

POLITICAL AND LEGAL PERCEPCION OF PROTOCOL NO. 30 ON THE APPLICATION OF THE EU CHARTER

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Abstract

The present article aims at introducing the circumstances surrounding the adoption of the Protocol on the application of the Charter of fundamental rights of the European Union to Poland and to the United Kingdom, at analysing the Protocol from the legal point of view and at assessing its impact on the level of human rights protection in the European Union. The author also refers to and extracts parts of the recent case law of the Court of Justice of the European Union concerning the status of the Protocol and concludes by information on the current political climate that is partially the outcome of the Court's case law and the prevailing opinion of the academic community.

Key words:

Protocol no.30, Charter of fundamental rights of the European Union, opt-out, United Kingdom, Poland, Czech Republic

Introduction

The EU Charter of fundamental rights that acquired binding force along with the ratification of the Lisbon Treaty in 2009 is empowered to fill the gaps left by EU legislators and the Court of Justice of the EU in the field of human rights protection, to make the rights more visible and predictable. It is also seen as a source of crystallization of EU competences.²⁰ On the other hand, the Charter runs the risk of becoming a source of differentiation and paradoxically, a source of legal uncertainty. It is caused by the Protocol No. 30²¹ which allows for the “opt-out“ of two Member States and therefore allows for the same rights to be applied differently among Member States within the European Union. Or does it not?

On the interpretation of the Protocol

At the European Council in June 2007, the UK government secured an ‘opt-out’ from the legal enforceability to be given to the Charter as part of the Reform Treaty agreed on by the Council. According to the presidency conclusions issued at the end of the European Council, two other Member States – reportedly Ireland and Poland – “reserved their right to join in this protocol”²². Poland took advantage of this right and joined the UK. The Czech Republic followed the same idea but in

²⁰ For example by Jean-Paul Jacqu , Abdelhaleq Berramdane

²¹ OJEU 9.5.2008 (C 115/313-314): Protocol (No 30) on the application of the Charter of fundamental rights of the European Union to Poland and to the United Kingdom

²² Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf. See a footnote no. 20. (last visit on 16th January 2013)

order to be a Party to the Protocol, it was required to wait until the next Accession treaty is drafted (presumably with Croatia).

According to the Lisbon treaty wording, the Charter acquires "the same legal value as the Treaties" (Article 6 Treaty on European Union - TEU). In spite of the affirmation that "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"²³, Member States mentioned above "desirous of clarifying the application of the Charter in relation to the laws and administrative action and of its justiciability"²⁴, had fought for being excluded of its binding force to secure a full opt-out.

Protocol is an international treaty, and according to Article 51 TEU the protocols and annexes to the Treaties shall form an integral part thereof. They enjoy *lex specialis* status, and therefore they may serve to secure exceptions from the rule. The development brought by the Lisbon treaty highlights the mechanism of the opt-out in general terms. The Protocol becomes a part of the primary law and is of the same binding force.

Article 1 paragraph 1 of the Protocol no.30 that reads as follows:

The Charter does not extend the ability of the Court of Justice of the EU, or any court or tribunal of Poland or of the UK, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

specifies an interpretation of the Article 51 of the Charter concerning the field of application of the Charter:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The aim of the Article 1 par. 1 of the Protocol therefore seems to merely confirm that Member states are obliged to apply the provisions of the Charter only when implementing the EU law and not when applying purely national rules, procedures, and provisions. The latter had not been in Court's power before the entry into force of the Lisbon Treaty, and the objective of the Article 1 par.1 was *inter alia* probably to confirm that it is still the case even though the Charter acquired a binding force. Even if the Court had examined the national provisions, by doing so it would have exceeded its powers, and therefore the Member State would not have to respect such *ultra vires* decision.²⁵

The second paragraph of Article 1 of the Protocol is of an explanatory character and a concretisation of par.1:

²³ Preamble of the Protocol n.30

²⁴ Preamble of the Protocol n.30

²⁵ KRÁLOVÁ, J.: K vlivu tzv. Britsko-polského protokolu a tzv. českých „záruk“ k Listině základních práv EU na uplatňování základních práv v těchto státech. In *Jurisprudence*. 2010, no. 3, 3-7 p. ISSN 1802-384. p. 5.

