Protocol (No. 30)

On the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

THE HIGH CONTRACTING PARTIES,

WHEREAS in Article 6 of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union,[10,13]

WHEREAS the Charter is to be applied in strict accordance with the provisions of the aforementioned Article 6 and Title VII of the Charter itself,[13]

WHEREAS the aforementioned Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article,[13]

WHEREAS the Charter contains both rights and principles,[13,23–26,38]

WHEREAS the Charter contains both provisions which are civil and political in character and those which are economic and social in character,[4,13,23]

WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles,[10,13,18]

RECALLING the 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,[13]

NOTING the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter,[13,15]

DESIROUS therefore 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 within Poland and within the United Kingdom,[13,41]

REAFFIRMING 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,[13]

REAFFIRMING that this Protocol is without prejudice to the application of the Charter to other Member States,[13]

REAFFIRMING that this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European

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Union, the Treaty on the Functioning of the European Union, and Union law generally,[13]

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

1. **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.**[14–22,43]
2. **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.**[22,27–31,43,46]

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom 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.[15,34–35,45–46]

Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic[1]

The Heads of State or Government of the 27 Member States of the European Union, taking note of the wish expressed by the Czech Republic,[2]

Having regard to the Conclusions of the European Council,

Have agreed on the following Protocol:

Article 1

Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom shall apply to the Czech Republic.[10–11]

Article 2

The Title, Preamble and operative part of Protocol No 30 shall be modified in order to refer to the Czech Republic in the same terms as they refer to Poland and to the United Kingdom.

[1] Brussels European Council of 29/30 October 2009, 15265/1/09 REV 1, Annex I. This Protocol has not yet entered into force but is to be annexed to the Treaties in accordance with the procedure under Art. 48.2–5 TEU.

Article 3

This Protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

Contents

1 Introduction

Analysing Protocol No. 30's aims, meaning and consequences for **Poland** and the **United Kingdom** (the UK) jointly is a risky exercise. What was and is essential for the UK government (the question of social and economic rights) appeared devoid of any significance for the Polish. What was essential to the Polish delegates (abortion, euthanasia and same-sex partnerships) was greatly unimportant to the UK. The only common point of the position adopted by both MS concerned the fear that the CJEU would interpret the EUCFR in a way that would be ultimately unacceptable in the UK and in Poland. This similarity is, however, only formal. Concerning the substance, the **opposition** to the potential judicial outcomes was obviously political and it was also **essentially different for both countries**. Indeed, it would be difficult to imagine a situation where one and the same potential interpretation of EUCFR's provisions would actually be unacceptable to both States at the same time. **1**

As the title of Protocol No. 30 suggests, this instrument applies to the UK and Poland. In addition, in 2009, the scope of the Protocol's **application was extended to the Czech Republic**. The political and legal impact of Protocol No. 30 cannot be **2**

overstated. A source of significant academic criticism, the Protocol is likely to create controversy in the EU's efforts to respect fundamental rights. Indeed, the EUCFR will apply in 24 MS in full, while thanks to the Protocol, the legal consequences of the EUCFR's application to three MS are not entirely clear.

3 This commentary analyses the **reasons and implications** of the Protocol's application to these three MS and beyond.[2] In particular, Part 1 of the commentary assesses the reasons behind the UK and Poland's negotiation of the Protocol and the Czech Republic's decision to join it. Part 2 then assesses the legal meaning of Protocol No. 30's two provisions.

2 Reasons for Adopting Protocol No. 30: The United Kingdom, Poland and the Czech Republic

2.1 The United Kingdom's Rationale for Negotiating Protocol No. 30: Second Thoughts?

4 Protocol No. 30 reflects the UK's concerns in relation to **economic and social rights**, which were present from the inception of the EUCFR. Because the EUCFR could potentially place social and economic rights on an equal footing with political and civil rights, the UK's preference was to have the EUCFR in the form of a **strong political declaration rather than a legally binding instrument**.[3] Two provisions of the EUCFR seemed to be particularly problematic in the UK, i.e., the right to strike and the right to protection in the event of unfair dismissal. In particular, domestic legislation has imposed significant restrictions on the right to strike since 1979; moreover, protection in the event of unfair dismissal is granted only after 1 year of employment thereby giving a competitive advantage to small businesses.[4] During the negotiations of the EUCFR, the UK fought hard and succeeded in qualifying these rights by incorporating references to "national laws".[5]

5 In light of this background, the UK's attempt to limit the application of Title IV of the EUCFR on Solidarity, which includes the right of collective bargaining and action (Art. 28 EUCFR) and protection in the event of unjustified dismissal (Art. 30 EUCFR), is not surprising. The Protocol is, nevertheless, problematic.[6] Two years prior to negotiating the Protocol, **the UK signed the TCE which incorporated the EUCFR in full**. At the time of signature, the UK made no reservations. Why then was it necessary to introduce limitations to the EUCFR

[2] See also Blanke (2012), p. 174 et seqq.

[3] Goldsmith (2001), p. 1214; Wicks (2001), p. 534.

[4] Wicks (2001), p. 529; Dougan (2008), p. 666.

[5] Wicks (2001), p. 529.

[6] Craig (2008), p. 163.

2 years later? Arguably, the rationale for limiting the scope of the EUCFR's application during the negotiations of the Treaty of Lisbon was the government's desire to show that this Treaty was different from the TCE. This attempt to distinguish between the Treaties can be explained by the government's promise to hold a referendum on the TCE. Following the rejection of the TCE in France and the Netherlands, the UK Parliament discontinued its reading of the relevant bill.

Nevertheless, in a legal challenge before the high court, it was argued that the Treaty of Lisbon replicated the innovations introduced by the TCE; consequently, the government should have stood by its promise and held a referendum.[7] The claim was dismissed because it lacked substantive merit, as the promise was made in relation to the TCE and not the Treaty of Lisbon. Accordingly, the Protocol may be seen as one of the ways in which the UK government attempted to **distinguish the Treaty of Lisbon from the TCE**. Such a distinction allowed the government to ratify the Treaty of Lisbon by using an ordinary parliamentary vote,[8] instead of holding a referendum. Despite the government's claims that the Protocol was the result of re-evaluation of the EUCFR's possible impact on UK business,[9] arguably, these arguments are not convincing.

2.2 Poland's Rationale for Negotiating Protocol No 30: Morality, Morals and Religion

Whilst in negotiating Protocol No. 30 UK delegates were focused on social and labour rights, Poland's delegates were concerned with the issues of morality, morals and religion(i.e. issues of abortion, euthanasia, as well as same-sex partnership/marriage) as well as questions of the apparent menace of the EUCFR as a legal basis for claims against the Polish State by German citizens for the compensation for real estate lost to the Polish territory as described by international treaties following World War II.[10] **6**

It is to be noted that the Protocol is a document that went unmistakably **beyond the negotiation mandate** that the Government of the Republic of Poland had received from the *Sejm*, i.e. the "lower" preponderant chamber of the Parliament. The negotiation mandate was established in the Resolution of the *Sejm* of 15 June 2007 ("Resolution"). The Resolution put a special emphasis on the Treaty of Lisbon **7**

[7] *R. (on the application of Wheeler) v Office of the Prime Minister Divisional Court*, Court of Appeal—Administrative Court, [2008] EWHC 1409 (Admin) (25 June 2008).

