136 TEC) defines its objectives, which are, among others, improved living and working conditions and proper social protection. It is also stated that in pursuance of those objectives the Union and the Member States will bear in mind fundamental social rights as those recognised in the European Social Charter (1961) and the Community Charter of the Fundamental Social Rights of Workers (1989). Article 153 TFEU (ex 137 TEC) encompasses different fields in which the Union has the competence to support and complement the actions of the Member States.⁵³ Although the “representation and collective defence of workers and employers interests” is one of those field, Paragraph 5 of the same Article says that the provision there provided will not apply “to pay, the right to association, the right to strike or the right to

finding that the CFR is premature, unclear and ambiguous; that disturbs the balance between the powers by granting too many rights to judges, etc.

Wyrzykowski, M., pages 31-33.

⁵² Footnote 14.

⁵³ Article 153 (1): „With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers' health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).“

impose lock-outs”. Such exclusion seems interesting from the point of view of the CFR, which recognises in its Article 28 right to collective bargaining and action:

„Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, *including strike action*.“.

Again, even though the Treaties and the CFR provide on various places safeguards for respecting the competences of the EU and those of the Member States, by including strike action in the scope of the given right, this Article might be interpreted as to allow for the widening of the EU competences through the ECJ’s case-law. The further question is what the case-law says on that matter?

3.2.2. CASE-LAW

Starting with cases *Omega*⁵⁴ and *Schmidberger*⁵⁵, when certain fundamental right is confronted to one of the market freedoms of the EU, the ECJ “strikes the balance” between them. In mentioned cases, the ECJ left to national courts to apply such normative balancing to the cases before them. However, recent case-law shows that the ECJ took more active role in determining the proper balance between the right to collective action (including strike) and the market freedoms.

Viking case⁵⁶ (see also case *Laval*⁵⁷) is an example where the right to collective action was to be balanced with the freedom of establishment and freedom to provide services. The dispute arose when shipping company Viking decided to reflag one of its ships “Rosella” to an Estonian flag, in order to acquire cheaper labour and the Finnish Seamen’s Union insisted on applying Finnish collective agreement on those workers. Disagreement with the Viking company led to collective action and calling international trade unions to support it. The ECJ

⁵⁴ The case concerns the prohibition of the operation of games that involve „killing“ human targets, thus, the „human dignity“ was confronted to the freedom to provide services.

Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH Oberbürgermeisterin der Bundesstadt Bonn* (2004) ECR I-09609.

⁵⁵ *Schmidberger* case concerns the confrontation of the freedom of expression and freedom of movement of goods, what was the result of granting permission for the motorway in Austria to be closed in order to allow environmental demonstrations.

Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (2003) ECR I-05659.

⁵⁶ Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti* (2007) ECR I-10779.

⁵⁷ Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and others* (2007) ECR I-11767.

ruling starts with finding that such action (with aim to protect the jobs and conditions of employment) could be considered to fall within the objective of protecting workers, which the EU social policy encompasses. However, the ECJ continued, that would not be the case in a situation where “the jobs or conditions of employment at issue were not jeopardised or under serious threat.” (§ 81). Although the ECJ proceeded that it is for national courts to decide whether such requirements are met in the present case and whether the taken measure of collective action does not go beyond what is necessary in achieving the legitimate aim⁵⁸, the guideline provided in Paragraph 81 shows more active and decisive role of the ECJ in „striking the balance“, especially when we take into consideration that standards as „jeopardised“ or „serious threat“ are hard to be achieved and proved in practice. Irrespective of discussion what impact such development of the ECJ’s case-law may (or may not) have on Polish “fears” that their comparative advantage might be lost, the fact is that outside the CFR there is defined social policy of the EU in the Treaties, invoked in case-law and balanced with other Union's policies; and standards developed therein are binding upon Poland no matter the consequences the Protocol may have.

3.3. PROPERTY CLAIMS CONNECTED TO THE SECOND WORLD WAR

As a result of the Second World War German citizens were deprived of their properties which became part of Polish territory. That was a basis for some political statements that the CFR may enable those German citizens to succeed with their claims against Polish citizens that now live on those lands.⁵⁹ This “reason” seems to lack a legal reasoning for many causes. First of all, including the right to property in the CFR⁶⁰ does not mean that this is a proper ground for such property claims concerning questions of expropriation and compensation. We must always bear in mind special features of the EU system of fundamental rights protection, whose scope of application is linked to the matters that EU law regulates. What seem even more insignificant are proposals that have been given in order to exclude the possibility of such property claims by including in the CFR a “temporal clause”, which would stipulate that

⁵⁸ § 84.