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

The Title IV of the Charter is headed Solidarity and consists mainly of economic and social rights. In 1966, adoption of two International covenants (the International Covenant on Civil and Political Rights – ICCPR - and the International Covenant on Economic, Social and Cultural Rights - ICESCR) reflected a long-lasting dichotomy of the human rights regime – civil and political rights on one hand and social and economic rights on the other. According to Advocate General Trstenjak the "title, entitled 'Solidarity', is regarded as one of the most controversial areas in the evolution of the Charter. There was dispute not only over the fundamental question whether social rights and principles should be incorporated into the Charter, but also how many social rights should be included, how they should be organised in detail, what binding force they should have, and whether they should be classified as fundamental rights or as principles"²⁶. Although the EU Charter of fundamental rights encompasses both areas in one document, De Witte declares that we should not be deceived by rhetorical support given to the indivisibility of rights because in spite of the fact that social rights are along side of other rights in the Charter and the Court in its case law did not draw distinction between them neither, their position remains quite distinctive.²⁷ Protocol no. 30 supports the dichotomy.²⁸

Not all the rights in Title IV are directly justiciable. Considering some of them it is not clear if it is a principle or a subjective right. Paragraph 2 is a safety catch against an extensive interpretation of the Charter and aims to prevent the Court from declaring a provision justiciable regardless of the applicable law of the EU which states the opposite.²⁹ The differences in social and economic rights in the Member States might be, however, considered by the Court as an obstacle for functioning of the EU internal market which may create a conflict between the fundamental rights and the four market freedoms.

The term “for the avoidance of any doubt” suggests that the issue of the EU competences in the area of Title IV of the Charter is dependent on Article 51 par. 2 of the Charter, and therefore it is merely an interpretation rule with declaratory effects important to all the Member States.³⁰

Article 2 serves to specify the interpretation of those Charter provisions which refer to the national laws and practices³¹, and these national provisions create borders of application of the given right:

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.

²⁶ Opinion of Advocate General Trstenjak delivered on 22 September 2011 concerning the Case C-411/10 N. S. v Secretary of State for the Home Department (§172).

²⁷ DE WITTE, B.: The Trajectory of Fundamental Social Rights in the European Union. In: DE BÜRCA, G. - DE WITTE, B. (eds.): *Social Rights in Europe*. Oxford, 2005. ISBN 9780199287994. p. 153

²⁸ Similarly, the state of ratification of the Optional protocol that would establish an individual application mechanism with regard to ICESCR confirms that social and economic rights are not to be easily recognised as the self-executing and directly applicable.

²⁹ KRALOVÁ, J.: K vlivu tzv. Britsko-polského protokolu... p. 6

³⁰ SCHWARZ, J.: Protokol o uplatňování Charty základních práv Evropské unie. In *Jurisprudence*. 2010, no. 2. 16-23 p. ISSN 1802-384. p. 22

³¹ E.g. article 9 (right to marry and right to found a family), article 10 par.2 (freedom of thought, conscience and religion), article 16 (right to conduct a business), article 28 (right of collective bargaining and action), etc.

Simultaneously, it interprets Article 52 par. 6 which states that “full account shall be taken of national laws and practices as specified in this Charter.”

While some authors accept the Protocol as an exception capable of limiting the effects of the Charter, others point out that it actually is not an opt-out protocol but either a useful clarification, an interpretative protocol or even a political tool and the Protocol is widely misreported. When discussing the character of the opt-out protocols, we must not forget to mention other ways of human rights protection stemming from the primary law applicable in all Member States:

- Firstly, the Court of Justice opened the door for human rights protection by declaring the fundamental rights part of the **general principles** of EU law. Thus, even before the codification of fundamental rights, general principles had been directly applicable on the territory of Member States and enjoyed primacy over the national laws as a consequence of the wording of Article 6 TEU. The range of rights accorded by the Charter would logically seem to be destined to substitute the references to the European Convention as well as to the general principles and national constitutional traditions contained in Article 6 TEU, but that is not the case. The development resulted in the multiplicity of sources which leads to the question on what their role is. Jacqu  argues that “suppression of the reference to general principles would in any case be inoperative because the recourse to that has never been founded on an express authorisation accorded by the Treaties.”³² There is a great coincidence existing between the rights included in the Charter and the rights protected by virtue of their character as general principles of law. According to Jacqu , preservation of the reference to general principles should play essential role in a short term. General principles serve the Court to interpret certain provisions of the Charter. Except for the interpretative function, general principles constitute a way of recognition of new rights by the Court. Common constitutional traditions are not fixed, the rights they grant may be subject to extension and in that case, “the vector of the general principles permits to incorporate these innovations into the law of the Union.”³³