[8] Dougan (2008), p. 665.

[9] Craig (2008), p. 163; Barnard (2008), p. 15.

[10] Several such claims were (unsuccessfully) brought before the ECtHR: 47550/06, *Preussische-Treuhand GmbH & Co.KG a.A v Poland*, Inadmissibility Decision of 7 October 2008; 7948/07, *Markward Von Loesch v Poland*, Inadmissibility Decision of 9 December 2008; 28742/08, *Heinrich Fenske v Poland*, Inadmissibility Decision of 9 December 2008.

as the forthcoming compromise that would strengthen and consolidate the EU as well as make its action more effective. It also provided that the Treaty should guarantee a strong position of Poland; the strong position of the State within the EU was to correlate to the country's potential.[11]

The Resolution also stressed that Polish membership in a strong and effective EU is at the very heart of Polish national interest. The negotiating mandate contained one concrete disposition that bound the Polish negotiators; the negotiators were thereby directed to show prowess in striving to bring up the matter of **voting weights in the Council** of the EU. The majority in the *Sejm* indeed indicated the Penrose method as the only acceptable arrangement. It is to be reminded that the abortive square root voting mechanism was to narrow the weighting of votes between the largest and smallest countries in terms of population because the mechanism consists in that each representative in the voting body receives the number of votes (the voting weight) proportional to the square root of the population he or she represents.

The matters concerning the **regulation of fundamental rights**, and particularly the potential or real limitation of such rights in respect of Polish citizens, fell well **outside of the negotiating mandate**. Acceding to the British endeavour, the Government of the Republic of Poland thus transgressed the negotiation mandate. This transgression of the mandate should not be eclipsed by the fact that no political accountability measures were directed against the Government.

8 In addition to joining the Protocol, Poland made two Declarations, No. 61 and 62 (→ para 31) concerning the application of the EUCFR to Poland. **Declaration No. 61** proclaims that "[t]he Charter does not affect in any way the right of 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".

This Declaration seems to repeat the Declaration No. 39 that Poland made in respect of the **Accession Treaty**. **Declaration No. 39** proclaimed that "nothing in the provisions of the Treaty on European Union, of the Treaties establishing the European Communities and the provisions of treaties amending or supplementing those treaties prevents the Polish State in regulating questions of moral significance, as well as those related to the protection of human life".

These declarations suggest that the accession negotiations as well as the negotiations concerning the Reform Treaty had at least one thing in common. The **reservations concerning the fundamental rights**—and concerning the fundamental rights entrenched in the EUCFR—are limited to three issues, i.e. the right to **abortion**, the right to **euthanasia** and the discretion of the State to regulate **same-sex partnership/marriage**.[12] Those three problem-areas are of course but a

[11] See also Wyrzykowski (2009), p. 26–27.

[12] Wyrozumska (2009) p. 106 rightly claims that the rulings of the UN Committee on Human Rights and ECtHR prove clearly that the idea that the "exemption" of the Charter with regard to Poland from external ruling upon sensitive moral issues is faulty and that it is enough "not to accept the broad principle of non-discrimination included in the Charter".

negligible aspect of the vast regulation of fundamental rights. Fourth problem referred to the political fears that the Charter constitutes legal basis for effective proprietary claims of German citizens connected with their, or their ancestors, depravation of real estate which belonged to them in 1945, and was subsequently seized—as the result of the WWII—by Poland. Those fears are not grounded while the Charter does not create any "independent right"—no "new" right to property—and can only be invoked within the competences of the EU.[13]

Significantly, declarations are unilateral instruments and as such have limited importance (→ Art. 51 para 12). First, they fall under the jurisdiction of the CJEU in their interpretation; it is likely that the CJEU may construe them narrowly. Secondly, the terms of the above-discussed Declarations are formulated vaguely enough to allow narrowing down of their interpretation. Consequently, it is to be expected that Poland will not reach the political objectives apparent in Declaration No. 61. **9**

However, because the issues of morality, morals and religion are important enough to Poland, it seems that the Government resorted to use the Protocol in order to realise the primary objective—which is auspiciously unrealisable—of shutting off the applicability of the EUCFR *in toto* within the Polish territory.

2.3 The Czech Republic's Reasons in Joining Protocol No 30: An Afterthought?

The Czech Republic's decision to join the Protocol (via a separate Protocol to annexed in the course of the next accession) was driven by the fear that the EUCFR could allow legal challenges against the 1940s Beneš Decrees regarding the confiscation of property during World War II.[14] Concerns about the legal effects of the EUCFR on national law led the Czech Republic to place **Declaration No. 53** on the EUCFR. The Declaration largely repeats Art. 51 EUCFR and the second paragraph of Art. 6.1 TEU. In particular, it emphasised that the EUCFR is addressed to the MS when they are implementing EU law only. The Declaration also reiterated the significance of the division of competences between the EU and its MS and the principle of subsidiarity. In addition to reminding the Union that the EUCFR does not create any new power for the EU, it emphasised that the EUCFR "does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field" (paragraph 2). **10**

However, as mentioned above, unlike protocols, declarations do not form an integral part of the Treaty (→ para 9; → Art. 51 para 12); therefore, Declaration No. 53 **did not have sufficient legal weight to address the Czech Republic's concerns** about the possible impact of the EUCFR on the Beneš Decrees. As a result,

[13] Wyrozumska (2009), p. 111–112; Wyrzykowski (2009), p. 30.

[14] Peers (2009), p. 1; Dutheil de la Rochere (2011), p. 1784.

President *Vaclav Klaus* hesitated to sign the Treaty of Lisbon, which would confer a legally-binding status on the EUCFR. As the last country to ratify the Treaty of Lisbon, the Czech Republic had a strong bargaining position. On 29 October 2009, the European Council extended the application of Protocol No. 30 to the Czech Republic.[15] On 3 November 2009, the President signed the instrument of ratification.[16]

11 Two issues arise in relation to the application of the Protocol to the Czech Republic. First, does the Protocol really **address the Czech Republic's concerns**? Arguably, as the EUCFR applies only to disputes which fall within the scope of EU law[17] and is unlikely to extend to the Beneš Decrees, those fears were largely unfounded. Besides, as the EUCFR mainly codifies the existing rights within the EU legal order,[18] were the Beneš Decrees to come within the scope of EU law, the CJEU would already have jurisdiction to consider the issue by virtue of the general principles of EU law (Art. 6.3 TEU).[19]

Second, given that the Czech Republic's fears in relation to the EUCFR concerned a specific issue, was it **necessary to allow it to join Protocol No. 30**, which has more extensive limitations? It is possible that the extension of the existing Protocol to the Czech Republic was regarded as a simpler solution than a prospect of entering into a lengthy negotiation regarding an individual protocol, which could delay the ratification of the Treaty of Lisbon.[20] The outcome of this shortcut is a more extensive opt-out than the Czech Republic needed to put its doubts to rest.