⁵⁹ See, for example, what Polish Minister of Foreign Affairs A. Fotyga or the government official responsible for the Polish-German relations M. Muszyński said in:

Wyrozumka, A., page 110, footnotes 2-4.

⁶⁰ Article 17(1) states as follow: „Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.“.

the CFR is not to be applicable for the period before its entering into force.⁶¹ Insignificant, not just because such claims are not possible within the EU system, but also because the rule of international law is that treaties do not have a retroactive effect (Article 28 of the Vienna Convention on the Law of the Treaties)⁶².

⁶¹ See for example what Z. Galicki said in his Legal Opinion on the exempting Protocol and temporal caesura concerning the CFR in:

Wyrozumska, A., page 110, footnote 4.

⁶² Article 28: „Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.“. Full text of the Convention at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

4. OTHER OBJECTIONS TO THE CFR⁶³

If we conclude that the reasons for signing the Protocol and taking somewhat restrictive approach toward the application of the CFR are based on the extensive or even over-interpretation of the Charter, the question that logically follows is – how should the CFR be interpreted? Although a lot has been said about limitations on the application of the Charter, from the point of view of “fears” that had led to the signing of the Protocol more has to be said about the scope and interpretation of rights and principles that the CFR encompasses.

4.1. AMBIGUITY OF THE CFR – RIGHTS AND PRINCIPLES

Unclear distinction between rights and principles in the Charter seems to be one of the most important issues connected to the application of the Charter. That it is so, confirms the Paragraph 5 of Article 52 (titled “Scope and interpretation of rights and principles”), that was amended to the Article’s version from the year 2000. That Paragraph seems to provide guidelines for the interpretation of the mentioned distinction:

“The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.“.

From this Paragraph follows that principles cannot be generally invoked in front of courts. Addressees of those principles are primarily EU’s institutions and Member States when exercising legislative or executive powers within the EU competences. Only on the basis of the acts that result from those actions of the EU and Member States can the principles be invoked in front of the ECJ or national courts – either in the case of their interpretation or when their legality is in question.

Although it may seem that provided interpretation solves the problem of distinction between rights and principles, situation becomes less clear when we take a look at the content of the CFR, which does not give clear distinction between them. Indeed, terms used in the Charter – “must be respected and protected”, “the Union shall respect”, “shall be guaranteed”,

⁶³ The aim of this chapter is to analyse some of the allegations to the Charter that may have been found in public discussions (see, for example, footnote 47), that seem important for discussion whether the “fear” of widening EU competences on the basis of the CFR (which fear is the base of all the reasons that explain joining the Protocol) is, in general, a result of over-interpretation of the Charter.

“shall enjoy protection”, “Union policies shall ensure”, etc. – ask for legal interpretation which will define their character. It may be useful to mention the distinction and interpretation that dr. Adam Bodnar suggests.⁶⁴ He believes that principles - rights and freedoms division is not enough and that from perspective of their normative character we can divide the Charter’s provisions in five groups: 1. rights and freedoms which may be directly invoked in front of courts, 2. rights and freedoms whose normative content depends upon national or Union law, 3. principles (autonomous and non-autonomous)⁶⁵, 4. aspirational and programmatic provisions⁶⁶, 5. rights connected with the EU citizenship.

If we try to place the rights and principles at which this work was mostly focused within this distinction, we can see that right to marry and right to found a family belong to the second group, because of their reference to national laws and practices. As far as social rights are concerned, we may conclude that they mostly belong to the third group (e.g. social security and social assistance, Article 34), but the right of collective bargaining and action, to which most attention was paid, belongs to the rights, not principles (although, to the second group, because it refers to Union law and national laws and practices).

4.2. REFERRING TO RIGHTS AS TO WHICH THE EU DOES NOT HAVE COMPETENCES

Another basis for extensive interpretation of the CFR are those rights and freedoms (e.g. freedom of thought, conscience and religion, Article 10) which concern areas where the EU has no competences. But before we draw any conclusions as to whether that may lead to widening of the competences of the EU, we must seek for the real aim of inclusion of such rights in the Charter.