- Secondly, there are number of provisions with human rights dimension enshrined in the **founding treaties**. Since the Treaty of Maastricht and its Article 6 (now Article 2 and Article 6 of the TEU) have come into force, the European Union is bound to respect the human rights in a very wide context. It is worth mentioning Article 2 TEU which actually names all the spheres covered by the Charter as common values of all Member States. One of the purposes of this Article is to set standards for membership itself. Article 2 TEU does not exclude anyone from its scope. The Lisbon treaty reformed this provision by making it possible for the accession to the European Convention and by elaborating on the values the Union is founded on. First line of the Preamble to the Protocol reminds that in Article 6 TEU the Union recognises the rights, freedoms and principles set out in the Charter. According to Schwarz this recognition cannot be affected by the Protocol and as the Member States may file the action for annulment by arguing incompatibility with the fundamental rights, nationals and legal persons of the UK, Poland and possibly Ireland and Czech Republic may use the same argument on the grounds of Article 263 par. 4 TFEU if it is against a regulatory act which is of direct concern to them and does not entail implementing measures. Moreover, the national courts in

³² JACQU , J.P.: Le trait  de Lisbonne. Une vue cavali re. In: *Revue trimestrielle de droit europ en*. 2008, vol. 44, no. 3, pp. 439-483. ISSN 0035-4317, p. 450

³³ JACQU , J.P.: Le trait  de Lisbonne..., p. 451

the countries in question may request the Court to provide a ruling if they suspect that the act is not in accordance with the Charter.

- Thirdly, reference to the **European Convention** for the protection of human rights and fundamental freedoms and the future EU accession to the Convention further enforces the human rights dimension, culture and commitment of the EU. Article 6 par. 3 declares the respect to the European Convention and constitutional traditions as general principles and it must be interpreted as a guarantee of a high standard of human rights protection and not a minimum common indicator.

A glance back...

The **United Kingdom** government praised the declaration of the Charter in 2000. A few years later, the UK signed the Constitutional Treaty without making any reservation concerning the inclusion of the Charter. Whilst the Charter sets out desirable improvements in the field of human rights, the later concern of the UK has been the threat to the national sovereignty. Even after the inclusion of par. 5 of Article 52 of the Charter on the incitation of the UK in 2004³⁴, the government maintained that the Charter gave the EU new reasons to intervene, especially concerning the protection of the environment, workers, or the right to asylum.

The Protocol especially concerns Title IV of the Charter and the elevation of the degree of the justiciability of social rights. In the field of the employment law (Title IV), it covers workers' rights in the areas such as information and consultation within an undertaking; collective bargaining and industrial action; protection in the event of unjustified dismissal; fair and just working conditions; maternity and parental leave.

The resistance in the UK towards the EU social policy can be traced throughout its whole history. UK is not a signatory to the "Community Charter of the Fundamental Social Rights of Workers". Moreover, under the UK influence, provisions on social policy were not included in the Maastricht Treaty but added in the form of the Protocol n. 14 on social policy signed by all the members except the UK. It was only in 1997 when the Labour Party won the elections that the social policy became acceptable. Soon after that the Charter was adopted.

The UK is an example of a country where employee representatives and employees do not participate in the policy shaping. "The "striking" example of a conflict between the legal system of the United Kingdom and the provisions of the Charter is the right to take a collective action including the right to strike (Article 28 of the Charter). The British see strikes as impediments to the rights of those whose lives would be hindered or endangered by the strikers. The right to strike has been restricted in the UK since the 1980s and there are also rules about ballots and picketing. However, none of these restrictions is mentioned in the Charter."³⁵ And indeed by the Treaty of Lisbon "the primary law enshrinement of the right to bargain collectively was strengthened by the fact that Article 6 TEU declares the Charter of Fundamental Rights of the European Union to have binding legal force. By that general reference to the charter, the right to bargain collectively, described in Article 28 of that charter, is now expressly incorporated in primary law."³⁶

³⁴ SCHWARZ, J.: Protokol o uplatňování Charty základních práv Evropské unie... p. 21

³⁵ JIRÁSEK, J.: Application of the Charter of Fundamental Freedoms of the EU in the United Kingdom and Poland according to the Lisbon Treaty. In: *Europeanization of the National Law, The Lisbon Treaty and Some Other Legal Issues. Sborník příspěvků z konference Cofola 2008 13.-14.5.2008*. Brno: Masarykova univerzita, 2008. 1-9 pp. ISBN 978-80-210-4630-6

³⁶ Advocate General Trstenjak opinion delivered on 14 April 2010 concerning the case C-271/08

Another provision that raised discussion was Article 30 on the protection in the event of unjustified dismissal. They are both formulated as rights, not principles and thus their direct application cannot be excluded.

The UK opt-out was met with mixed responses by a part of trade unions, politicians, and the EU law scholars. The misunderstanding on the effects the Charter might have strengthened the UK resistance towards the Charter. As for the political and social partners' reactions, the opt-out was praised by the representatives of the Confederation of the British Industry as well as the Federation of Small Businesses.