3 Legal Analysis of the Protocol's Provisions

12 It is important to note from the outset that, pursuant to Art. 51 TEU, Protocol No. 30 has the **same legal value as the EU founding Treaties**. Under the Treaty of Lisbon, the Protocol governs the totality of the substantial applicability of EU law and indeed is part of primary law of the EU on a par with the Treaties.

13 The Protocol has a lengthy **Preamble**. The recitals of the Preamble can be grouped around five key issues.

[15] Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic, Brussels European Council, Presidency Conclusions of 29/30 October 2009, Annex I, 14.

[16] McDermott (2010), p. 752.

[17] Czech Constitutional Court, Pl. US 19/08(26 November 2008) para 191—*Treaty of Lisbon I* (English translation available online); more extensively on this decision, see, Bříza (2009); see also, Peers (2009), p. 7.

[18] Case C-540/03,*EP v Council*(ECJ 27 June 2006); Preamble to the Charter of Fundamental Rights, para 5.

[19] See also Peers (2009), p. 10.

[20] McDermott (2010), p. 752.

The first (recitals 1–3) concerns the strict **interpretation of the EUCFR in accordance with Art. 6 TEU** and Title VII of the EUCFR (the so-called horizontal provisions; → Art. 6 para 37–39).[21] Title VII of the EUCFR deserves particular attention. It is an instrument of the constitutional policy of "double-safeguard policy" aimed at circumscribing the operational scope of EUCFR's rights by *inter alia* excluding the possibility of a broad interpretation of the instrument's provisions. The original intent of the authors of the Protocol was to erect a barrier to "imaginative interpretation" of EUCFR's provisions, as well as to the usurpation of the power of extensive interpretation of the instrument by EU institutions. Accordingly, these references in the Preamble serve as a reminder that the EUCFR does not extend the powers of the EU.

The second issue (recitals 4–6) highlights the **dichotomy between "rights" vs. "principles"** and reflects the UK's concerns in relation to the distinction between civil and political rights on the one hand and economic and social rights on the other. The preamble then emphasises that Poland and the UK simply wish to clarify certain aspects of the EUCFR's application and its justiciability within these States (recitals 8, 9). Thereafter, the preamble reaffirms that this Protocol does not affect other Treaty obligations of Poland and the UK, or the operation of EUCFR's other provisions (recitals 7, 10, 12). The final issue concerns the impact of the Protocol on other MS; the Preamble emphasises that the Protocol is without prejudice to the EUCFR's application to the remaining MS (recital 11).

14 The Protocol itself contains **two substantive provisions**. Art. 1 has two paragraphs. Art. 1.1 concerns the litigants who may challenge the compatibility of national law with the EUCFR before their national courts or the CJEU.[22] Art. 1.2 then clarifies that the provisions of Title IV on solidarity of the EUCFR will not be justiciable in the UK or Poland. Art. 2 attempts to curtail the EUCFR's application further by emphasising that those provisions of the EUCFR that refer to "national law or practices" would apply in the UK or Poland only to the extent that these rights and principles are recognised in domestic law. The sections below analyse these two provisions more closely.

3.1 Exploring the "Bite" of Article 1

3.1.1 Article 1.1: A Simple Reminder to National Courts?

15 Potentially, this provision could lend itself to a "broad" or to a "narrow" reading.[23] The "broad" reading of Art. 1.1 could result in an unsustainable view that the provisions of the EUCFR are not legally enforceable before the domestic courts of

[21] More extensively on the limitations in Title VII, see Borowski (2007); and Alonso Garcia (2002).

[22] Barnard (2008), p. 8.

[23] Craig (2008), p. 163; Craig (2010), p. 239; Dougan (2008), p. 669; Barnard (2008), p. 8–9; Jirasek (2008), p. 5.

the UK, Poland and the Czech Republic or the EU courts[24] and cannot be used to challenge national law implementing EU legislation.[25] This line of reasoning is not likely to succeed in light of the Protocol's preamble and its Art. 2. For example, recital 8 of the Preamble notes the wish of Poland and the UK to *clarify* certain aspects of the EUCFR's application; furthermore, Art. 2 would lose its meaning, because it refers to the extent that the EUCFR applies in the UK and Poland.

Therefore, a **narrow reading of Art. 1.1 is preferable.** Such a reading should be based on the wording of the provision, i.e., that the EUCFR *does not extend the ability* of the EU and national courts of Poland or the UK to find national laws inconsistent with the EUCFR's provisions. The EUCFR also cannot be considered to extend the ability of courts in any way, because prior to the EUCFR's adoption, national courts could refer questions to the CJEU concerning the legality of MS' laws and practices falling within the scope of EU law.[26]

16 Furthermore, the CJEU is the exclusive forum for discussing the meaning of the Protocol as it is part of the primary law of the EU. It is not likely that the CJEU would foreclose the preliminary ruling procedure in respect of the Protocol. Nor are there any national rules in these three MS which preclude domestic courts from referring preliminary ruling questions in respect of the Protocol. Anyway, case-law and the EUCFR clearly confirm that the jurisdiction of the CJEU cover two areas, i.e. the activities of the EU institutions as well as the activities of the MS (i.e. "the laws, regulations or administrative provisions, practices or action" of Poland or the UK). Accordingly, the Protocol does not preclude any EU or domestic procedures allowing for the **judicial review** of the conformity of, for example, Polish statutory, regulatory or administrative provisions with the fundamental rights, freedoms or principles reaffirmed by the EUCFR. This is confirmed by the official statement of the Polish Ministry of Foreign Affairs: "[t]he Polish-British Protocol only establishes that there shall be no new possibilities for declaring incompatibility of Polish legislation with the EUCFR compared to the possibilities under the law as it stood before the Treaty of Lisbon".[27]

17 The expression "does not extend the ability" in Art. 1.1 may also lend itself to another interpretation, i.e., as to how an existing competence is to be exercised. Arguably, the EUCFR and the Treaty of Lisbon contain sufficient safeguards to make the **stipulation in Art. 1.1 unnecessary**. Thus, pursuant to Art. 51.1 EUCFR the legal effects of the EUCFR are limited to serving as a tool in interpreting EU legislation and MS' implementing measures and as a ground for challenging such acts. Furthermore, Art. 52.2 EUCFR emphasises that rights recognised by the EUCFR "shall be exercised under the conditions and within the limits defined by those Treaties". In addition, the Treaty of Lisbon clearly **delimits the competences of the EU and its MS**. Thus, competences not conferred upon the Union in the

[24] Craig (2010), p. 239.

[25] Barnard (2008), p. 9.

[26] Craig (2010), p. 239.

[27] MSZ DPEUR/11/70910 of 26 April 2011.