Maybe the best example is the one Lord Goldsmith gave with slaughterhouses. According to his point of view, if the EU would want to adopt a law concerning slaughterhouses (what is in accordance with its competence in agricultural matters), the freedom of thought, conscience

⁶⁴ Bodnar, A., *The Charter of Fundamental Rights: Differentiated Legal Character of Charter's Provisions, Their Consequences for Individuals, Courts and the Legislator* in: *Fundamental rights protection in the EU*, Jan Barcz (et al). Warszawa, 2009, pages 145 -167.

⁶⁵ According to Bodnar, autonomous principles („the EU recognises and respects“) are those for which the Charter strictly determines the way they should be executed. Non-autonomous principles („established in Union law and national law and practices“), on the other hand, are more opened ones, leaving more space for their fulfilment with normative content. Pages 157-158.

⁶⁶ For example, Article 37 (Environmental protection): „A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.“

and religion would play its role in a way that the problem of rituals performed in different religions should be taken into consideration in such case.⁶⁷ This example shows that “fears” of the wider competences of the EU to which the CFR serves as a good basis are often result of the over-interpretation of the Charter, that does not take account about the broader, legal context of the EU actions which may justify providing in the Charter even such provisions, that at first sight have nothing in common with the EU. This is even more important in the context of entering into force of the Treaty of Lisbon that widens Union’s competences in many areas.⁶⁸

4.3. COLLISION WITH OTHER SYSTEMS? – relation to the ECHR

Since many of rights in the Charter are also recognised in the ECHR, and taking into consideration that the ECJ relies in its case-law on the ECHR and developed case-law of the ECtHR, it seems important to define that relation, in order to exclude misunderstandings that the multi-level system of fundamental (or human) rights may invoke.

Paragraph 3, Article 52, defines that relation as follows:

„In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.“

We can conclude that the CFR system guarantees as minimum level of protection the level reached within the ECHR system, but it also gives basis for enhanced protection of those rights. This “minimum level of protection” is a consequence of the ECtHR’s rulings on the question whether and under which conditions the ECtHR can review EC law.⁶⁹ *Bosphorus*

⁶⁷ Bodnar, A., page 150.

⁶⁸ Prof. Ingolf Pernice draws a comparison of the process in the EU with the development of fundamental rights in general; stating that visibility of those rights and the legally binding character of the CFR are conditions for accepting new competences at the Union level. In the framework of the changes in the EU pillar system which reduce direct control and legitimisation of such policies by national governments, the CFR plays the same role the Magna Carta Libertatum (1215.), Virginia Bill of Rights(1776.) and similar documents did - a moderation of political power and constituting governing power as a trustee of the citizens.

Pernice, I., *The Treaty of Lisbon and Fundamental Rights* in: *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, Griller, S., Ziller, J. (eds.); Springer, New York, Wien, 2008., pages 236-238.

Those wordings are in line with the preamble of the CFR when it says that the EU „places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.“

⁶⁹ According to current situation (which will be changed if and when the EU accesses to the ECHR), the ECtHR reviews EC law indirectly – Member States are held responsible for all acts or omissions of their organs, regardless of whether such act or omission is a consequence of domestic law or international obligations they are obliged to comply with (including cases of transferred sovereign power to an international/supranational

case⁷⁰ is important because it introduced a “test of equivalence” of human rights protection at Community level to the one provided by the ECHR. The ECtHR stated that it is presumed that State has not departed from the ECHR requirements when implementing legal obligations that derive from the membership in the organisation at issue, if the protection of fundamental rights (as regards both the substantive guarantees offered and the mechanisms controlling their observance) is at least equivalent to that for which the ECHR provides (§ 155). That presumption can be rebutted in the circumstances of the particular case if “it is considered that the protection of Convention rights was manifestly deficient“ (§ 156). However, the standard of „manifest deficiency“ seems to be difficult to achieve in practice.⁷¹ Bosphorus case can be compared to Solange II judgment of German Federal Constitutional Tribunal (1986.) which defined in a similar manner the relation between Union's and national system of fundamental rights protection (as long as standards of protection at the EU level are adequate to German ones). Within the multi-level system of fundamental rights protection it is very important for those relations to be defined in a way that enables their co-existence and further developments. Moreover, it is necessary for safeguarding of the supremacy of EU law over national laws to provide at least the level of protection as national laws (constitutions) or ECHR (on basis of which national laws are reviewed) do. Wordings of the CFR should be read with taking into consideration the given context and it should not be concluded that standards of protection have to be the same⁷² (even when the ECJ relies on national constitutions or the ECHR).