On one hand, there was a fear that relevant Charter rights might damage the UK's flexible labour market and a fear of widening the EU social policy competence more generally. Thus, the Conservative Party called for even stronger guarantees concerning the opt-out. On the other hand, the Trade Union Congress was disappointed because the opt-out indicated fewer rights enjoyed by workers and employees. Similar point was made by the Liberal Democrats.³⁷

As for **Poland**, the principle concern, raised by the Polish political party "Law and Justice", was the scope of the principle of non-discrimination with regard to sexual minorities, impact on privacy concerning abortion and family planning. The main preoccupation of Poland was therefore the recognition of equality of homosexual partnership and heterosexual marriage as well as legislation on voluntary abortion. In other words, a fear that the EU might impose "moral standards" on Poland. It is not clear, therefore, to what extent the Protocol responds to the Polish preoccupations since it focuses on Title IV, and does not particularly cover aspects of family rights which are already covered by ECHR to which Poland is a Party.³⁸ Other explanation may be grounded in the concern about the possibility of German claims on the Polish land.

As the intergovernmental conference that took place in 2007 with the aim to sign the Lisbon treaty allowed for declarations to be made by the Member States, Poland adopted two declarations related to the adoption of the Protocol. Declaration of Poland No. 61 on Charter of the fundamental rights of the EU states the following:

"The 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."

By Declaration No. 62 on the Protocol Poland declares in even more puzzling way that even though it joined the UK in the Protocol which refuses to follow Title IV of the Charter a full respect to these rights:

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.

Third country that fought for being included in the Protocol is the Czech Republic. In spite of the prompt application of the Charter by the Czech Constitutional court in less than 6 months after its declaration in 2000³⁹ and Agreement on inclusion of the Charter in the Treaty in Constitution, **the Czech Republic** made an unexpected turnaround.

³⁷ Available at <http://www.eurofound.europa.eu/eiro/2007/07/articles/uk0707049i.htm> (last visit on 16th January 2013)

³⁸ See JACQUÉ, J.P.: Le traité de Lisbonne...

³⁹ Decision of 12th July 2001 (11/2000)

The Czech Republic also decided to make a Declaration on the Charter of Fundamental Rights of the European Union at 2007 EU summit:

1. The Czech Republic recalls that the provisions of the Charter of Fundamental Rights of the European Union are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and division of competences between the European Union and its Member States, as reaffirmed in Declaration (No 18) in relation to the delimitation of competences. The Czech Republic stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law.

2. The Czech Republic also emphasises that the Charter does not extend the field of application of Union law and does not establish any new power for the Union. It does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field.

3. The Czech Republic stresses that, in so far as the Charter recognises fundamental rights and principles as they result from constitutional traditions common to the Member States, those rights and principles are to be interpreted in harmony with those traditions.

4. The Czech Republic further stresses that nothing in the Charter may be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective field of application, by Union law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' Constitutions.

In paragraph 1 of the Declaration no.53 it is basically repeated and stressed what the field of application is as stated in Article 51 of the Charter and it further stresses Article 51 par. 4 concerning the interpretation in harmony with constitutional traditions of the Member States and the level of protection as it can already be found in Article 53.⁴⁰

Two years later the President of the Czech Republic Václav Klaus made another declaration as part of the national ratification procedure concerning the Lisbon Treaty and conditioned the ratification by arranging for the same "opt-out" as the Great Britain and Poland. The government therefore negotiated for the accession to the Protocol which would in comparison to the Declaration no.53 was of a binding force.⁴¹ The reason for the sudden refusal of the binding Charter is connected to the series of laws enacted by the Czechoslovak government in exile during the Second World War (Beneš Decrees) that gave rise to claims over the property from deported Germans and Hungarians. Article 17 of the Charter on right to property, however, does not create new rights or new obligations. The same right can be found in the Czech or Polish constitution and other international documents. Although, there is no interdiction of retroactivity amongst the Charter Articles, it can be derived from Article 28 of the 1969 Vienna convention. Even the European Parliament Committee on Constitutional Affairs is of the opinion that "the Charter has no effect whatsoever, in terms of Czech, Union or international law, on the validity of the

⁴⁰ Article 53 – Level of protection - Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions

⁴¹ KRÁLOVÁ, J.: K vlivu tzv. Britsko-polského protokolu..., p. 3.

Beneš Decrees concerning the expropriation of property after the Second World War."⁴²

In any case a promise was given to the Czech Republic at Brussels European Council which took place on the 29th and 30th October 2009 that at the next accession Treaty the protocol will be amended so as to include the Czech Republic.