Treaties remain with the MS (Art. 4.1 and 5.2 TEU; → Art. 5 para 11–12). Even where there is an EU competence, the breadth of measures may vary depending on whether these competences are exclusive (Art. 2 and 3 TFEU), shared (Art. 4 TFEU) or designed to support MS' action (Art. 5 TFEU).[28]

The Treaty of Lisbon also envisages a stronger application of the **principle of subsidiarity** (Art. 5.3 TEU, Protocol No 2). All these provisions are in place to prevent creeping EU competences into areas where MS may wish to retain their powers.[29] Accordingly, there are sufficient safeguards to prevent EU encroachment upon MS' powers both in the EUCFR and the Treaty of Lisbon. The CJEU is likely to take these limitations seriously, particularly in light of "warnings" issued by some Constitutional Courts of EU MS,[30] aiming to discourage EU encroachment upon their competences. Therefore, in practical terms, Art. 1.1 is superfluous.

18 Consequently, in legal terms, **Art. 1.1 does not add anything new** and **confirms the stipulation in Art. 51.2 EUCFR**,[31] which explicitly excludes the EUCFR's application beyond EU powers, establishment of any new power or task for the EU, or modification of powers and tasks as defined in the Treaties. A stipulation similar to that in Art. 51.2 is also contained in paragraph 2 of Declaration No. 1 concerning the EUCFR. Likewise, Art. 6.1 TEU emphasises that the EUCFR does not extend the competences of the EU as defined in the Treaties (→ Art. 6 para 34–36).

19 However, the application of Art. 1.1 of the Protocol may pose **problems to the principle of primacy**. As stated above, Art. 1.1 stipulates that the EUCFR does not extend the ability of the CJEU, or any court or tribunal of the MS which are parties to the Protocol, to "find that the laws, regulations or administrative provisions, practices or action" of those MS "are inconsistent with the fundamental rights, freedoms and principles" that the EUCFR reaffirms. Significantly, "finding inconsistency" is part and parcel of the principle of primacy of EU law. Indeed, the priority of the application of norms is conditional on that there is some conflict between the domestic norm and the EU norm; conflict of norms suggests that the norms are inconsistent.

20 This, potentially, may lead to two interpretations of Art. 1.1 of the Protocol. The first interpretation proceeds on the assumption that Art. 1.1 does not preclude the operation of the principle of primacy of EU law in cases where Union and domestic legislation are in conflict. The second interpretation may be based on the hypothesis that Art. 1.1 of the Protocol forecloses the very examination of conflict of norms under the EUCFR. The argument does not have strong foundations. Accepting it for the sake of argument, however, leads one to the conclusion that the position would lose all its practical relevance. After all, the **general principles of EU law** that are

[28] See also Declaration No. 18 in relation to the delimitation of competences, and Church and Phinnemore (2010), p. 10. More generally, see, von Bogdandy and Bast (2010) and Craig (2009).

[29] See generally Pollack (2000).

[30] See, for example, the decision of the German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009)—*Treaty of Lisbon* (English translation available online). For analysis see Hoffmann (2009).

[31] Craig (2010), p. 239; see also Groussot and Pech (2010), p. 8.

guaranteed under Art. 6 TEU are not only fully operative but are also covered by the principle of primacy (→ Art. 6 para 26).

Admittedly, there could be an obstacle in the technicality of relying on such principles instead of on the concrete provisions of the EUCFR. Should the interpretation of any particular right, freedom or principle entrenched in the EUCFR evolve, on the other hand, any such right, freedom and principle derived from other normative sources (such as the common constitutional traditions, or the international agreements binding the MS) will be reinterpreted accordingly because the **EUCFR is to reflect the fundamental rights recognised and respected within the EU**. The CJEU could therefore find that, for example, the Republic of Poland violates the prohibition of discrimination based on sexual orientation even though the legal foundation for such a declaration of infringement would not lie formally in the EUCFR but in the general principles of EU law.

21 Some of the above discussed concerns have been recently put to rest in ***N.S. v Secretary of State for the Home Department***.[32] The case concerns MS' responsibilities in sending asylum seekers to other MS under the Common European Asylum System. The case addressed whether, and if so to what extent, Protocol No. 30 can be regarded as an "opt-out" from the EUCFR for the UK and Poland. In her Opinion, Advocate General *Trstenjak* confirmed that Art. 1.1 of Protocol No. 30 cannot be regarded as a general opt-out from the EUCFR for the UK and Poland.[33] The CJEU reached the same conclusion and substantiated its view by references to the Preamble of the EUCFR. In particular, according to the third recital in the Preamble to the Protocol, Art. 6 TEU requires the courts of Poland and of the UK to apply and interpret the EUCFR strictly in accordance with the explanations referred to in that article.[34]

Furthermore, the sixth recital in the Preamble emphasises that the EUCFR reaffirms the rights, freedoms and principles recognised in the EU; the aim of the instrument is to make those rights more visible, not to create new rights or principles.[35] Based on this analysis, the CJEU concluded that **Art. 1.1 merely explains Art. 51 EUCFR with regard to the scope of the EUCFR**; furthermore, the provision neither exempts Poland or the UK from the obligation to comply with the provisions of the EUCFR nor prevents a court of one of those MS from ensuring compliance with those provisions.[36]

[32] Case C-411/10, *N.S. v Secretary of State for the Home Department* (ECJ, Grand Chamber, 21 December 2011).

[33] Case C-411/10, *N.S. v Secretary of State for the Home Department* (Opinion of Advocate General Trstenjak of 22 September 2011) para 167.

[34] Case C-411/10, *N.S. v Secretary of State for the Home Department* (ECJ, Grand Chamber, 21 December 2011) para 119.

[35] Case C-411/10, *N.S. v Secretary of State for the Home Department* (ECJ, Grand Chamber, 21 December 2011) para 119.

[36] Case C-411/10, *N.S. v Secretary of State for the Home Department* (ECJ, Grand Chamber, 21 December 2011) para 120.

3.1.2 Article 1.2: A Potential Substantive Limit?

The opening wording of the provision ("in particular, and for the avoidance of doubt") suggests that Art. 1.2 aims to clarify Art. 1.1 of the Protocol. Moreover, the provision places a specific **substantive limitation on Title IV of the EUCFR** by clarifying that nothing in Title IV creates justiciable rights applicable to Poland or the UK (as well as the Czech Republic following its joining to the Protocol), except in so far as these countries have provided for such rights in their national law. In other words, the rights and principles entrenched in the EUCFR are judicially enforceable but only to the extent provided for in the Polish and British legal systems.[37] **22**

So, why did Poland, but primarily the UK, find Title IV rights problematic and insist on negotiating this opt-out? One of the issues mentioned in Art. 1.2 itself is that Title IV, which includes economic and social rights,[38] may create justiciable rights. The **objection to justiciability of economic and social rights** stems from the distinction between "rights" and "principles" in the EUCFR. It may be useful to distinguish these two terms here. In general "rights" can be described as "norms which, if applied, determine the relevant issue conclusively".[39] By contrast, "principles merely argue for a particular outcome; more than one may well be relevant to a given issue, and in such a case these competing principles must be weighted against each other".[40] Social and economic rights usually fall into the second category. They are not justiciable by individuals; rather, they influence a legislator's policy-making process.[41] As a result, the decision of how to implement principles, including the allocation of resources to them, lies with national governments, not courts.[42] **23**