Emphasising the possibility of more extensive protection at Union's level is particularly important in fields as anti-discrimination law, where the EU has more competences and, thus,

organisation). See, for example, cases: *M. & Co. v. Germany*, 9 February 1990, Application No. 13258/87; *Cantoni v. France*, 22 October 1996, Application No. 17862/91; *Matthews v. the United Kingdom.*, 18 February 1999, Application No. 24833/94.

⁷⁰ In Bosphorus case, the right to property of the Turkish airline charter company (Bosphorus) was allegedly violated by Irish authorities (the aircraft was brought to Ireland for maintenance work) which acted on the basis of EC Regulation. The question that arose was whether interference with company's property rights can be justified (and to what extent) by necessity to comply with Community's obligations.

Case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, Application No. 45036/98.

⁷¹ See, for example:

Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. Netherlands, 20 January 2009, Application no. 13645/05.

⁷² In *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. Netherlands*, the ECtHR examined preliminary ruling procedure before the ECJ, on basis of the alleged violation of Article 6 of the Convention (right to fair trial), since the applicant considered that the right was violated as a result of the ECJ's refusal to allow it to respond to Advocate General's Opinion. The ECtHR stated that „test of equivalence“ applies also to procedures within international organisations that follow States' action, but that such protection needs not to be identical to that provided by Article 6 of the Convention. Page 20 at:

http://www.rtdh.eu/pdf/20090120-coöperatieve_producentenorganisatie_kokkel_c_netherlands.pdf

more possibilities to widen protection on the basis of non-discrimination principle.⁷³ Within the ECHR system, on the other hand, non-discrimination principle can be invoked only in connection with the alleged violation of some other right or freedom that the ECHR recognises.⁷⁴

When defining relation between the CFR and the ECHR system, Explanations to the CFR should be taken into account.⁷⁵ Although we are not speaking of the source of law, Explanations are useful interpretative instrument. Paragraph 7 of Article 52 says that courts shall give due regard to guidelines in the interpretation of the CFR that the Explanations provide. The Explanations set out Articles that have the same scope and the meaning as the corresponding Articles of the ECHR⁷⁶ and those Articles where the meaning is the same but the scope is wider than in the ECHR⁷⁷. As far as the right to marriage is concerned, more

⁷³ See the chapter 4.1.2.1.

⁷⁴ Article 14: „The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.“.

⁷⁵ Text of the Explanations at:

http://www.europarl.europa.eu/charter/pdf/04473_en.pdf.

⁷⁶ Those are:

- Article 2 corresponds to Article 2 of the ECHR
- Article 4 corresponds to Article 3 of the ECHR
- Article 5(1) and (2) correspond to Article 4 of the ECHR
- Article 6 corresponds to Article 5 of the ECHR
- Article 7 corresponds to Article 8 of the ECHR
- Article 10(1) corresponds to Article 9 of the ECHR
- Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Community law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR
- Article 17 corresponds to Article 1 of the Protocol to the ECHR
- Article 19(1) corresponds to Article 4 of Protocol No 4
- Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights
- Article 48 corresponds to Article 6(2) and(3) of the ECHR
- Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.

⁷⁷ Those are:

- **Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation**
- Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level
- Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training
- Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of Parents
- Article 47(2) and (3) correspond to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation
- Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States.
- Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Community law, because of the prohibition of any discrimination on grounds of

extensive protection with the CFR system is logical consequences of the fact Member States differently solve that question and that some of them recognise same-sex marriages.

However, it is emphasized that those lists reflect the current stage and do not preclude possible changes and development in the law, legislation and the Treaties. This is important for realising that relation between the EU and ECHR system of fundamental rights protection is not a static one and needs to be (re)considered from the point of view of changes in society and developments in legal protection. In other words, when the ECJ “draws inspiration” from the ECHR, we should not expect “copy-pasted” case-law of the ECtHR. Although the harmonised protection within multi-level system is favourable, it definitely should not be an obstacle for more enhanced protection of fundamental rights, especially when we take into consideration differences in systems. As it was mentioned, in some areas EU has more competences (e.g. anti-discrimination law) and in some areas the ECtHR is more competent to rule (e.g. *Tysiqc* case). Speaking of differences in systems, it is enough to take into consideration “common values” of 27 Member States of the EU and the level of protection that ECHR system (47 countries!) provides. Multi-level protection of fundamental rights is a reality and it is wrong to conclude that because of their differences or the areas where they over-lap they collide. We must bear in mind that over-lapping is not a disadvantage by itself. Quite contrary, it may strengthen protection of fundamental rights if due regard is paid to changes and developments that occur in certain areas.

nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.

5. CONSEQUENCES ON THE FUNDAMENTAL RIGHTS PROTECTION (conclusion before the conclusion)

Given analysis showed that the Protocol considered as an interpretative instrument will not play significant role for the protection of rights of individuals in practice because of the fact that Poland is already bounded upon the same (or similar) standards outside the CFR system. But no matter what are the limitations imposed by the Protocol or what will their impacts be in practice when the CFR is invoked, we can claim that the same protection of fundamental rights within the EU can be achieved on the basis of general principles of the EU law, which are binding upon Poland. Since it will be shown on that basis that the Protocol is insignificant from the point of view of its final consequences in practice, the following chapters will also try to give an insight in more general issues of the fundamental rights protection that the Protocol indicated.

5.1.GENERAL PRINCIPLES OF EU LAW – a back-door for fundamental rights protection

General principles of the EU consist of two elements – ECHR system (and other international treaties which are binding upon Member States, what can be concluded from the case-law, as it was explained at the beginning) and constitutional traditions common to Member States. Although there are many international treaties on human rights, the ECHR has the most significant role within the EU fundamental rights protection. In analysing why it is like that, we can excerpt two main reasons: the fact that all the 27 Member States of the EU are bounded upon it and the scope of its application⁷⁸. This “priority” among other international treaties evolved through the case-law of the ECJ gradually – from the case *Nold*⁷⁹ where there was no special reference to the ECHR, but international treaties in general; case *Rutili*⁸⁰, where the ECJ referred directly to the ECHR; case *Familiapress*⁸¹, where the ECJ referred to a judgment of the European Court of Human Rights; etc.

⁷⁸ The ECHR system includes: the Convention (protects above-all political and citizen rights), 14 additional protocols and the case-law of the Convention bodies. Although the possibilities of including new rights are limited, the dynamic interpretation of the Convention shows sometimes as an effective substitute, what cases discussed in this work confirm. More about the scope of application and the ECHR system in: Mik, C., *Significance of the ECHR Provisions for the Protection of Fundamental Rights as General Principles of the EU law* in: *Fundamental rights protection in the EU*, Jan Barcz (et al). Warszawa, 2009, pages 202-205.

⁷⁹ Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission* (1974) ECR 00491.

⁸⁰ Case 36/75 *Roland Rutili v. Ministre de l'intérieur* (1975) ECR 01219.

When speaking of constitutional traditions common to Member States, first word that seeks for explanation is “common”. Indeed, what is common in constitutional traditions of 27 Member States? How should ECJ rule in cases where there are big differences among those traditions? After the case *Internationale Handelsgesellschaft*⁸², where this source of the ECJ’s inspiration for fundamental rights protection was mentioned for the first time, the ECJ started to refer to “common constitutional traditions” in its practice in a manner that some authors define as a “minimalist approach”. Cases like *Hoechst v. Commission*⁸³ or *Australian Mining and Smelting Europe Ltd v. Commission*⁸⁴, from their point of view suggest that when certain rights are protected to different degrees in Member States, the ECJ looks for some “common underlying principle” to uphold as part of the EU law.⁸⁵

However, speaking of those two “sources of inspiration” for the fundamental rights protection in the EU, we must bear in mind that the ECJ does not have to accept the minimalist approach in all cases or providing exactly the same standard of protection as the ECHR ensures. Quite the contrary, on those basis the ECJ may develop autonomous standards that will play significant role in ensuring the full effectiveness of EU law and, thus, enhance the protection of fundamental rights (the “minimalism” in both aspects may seem as a safeguard of the supremacy of EU law comparing to Member States and for avoidance of the reviewing of EU law by the ECtHR).

For the purpose of answering the question on relation between general principles of EU law and the CFR, Article 6 TEU should be invoked again:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. (§ 1);

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. (§ 3)“.