The EUCFR specifies in its preamble that it includes rights, freedoms and principles,[43] but does not elaborate on which of the EUCFR provisions fall into which categories. Furthermore, the explanations to the EUCFR give examples of provisions which constitute both **rights and principles** (for example, Art. 23 EUCFR on equality between women and men in Title III and Art. 34 EUCFR on social security and social assistance in Title IV) and those that are mainly to be considered principles (Art. 25 EUCFR on the rights of elderly in Title III and **24**

[37] The British government explained at the House of Lords hearing that Art. 1.2 of the Protocol guarantees that the provisions of the Charter, and the "Solidarity" provisions in particular "*those articles either do not reflect any rights at all, or do no more than reflect the rights that already exist in UK law*", House of Lords, Constitution Committee, 6th Report of Session 2007–08, op.cit, p. 22, paragraph 70.

[38] On "social rights" see Coppola (2011).

[39] Phillipson (1999), p. 831.

[40] Phillipson (1999), p. 831.

[41] Goldsmith (2001), p. 1212.

[42] Goldsmith (2001), p. 1212.

[43] EUCFR, Preamble, recital 7.

Art. 37 EUCFR on environmental protection in Title IV).[44] Significantly, not all of these principles are located in Title IV; besides, depending on the specific context of a case, the CJEU may rule that some provisions in Title IV are to be regarded as justiciable rights.

25 Needless to say, such a prospect was unnerving for some MS. Unsurprisingly, a further attempt to clarify the distinction between "rights" and "principles" came with the UK's initiative in 2004, when the EUCFR was amended to include **Art. 52.5 EUCFR**. The provision reads as follows:

> 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.
>
> The explanations to the EUCFR clarify that according to the distinction between "rights" and "principles" set out in the EUCFR, "**subjective rights shall be respected, whereas principles shall be observed** [...]. Principles may be implemented through legislative or executive acts [...]; accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities".[45]

26 While this clarification that principles are not directly effective in national courts[46] is clear, we are none the wiser as to which provision of the EUCFR constitute rights and which are principles. Furthermore, arguably, this **artificial distinction** between "rights" and "principles" may be regarded as a disguised attempt to prevent "social" rights from becoming "justiciable". The guidance provided by the explanations is not particularly useful and we will need to wait and see how the CJEU may apply the EUCFR.

27 Against this background, it becomes apparent that Art. 1.2 partially restates Art. 52.5 EUCFR and takes it a step further by specifying that the rights in Title IV of the EUCFR will not be justiciable "except in so far as Poland or the United Kingdom has provided for such rights in its national law". The reference to "**national law**" means that the EU should not impose on the MS specific standards directly or indirectly, for example, when legislating on other matters within its competences.[47] The wording also suggests that the EU is under an obligation to respect the national differences of Poland and the UK in relation to Title IV.

28 Art. 1.2 seems to **narrow down the limitations already contained in some provisions** in Title IV. For example, Art. 28 and 30 EUCFR establish that the exercise of these rights is "in accordance with Union law and national laws and practices". The UK fought very hard to ensure such a formulation during the

[44] Hinarejos (2008), p. 724; Wyrozumska (2009), p. 86–87.

[45] Explanations relating to the Charter of Fundamental Rights, O.J. C303/17 (2007), p. 35.

[46] Barnard (2008), p. 3–4.

[47] Goldsmith (2001), p. 1213.

negotiation phase.[48] Art. 1.2 seems to be a further step in the same direction as it clarifies that as a general rule, economic and social rights in Title IV cannot be justiciable, unless the domestic legislation of Poland or the UK explicitly provides otherwise. Arguably, the formula "in accordance with national law" in six out of 11 provisions in Title IV (Art. 27, 28, 30, 34, 35 and 36 EUCFR) is a sufficient safeguard to ensure that these economic and social rights are recognised at the EU level only to the extent that they are recognised by national law. This formulation reaffirms the principle of subsidiarity.[49]

29 For example, in ***Laval***[50]and ***Viking***[51] involving a right to collective action, the CJEU demonstrated a certain deference to the domestic laws of Sweden and Finland imposing limitations on the exercise of this right. Importantly, the right was used as a justification by these MS for breaching the free movement of services and freedom of establishment respectively, and not as a yardstick of legality.[52] In their submissions, the governments argued that the right to strike does not fall within the scope of EU law. The CJEU disagreed and stated that the right to strike is an integral part of the general principles of EU law. It then balanced the fundamental right to strike with EU free movement regimes.[53] The ECJ reasoned that the limitations on the right to strike imposed by domestic legislation are justified if the exercise of the right is reconciled with the Treaty requirements, there is no serious threat to the exercise of fundamental rights and the principle of proportionality is satisfied.[54] Interestingly, the CJEU dealt with the **right to strike as a general principle of EU law**, despite an explicit stipulation in Art. 28 EUCFR. The judgment did refer to Art. 28 EUCFR, but in order to limit the exercise of this right, not to expand on its scope. The CJEU achieved this by emphasising that the right to strike in Art. 28 EUCFR is to be protected in accordance with Union and national law.[55]

30 Accordingly, references to "national law" in Title IV provisions emphasise the subsidiary role of the EU in these matters, which is reflected in the CJEU's case law. Therefore, **Art. 1.2 of the Protocol does not add much to the limitations**

[48] Goldsmith (2001), p. 1213.

[49] Explanations relating to the Charter of Fundamental Rights, O.J.C 303/17 (2007), p. 35; Hinarejos (2008), p. 725.

[50] Case C-341/05, *Laval v Byggnads* (ECJ 18 December 2007).

[51] Case C-438/05, *International Transport Workers' Federation v Viking Line ABP* (ECJ 11 December 2007)

[52] Hinarejos (2008), p. 725; Wyrozumska (2009), p. 108.

[53] For a similar balancing act see Case C-112/00, *Eugen Schmidberger v Austria* (ECJ 12 June 2003) para 77; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* (ECJ 14 October 2004) para 36.

[54] Case C-341/05, *Laval v Byggnads* (ECJ 18 December 2007) para 94 and Case C-438/05, *International Transport Workers' Federation v Viking Line ABP* (ECJ 11 December 2007) para 45 and 46.

[55] Case C-341/05, *Laval v Byggnads* (ECJ 18 December 2007) para 91.

within the provisions in Title IV, further supported by the stipulation in Art. 52.1 EUCFR. In principle, given that Art. 1.2 partially restates the stipulation in Art. 52.5 EUCFR, it could be regarded as a declaratory provision.