From the wording of Article 6 we can conclude that, after entering into force of the Treaty of Lisbon, there are „two paths“ of fundamental rights protection within the EU: the CFR system and general principles of EU law which have been developed through the ECJ's case-law and

⁸¹ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* (1997) ECR I-03689.

⁸² Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr* (1970) ECR 01125.

⁸³ Joined cases 46/87 and 227/88 *Hoechst AG v. Commission of the European Communities* (1989) ECR 02859.

⁸⁴ Case 155/79 *AM & S Europe Limited v. Commission of the European Communities* (1982) ECR 0157.

⁸⁵ More about the minimalist approach in the ECJ's case-law in:

Steiner, J., Woods, L., Twigg-Flesner, C., *Textbook on EC Law*, Oxford, 2003, pages 155-157.

will continue to develop in future. If it would not be so, than the separate paragraphs would not be used or, at least, the wording of the whole Article would show that they are not only connected, but equal. It is true, however, that rights and principles in the Charter are not completely independent from the general principles of EU law (the Preamble shows that the CFR relies upon those principles⁸⁶). Speaking of those “two paths”, it must be marked that they are not two different systems of fundamental rights protection, but more like a highway with two tracks that have same direction, but one of them enables that the same aim is reached in a faster way.

In addition, wordings in the Protocol that it is without prejudice “to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally”, confirm that no matter the consequences that the Protocol has for the application of the CFR, Poland is still obliged to respect other parts of EU law (what general principles certainly are).

Recent judgments of the ECJ in cases *Mangold*⁸⁷ and *Küçükdeveci*⁸⁸, on the interpretation of non-discrimination principle on grounds of age and Council Directive 2000/78/EC, seem to substantiate the same. In *Küçükdeveci*, the national provision on calculating the notice period for dismissal was not taking into account periods of employment that the employee completed before reaching the age of 25. The Court found that it is not appropriate for achieving the aim (enabling employers to manage their personnel flexibly) because it applies to all employees who joined undertaking before the age of 25, whatever their age was at the time of dismissal. After ascertaining that the principle of non-discrimination on grounds of age is a general principle of law (and that Directive does not lay down, but merely gives expression to the principle of equal treatment), the Court stated in § 51 that “it is for the national court...to provide within the limits of its jurisdiction, the legal protection which individuals derive from EU law and *to ensure full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle*” (compare to § 77 in *Mangold*) (italics added) . Practically, this means that the ECJ might find that some Polish legislation is inconsistent with some fundamental right that forms part of general principles of the EU law, no matter if

⁸⁶ In the Preamble it is said that the Charter reaffirms „...the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.“

⁸⁷ Case C-144/04 *Werner Mangold v. Rüdiger Helm* (2005) ECR I-0998.

⁸⁸ Case C-555/07 *Küçükdeveci v. Swedex GmbH & Co.KG* (2010) ECR 00000.

that right is reaffirmed in the Charter or whether there are any limitations imposed upon it by the Protocol.

On the basis of the given interpretation we may ask ourselves about the possibility that the ECJ gives similar guidelines to national courts in cases like *Maruko*, where certain issue falls within Member States' competences. Is it possible that national courts will be asked to disapply even those national provisions on the basis that they are contrary to the principle of non-discrimination? In answering to that question, Advocate General Sharpston's Opinion in case *Bartsch* may be useful. She explains that general principles of law do not operate in abstract. In order to review national measures on the basis of their compliance with general principles of EU law it is necessary that they fall within the scope of EU law, what is being so in 3 cases: 1. case of implementation of EU law (irrespective of degree of Member States' discretion⁸⁹), 2. situation where some permitted derogation under EU law is invoked and, 3. other cases of falling within the scope of EU law because of some specific substantive rule applicable to that situation.⁹⁰

The question that stays open is how the full effectiveness of EU law, particularly of the non-discrimination principle on grounds of sexual orientation, should be ensured in cases that fall within the Member States discretion ("marriage"), taking into consideration diversity of solutions that Member States provide? How to solve the question, for example, of same-sex couple that got married in Belgium and because of work moves to Poland where their marriage will not be recognised?

The future case-law will give answer to such questions. Maybe the Court will go one step forward in stating that "nevertheless, Member States must comply with EU law", especially in line with given proposals that do not seek for imposing the institution of same-sex marriages on the Member States, but merely delimitating the discriminative effects by ensuring the same rights and advantages as the opposite-sex couples have.

⁸⁹ For example, *Mangold* and *Küçükdeveci* were cases that concerned the social and employment policy, where the Member States enjoy a broad discretion in the choice of measures for achieving those objectives. See § 38 in *Küçükdeveci* and § 63 in *Mangold*.

On the basis of analysis of the case *Wachauf v. Germany* (Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* (1989) ECR 02609) and *Bostock case* (Case C-2/92 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* (1994) ECR I-00955) some authors conclude that even when Member States are given certain discretion, the same should be exercised in accordance with fundamental rights. They found it doubtful, however, whether national authorities should recognise general principles that are not protected within their national legal systems.

Steiner, J., Woods, L., Twigg-Flesner, page 180.

⁹⁰ Paragraph 69 in the Advocate General's Opinion in case C-427/06, *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (2008) ECR I-07245.

Beside the developments in law of the EU, some final remarks should be given on its connection with social and cultural area that the EU encompasses and which connection showed to be significant for solving issues based on differences among the Member States

5.2. CULTURAL DIVERSITY AND FUNDAMENTAL RIGHTS PROTECTION

There are two co-existent theories in the area of human rights policy – universalism and cultural relativism. According to the first one, human rights are a completely universal value, independent of cultural, historical or economic factors. The second theory implies that human rights are subject of relativisation in the context of foreign policy, meaning that different standards might be applicable to different countries, even when the same system of a certain treaty applies to them. Nevertheless, allegations may be found that although all those differences must be borne in mind, it is the duty of states to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.⁹¹ Although those differences are more visible on the global level, the Protocol showed that Member States are not always ready to step from their national frameworks and standards for the aim of more broaden fundamental rights protection.

Preamble of the CFR starts with wordings: „The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.“. European citizenship (Title V of the CFR reaffirms rights of citizens) and common values ask for more than legal solutions in areas that are important for functioning of the EU. Chairman of the Committee on Human Rights in the Senate of the Republic of Poland, Z. Romaszewski, believes that material and civilisation gap and a diversity of moral values within the EU cannot be solved on the basis of different types of regulations, but that the integration process (especially in the context of the European citizenship) has to include also the social integration by promoting certain attitudes, tolerance and giving examples of successful solutions, not by imposing the same.⁹² The FRA is a good example within the EU that works on those issues.⁹³

⁹¹ Such attitude was expressed on the Conference when adopting the text of the Universal Declaration of Human Rights. More about the mentioned theories in:

Bieńczyk-Missala, A., *Human Rights in Polish Foreign Policy after 1989*, Warszawa, 2006, pages 42-46.

⁹² The speech from the Conference on FRA can be find in:

The problem of guarantees for fundamental rights protection in Europe, Center for International Relations, Warszawa, 2007, pages 16-19.

⁹³ Concerning the discrimination on grounds of sexual orientation see, for example, FRA's report: „Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation“ at:

6. CONCLUSION

The aim of this work was to give an overview on the fundamental rights protection in the EU and to analyse the questions that entering into force of the CFR and the Protocol on its application arose.

As it was shown, the wording of the Protocol might be interpreted in a way to conclude that the Protocol is more an interpretative instrument than an opt-out. Three important conclusions derive from that: first, as regards the provisions to which the Protocol refers to, individuals in Poland may have to prove their existence in the national law; second, the fact that possible development of standards that would bind Poland is already a reality evolving outside the CFR system shows that “fears” toward the CFR were unreasonable; and third, regardless how the Protocol is interpreted, there are always general principles of the EU law that the ECJ may use as a backdoor for providing the protection to individuals.

How should the Protocol’s significance finally be valued?

We may conclude as professor Jacqueline Dutheil de la Rochère did: „although the Protocol would probably provoke a significant amount of discussion and debate among lawyers, it might in the end produce little in the way of case-law“.

However, irrespective of its little or no legal significance for the protection of fundamental rights in practice, we can say that Protocol contributed to perceiving of the issues that Member States' reasons for signing the Protocol indicated– problem of protection of fundamental rights as „common values“ on which the EU is founded in the area of diversity of 27 Member States. Nevertheless, the respect given to such differences and work on promotion of development of fundamental rights protection may be considered as a good way for solving those questiones that stayed opened after entering into force of the CFR.

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