In practical terms, Art. 1.2 may become a substantive limit if any of Title IV rights are recognised as justiciable before national courts. In this case, Art. 1.2 may serve as an opt-out from Title IV for the UK, Poland and the Czech Republic.[56] Furthermore, Art. 1.2 may have an impact on the interpretation by the CJEU of Title IV provisions. For example, while in theory, the CJEU could by-pass the limitations in Art. 28 EUCFR by dealing with the right to strike as a general principle of EU law, Art. 1.2 of the Protocol serves as a warning against undermining the political will of the MS involved.

31 The interpretation of Art. 1.2 of the Protocol is further affected by Poland's **Declaration No. 62**. In this Declaration, "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".

It is rather perplexing to confront the contents of Art. 1.2 of the Protocol and Declaration No. 62. Whilst Art. 1.2 of the Protocol seems to verbalise and transcribe the intention of extinguishing the possibility of creating new social and labour rights that would be judicially enforceable, Declaration No. 62 declares that Poland fully respects social and labour rights, as established by EU law, and in particular those reaffirmed in Title IV of the EUCFR.

32 As to the wording of Declaration No. 62, what does the term "respect" entail? Respecting the rights and freedoms cannot be reduced to some act of showing respect; respecting the rights and freedoms necessarily entails **recognising them as rights and freedoms that are guaranteed by positive law**. If the respected rights or freedom were not to be legally entrenched, a declaration of respect would be nothing but an exercise in legal duplicity that cannot be countenanced in any circumstances. A State cannot declare to respect the law and at the same time shut out its binding force or applicability (be it temporally, subjectively, territorially, or otherwise).

As a matter of course, a State could describe its attitude to rights and freedoms as one of "non-respect" and thus declare not to respect one or other right or freedom. This is purely theoretical because no such declaration seems to actually have ever been made. This theoretical possibility, however, is important because it shows that difficult or impossible logic hides behind the case at hand. It would be interesting to define the unheard-of kind of "respect" for the law that consists in extinguishing its binding force or applicability within a State.

Therefore, logical analysis of the meaning of Art. 1.2 of the Protocol and Declaration No. 62 leads to no rational explanation of the meaning of both instruments. Arguably, the Declaration abrogates Art. 1.2. Such a political analysis

[56] Craig (2010), p. 239; Barnard (2008), p. 10.

would be plausible considering the statement made by Polish statesmen who negotiated the Treaty of Lisbon. The argument, however, cannot hold as a matter of normative analysis because the normative character of the Protocol and of the Declaration in international law are so different that the theory cannot be accommodated by legal reality.

In ***N.S. v Secretary of State for the Home Department***, because the contested fundamental rights were not among the social fundamental rights and principles set out in Title IV of the EUCFR, regrettably, neither the Opinion of Advocate General nor the CJEU's judgment shed any light on the interpretation of Art. 1.2. While acknowledging that there was dispute as to the extent, exact content and scope of social rights and principles in the EUCFR,[57] it was deemed unnecessary to examine the question of the precise validity and scope of Art. 1.2 of Protocol No. 30.[58] We will need to wait and see how the CJEU interprets Art. 1.2 in the future. **33**

3.2 Article 2: Cushioning EUCFR's Application: "In Accordance with National Law"

Art. 2 of the Protocol is not limited to Title IV but applies to any provision of the EUCFR which refers to national laws and practices. Let us consider the wording of the provision more closely. It begins with a reference "***to the extent* that a provision of the Charter refers to national laws and practices**". The extent of such a reference to national law in the EUCFR's provision would determine its application to Poland, the UK or the Czech Republic. In *N.S. v Secretary of State for the Home Department,* the Advocate General emphasised that Art. 2 of Protocol No. 30 does not constitute a general opt-out from the instrument and applies solely to provisions of the EUCFR which make reference to national law and practices.[59] There are only six substantive provisions falling into this category: Art. 9, 10.2, 14.3, 35, 36 and 49 EUCFR. However, the reverse is true too: "to the extent that a Charter provision also or instead refers to Union law",[60] these MS are under the duty to comply with primary and secondary EU legislation. **34**

Furthermore, a reference to "**national laws and practices**" suggests that the CJEU retains its power to assess whether the right in the EUCFR is indeed recognised in national laws and practices of Poland, the UK or the Czech Republic.[61] Accordingly, the CJEU and domestic courts preserve their powers held prior to the Protocol. Art. 2 of **35**

[57] Case C-411/10, *N.S. v Secretary of State for the Home Department* (Opinion of Advocate General Trstenjak of 22 September 2011) para 172.

[58] Case C-411/10, *N.S. v Secretary of State for the Home Department* (Opinion of Advocate General Trstenjak of 22 September 2011) para 174.

[59] Case C-411/10, *N.S. v Secretary of State for the Home Department* (Opinion of Advocate General Trstenjak of 22 September 2011) para 175.

[60] Dougan (2008), p. 670.

[61] Craig (2008), p. 163.

the Protocol concerns the legal effect of EUCFR's provisions which are regulated by MS' domestic legislation and practices. For example, Art. 9 EUCFR confirms that the right to marry and to found a family are guaranteed in accordance with MS legislation that regulate the exercise of that right. Art. 2 of the Protocol therefore only confirms what is the natural meaning of this provision. Similar observations follow from the analysis of Art. 52.6 EUCFR.

36 Moreover, the **Protocol does not affect the EU *acquis communautaire***, including the CJEU's case law on the general principles of EU law developed prior to the adoption of the EUCFR.[62] Indeed, Art. 6.3 TEU accords to the general principles of EU law the same legal status as the EUCFR enjoys under Art. 6.1 TEU (→ Art. 6 para 87). While an ambiguous legal status of fundamental rights in EU law may cause difficulties in practice,[63] it nevertheless guarantees that if deterred by the limitations in the EUCFR, claimants may choose to rely on the CJEU's jurisprudence on fundamental rights.[64]

37 This may have already taken place to a certain extent in ***Kücükdeveci***,[65] concerning the interpretation of the Directive establishing a general framework for equal treatment in employment and occupation (Employment Directive).[66] In a preliminary ruling procedure, the CJEU found the source of the right to non-discrimination on the ground of age (also prohibited by the Employment Directive) in the general principles of EU law, and not the EUCFR. Arguably, the CJEU could have preferred this line of reasoning, because Protocol No. 30 has no impact on the general principles of EU law.

It is true that an alternative explanation to this line of reasoning could be that the CJEU followed up on its approach in ***Mangold***,[67] where the Court boldly stated that the Employment Directive reflected a general principle of EU law of non-discrimination on the ground of age; furthermore, the fact that the CJEU considered *Kücükdeveci* only shortly after the EUCFR entered into force may serve as another excuse for the limited reliance on this instrument.[68] Nevertheless, the possible stifling impact of the Protocol on the application of the EUCFR is not excluded, particularly where references to "national law and practices" are concerned.

38 Thus, in order to avoid complications regarding the legal impact of a case on Poland, the UK and the Czech Republic, the CJEU may choose to deal with fundamental rights as general principles of EU law in Art. 6.3 TEU.[69] However,

[62] Craig (2008), p. 163.

[63] De Witte (2008), p. 80; more generally see Di Federico (2011).

[64] Craig (2008), p. 163.

[65] Case C-555/07, *Kücükdeveci v Swedex GmbH & Co. KG* (ECJ 19 January 2010). For case comment, see Roes (2010).

[66] Council (EC) Directive 2000/78 *establishing a general framework for equal treatment in employment and occupation*, O.J. L303/16 (2000).

[67] Case C-144/04, *Mangold v Helm* (ECJ 22 November 2005).

[68] Peers (2011), p. 582.

[69] Peers (2011), p. 582.

such a **bypassing of the EUCFR** may lead to further complications as it would, undoubtedly, represent an "undoing" of the political will of the UK, Poland and the Czech Republic to limit the protection of fundamental rights, as well as weaken the role of the EUCFR as the benchmark of fundamental rights protection in the EU.

Overall, the **redundancy of the Protocol is apparent**. The Protocol deals with problems that are already regulated in the EUCFR itself (Art. 52.4-7 EUCFR in particular) as well as in Art. 6.1 TEU. Thus, one of the issues that the Protocol addresses is the distinction between rights and principles; however, this differentiation is already spelled out in the EUCFR itself. Another concern is to ensure that the EUCFR does not create any new rights or powers for the EU; the aim of the EUCFR is mainly to confirm the fundamental rights that were already protected in EU law. **39**

As a result, the Protocol is an instrument that simply **ensures that such an understanding of the EUCFR would be preserved**. This argument was made explicitly by the British Government at the hearing before the House of Lords: "if, despite what the Charter provisions say, someone tried to argue that the Charter creates new rights, the argument would fail: the Protocol makes it clear that the Charter does not give national or European courts any new powers to strike down or reinterpret UK law, including labor and social legislation".[70]

The Protocol might well seem a legal redundancy; what seems a redundancy, however, was considered an essential legal safeguard. Were the UK, Poland or the Czech Republic to decide that there is no need for such a safeguard anymore, they would **not be able to unilaterally withdraw from the Protocol**, because under Art. 48 TEU Treaty amendments would be required. Withdrawal from the Protocol does not fall under the simplified procedure because Art. 48.6 TEU applies only to amendments which concern Part III TFEU and do not extend the powers of the EU. It would be, therefore, necessary to follow the standard treaty modification procedure. **40**

4 Conclusion

Contrary to the popular theory of an "opt-out" advanced by many commentators, the aim of the Protocol is not to foreclose the applicability of the EUCFR in respect of the Republic of Poland or the United Kingdom.[71] The Preamble proclaims in all clearness that the Protocol's aim is one of "**clarifying the application of the** **41**

[70] House of Lords, Constitution Committee, 6th Report of Session 2007–08, European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution, HL Paper 84, published 28 March 2008, p. 21, paragraph 69.

[71] The House of Lords construes the Protocol in this way: "[. . .] Protocol 7 clarifies the application of the Charter rather than operating as an opt-out', House of Lords, Constitution Committee, 6th Report of Session 2007–08, p. 23, paragraph 75. Cf. T. Blair, Press Conference at the Conclusion of the EU Summit in Brussels, 23 June 2007, www.number10.gov.uk/output/Page12094.asp—21k; M. Beunderman, 'Experts Question Scope of UK Treaty opt-out', 27.06.2007—http://euobserver.com/18/24368 accessed on 5 November 2011.

Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom" (recital 9). The Protocol thus governs the applicability of the EUCFR in respect of the domestic legal system in as much as they are implementing Union law (Art. 51.1 EUCFR).

42 On the whole, the **utility of the Protocol is questionable** at legal and political levels. From the political point of view, the Protocol was intended to address domestic concerns, such as the government's desire to avoid holding a referendum on the Treaty of Lisbon in the UK, regulation of abortion, euthanasia and same-sex partnerships in Poland, and the fears of the Polish and Czech governments that the EUCFR may allow legal challenges against decisions to confiscate property during World War II. However, the Protocol does not address these concerns, but imposes limitations capable of curtailing the impact of the EUCFR in these countries and other MS.

43 From the legal point of view, Art. 1.1 is superfluous. Several arguments support this view. First, the purpose of the EUCFR is not to extend the competences of the EU,[72] but rather codify existing EU rules. Furthermore, the limitations imposed by Art. 1.1 of the Protocol already feature in Art. 6.1 TEU, Art. 51 and 52 EUCFR and Declaration No. 1 on the EUCFR. As a result, the **purpose of Art. 1.1** of the Protocol may be mainly to serve as a **reminder to national courts** to apply the EUCFR only to legislation implementing EU law and not to issues concerning purely internal matters.[73]

It is to be concluded that Art. 1.1 only precludes that new powers of the courts be inferred from the EUCFR. Similarly, Art. 51.2 EUCFR and Art. 6 TEU provide that the EU—the CJEU included—does not receive any new powers under the EUCFR. Accordingly, the **EUCFR is binding** both for the UK and the Republic of Poland. This is now explicitly confirmed by the CJEU in *N.S. v Secretary of State for the Home Department*.

44 Unlike Art. 1.1, **Art. 1.2 is a substantive limitation**. Its impact would be even stronger if the CJEU recognises any of the provisions in Title IV as justiciable rights. **The same is true of Art. 2**, which may impact on the application of six provisions of the EUCFR, i.e., Art. 9, 10.2, 14.3, 35, 36 and 49 EUCFR. So far as Poland is concerned, resorting to the principle of direct effect of Union legislation in respect of Title IV provisions is not excluded. This is apparent from the fact that there is an overlap between, for example, the provisions of Title IV of the EUCFR and the Constitution of the Republic of Poland. Even if it is accepted that the Protocol does not allow for relying exclusively on a particular provision of Title IV of the EUCFR, the overlap between these rights and principles with domestic legislation of Poland solves this problem, although this might prove thorny in respect of the UK.

[72] Goldsmith (2001), p. 1206.

[73] Barnard (2008), p. 8; Wyrozumska (2009), p. 112.

Consequently, Art. 1.1 and Art. 2 of the Protocol may result in creating **two sets of standards on fundamental rights;** those in the UK, Poland and the Czech Republic, on the one hand, and the remaining 24 MS, on another. The interpretation of the Protocol in *N.S. v Secretary of State for the Home Department* does not shed sufficient light on the scope of the limitations imposed by the instrument. As the contested fundamental rights in the case did not require the application of Art. 1.2 and Art. 2 of the Protocol, both the Advocate General and the CJEU did not assess these provisions in any depth. The Opinion makes it clear, however, that Art. 1.1 and Art. 2 of the Protocol **do not constitute a general opt-out from the EUCFR** for the UK or Poland. The CJEU reached the same conclusion in relation to Art. 1.1 only. 45

Overall, **the Protocol may have damaging effect on the EUCFR** beyond the limitations in Art. 1.2 and Art. 2; that is, it may stifle the application of the EUCFR altogether. In the future, the CJEU may face the dilemma of either undoing the political will of three MS or promoting double standards on human rights in its MS.[74] Either way, the result would be unsatisfactory. Overall, the Protocol is regrettable[75] and does not add much to the limitations already in the EUCFR. Driven by political considerations, its poor drafting may result in confusing legal effects in three MS and beyond.[76] 46

Table of Cases

ECJ

ECJ 12.06.2003, C-112/00, *Eugen Schmidberger v Austria*, ECR 5659 [cit. in para 29]
ECJ 14.10.2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn*, ECR 9609 [cit. in para 29]
ECJ 22.11.2005, C-144/04, *Mangold v Helm*, ECR 9981 [cit. in para 37]
ECJ 27.06.2006, C-540/03, *EP v Council*, ECR 5769 [cit. in para 11]
ECJ 11.12.2007, C-438/05, *International Transport Workers' Federation v Viking Line ABP*, ECR 10779 [cit. in para 29]
ECJ 18.12.2007, C-341/05, *Laval v Byggnads*, ECR 11767 [cit. in para 29]
ECJ 19.01.2010, C-555/07, *Kücükdeveci v Swedex GmbH &Co. KG*, ECR 365 [cit. in para 37]
ECJ 21.12.2011, C-411/10, *N.S. v Secretary of State for the Home Department*, nyr [cit. in para 21, 33, 34]

[74] Dougan (2008), p. 667.
[75] Craig (2008), p. 164; Hinarejos (2008), p. 727.
[76] Dougan (2008), p. 667.

ECtHR

ECtHR 07.10.2008, 47550/06, *PreussischeTreuhand GmbH & Co.KG a.A v Poland* [cit. in para 6]
ECtHR 09.12.2008, 7948/07, *Markward Von Loesch v Poland* [cit. in para 6]
ECtHR 09.12.2008, 28742/08, *Heinrich Fenske v Poland* [cit. in para 6]

References

Alonso Garcia, R. (2002). The general provisions of the Charter of fundamental rights of the European Union. *European Law Journal, 8*(4), 492–514.

Barnard, C. (2008). *The 'opt-out' for the UK and Poland from the Charter of fundamental rights: Triumph of rhetoric over reality?*. www.law.cam.ac.uk/faculty-resources/10007309.pdf. Accessed 18 Mar 2011.

Blanke, H.-J. (2012). The protection of fundamental rights in Europe. In H.-J. Blanke & S. Mangiameli (Eds.), *The European Union after Lisbon: Constitutional basis, economic order and external action* (pp. 175–231). Heidelberg: Springer.

Borowski, M. (2007). Limiting clauses: The continental European tradition of special limiting clauses and the general limiting clause of Art 52(1) Charter of fundamental rights of the European Union. *Legisprudence, 1*(2), 197–240.

Bříza, P. (2009). The Czech Republic: The Constitutional Court on the Lisbon Treaty decision of 26 November 2008. *European Constitutional Law Review, 5*(1), 143–164.

Church, C., & Phinnemore, D. (2010). Understanding the Treaty of Lisbon. *Romanian Journal of European Affairs, 10*(2), 1–22.

Coppola, S. (2011). Social rights in the European Union: The possible added valued of a binding Charter of fundamental rights. In G. Di Federico (Ed.), *The EU Charter of fundamental rights: From declaration to binding instrument* (pp. 199–216). New York: Springer.

Craig, P. (2008). The Treaty of Lisbon, process, architecture and substance. *European Law Review, 33*(2), 137–166.

Craig, P. (2009). *Competence and Member State autonomy: Causality, Consequence and Legitimacy* (Oxford Legal Studies Research Paper, 57).

Craig, P. (2010). *The Lisbon Treaty: Law, politics, and treaty reform*. Oxford: OUP.

De Witte, B. (2008). Legal instruments and law-making in the Lisbon Treaty. In S. Griller & J. Ziller (Eds.), *The Lisbon Treaty: EU constitutionalism without a Constitutional Treaty?* (pp. 70–106). New York: Springer.

Di Federico, G. (2011). Fundamental rights in the EU: Legal pluralism and multi-level protection after the Lisbon Treaty. *Comparative Perspectives on Law and Justice, 8*(1), 15–54.

Dougan, M. (2008). The Treaty of Lisbon 2007: Winning minds, not hearts. *Common Market Law Review, 45*(3), 617–703.

Dutheil de la Rochere, J. (2011). Challenges for the protection of Fundamental Rights in the EU at the time of the entry into force of the Lisbon Treaty. *Fordham International Law Journal, 33* (6), 1776–1799.

Goldsmith, P. (2001). A Charter of rights, freedoms and principles. *Common Market Law Review, 38*(5), 1201–1216.

Groussot, X., & Pech, L. (2010). Fundamental rights protection in the European Union post Lisbon Treaty. *Policy papers of the Foundation Robert Schuman (European Issue), 173*.

Hinarejos, A. (2008). Laval and viking: The right to collective action versus EU fundamental freedoms. *Human rights Law Review, 8*(4), 714–729.

Hoffmann, L. (2009). Don't let the sun go down on me: The German Constitutional Court and its Lisbon judgement. *Journal of Contemporary European Research, 5*(3), 482–490.

Jirasek, J. (2008). *Application of the Charter of fundamental rights of the EU in the United Kingdom and Poland according to Lisbon Treaty*. http://www.law.muni.cz/edicni/sborniky/cofola2008/files/pdf/evropa/jirasek_jan.pdf. Accessed 19 Mar 2011.

McDermott, Y. (2010). Human rights and the Lisbon Treaty: Consensus or conditionality? *Whittier Law Review, 31*(4), 733–758.

Peers, S. (2009). *The Beneš Decrees and the EU Charter of fundamental rights*. http://www.*statewatch.org*/*news*/2009/*oct*/*lisbon – benes – decree.pdf*.*Accessed*20*Mar*2011.

Peers, S. (2011). The EU Charter of rights and the right to equality. *ERA Forum, 11*, 571–584.

Phillipson, G. (1999). The Human Rights Act, 'horizontal effect' and the Common law: A bang or a whimper? *The Modern Law Review, 62*(6), 824–849.

Pollack, M. (2000). The end of creeping competence? EU policy-making since Maastricht. *Journal of Common Market Studies, 38*(3), 519–538.

Roes, T. (2010). Case law: Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG. *Columbia Journal of European Law, 16*(3), 497–519.

von Bogdandy, A., & Bast, J. (2010). The federal order of competences. In A. von Bogdandy & J. Bast (Eds.), *Principles of European constitutional law* (2nd ed., pp. 275–307). Oxford: Hart.

Wicks, E. (2001). "Declaratory of existing rights" – The United Kingdom's role in drafting a European Bill of Rights, mark II. *Public Law*, 527–541.

Wyrozumska, A. (2009). 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 J. Barcz (Ed.), *Fundamental rights protection in the European Union* (pp. 80–113). Warszawa: Beck.

Wyrzykowski, M. (2009). Introduction: Limits of power and limits of interpretation. In J. Barcz (Ed.), *Fundamental rights protection in the European Union* (pp. 25–38). Warszawa: Beck.