Even though **Ireland** abandoned the idea to take advantage of joining the UK and Poland as a party to Protocol N. 30, it did find its way to acquire an exception, a special position in connection with the application of the Charter. After the first referendum held in June 2008 by which the Irish people rejected the Lisbon treaty, Ireland managed to obtain some reservations at the summit of the European Council in Brussels held a year later. The details are recorded in the Presidency Conclusions decided on by the heads of states or governments on 18-19th June 2009⁴³, and therefore these reservations do not have the force equal to the primary law as the Protocol does.⁴⁴

As it is stated in the Presidency Conclusions, the concerns presented by the prime minister of Ireland relate to taxation policy, the right to life, education and the family, and Ireland's traditional politics of military neutrality. A high importance is simultaneously attached to a number of social issues, including workers' rights. The European Council agreed to take the measures in order to reassure Ireland of the mutual satisfaction of Ireland and the other Member States. These measures include the Decision⁴⁵ enclosed to the Conclusion in the form of Annexe 1 which focuses on securing the following issues. Firstly, nothing in the Treaty of Lisbon attributing a legal status to the EU Charter or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life, family and education provided by the Constitution of Ireland. Secondly, nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the European Union in relation to taxation. The third part provides for several guarantees concerning the military neutrality of Ireland.

Although the Decision is not a part of the primary law, the Heads of governments declared that it is legally binding and would take effect on the date of entry of the Treaty of Lisbon into force. Moreover, it will be attached to the TEU and TFEU in the form of Protocol at the time of the conclusion of the next accession Treaty, similarly as in the Czech model.

A look ahead...

As far as the recent examples of case law are concerned, in the joined cases C-411/10 N.S and C-493/10 M.E., the Court was asked to rule on the relevance of the Protocol no 30 in the matter related to asylum procedures regulated by the Dublin regulation and to treatment of asylum seekers including alleged violations of human rights guaranteed by the Charter. Since the preliminary questions were raised in respect of the obligation of the UK, the Court of Appeal sought to find out whether the Protocol should be taken account of. To put it differently, whether the provisions of the Charter of Fundamental Rights which are relevant to the present

⁴² Third draft report on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE)) Committee on Constitutional Affairs Rapporteur: Andrew Duff 2011/0817(NLE)11.12.2012

⁴³ Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf (last visit 16th January 2013)

⁴⁴ BONČKOVÁ, H. - SMEKAL, H.: Fragmentace společných hodnot? Výjimky z Listiny základních práv Evropské unie. In *Současná Evropa*, 2010, no.2, p.61-81. ISSN1804-1280. p. 64

⁴⁵ Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon (Annex 1)

case can take full effect in the legal order of the United Kingdom, whether it can be regarded as a full "opt-out" from the Charter. The Court identified its ruling with the opinion of the Advocate General and declared that:

"Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. (...) Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU 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. In addition, according to the sixth recital in the preamble to that protocol, 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. In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions."

Thus, the Court concluded that there was no need or a ground to take the Protocol into account.

As stated above this was equally the essence of the Advocate General Trstenjak opinion delivered on 22 September 2011 as well as the Commission, the Polish Government, the United Kingdom Government, the appellant in the main proceedings, the United Nations High Commissioner for Refugees, the Equality and Human Rights Commission, Amnesty International Limited and the AIRE Centre who submitted their observations.

By applying the grammatical (linguistic) method of interpretation of the Protocol preamble and articles, Advocate General Trstenjak is very firm in her opinion and says that the question can be easily answered in negative.

Similarly the Advocate General Trstenjak issued her opinion in Polish case C-489/10, Prokurator Generalny v Łukasz Marcin Bonda concerning the ne bis in idem principle enshrined in Article 50 of the Charter:

"Article 1(1) of that protocol (...) does not distinguish itself by great clarity. However, Protocol No 30 does not signify an opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland. On the contrary, recitals 8 and 9 in the preamble to the protocol point in favour of the protocol not containing any derogation from the Charter for the two countries cited but having merely a clarifying function, serving as a guide to interpretation. Article 51(2) of the Charter itself establishes that it does not extend the field of application of European Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Since the prohibition of double penalties laid down in Article 50 of the Charter had however already been recognised as a general European Union law principle, and according to the previous case-law such a principle would also have been applicable to the case at issue, and since even on a narrower understanding of Article 51 of the Charter, the Charter is applicable, as explained above, an extension of the ability of the Court of Justice within the meaning of the protocol cannot come into question."

Unfortunately, the Court did not rule on the interpretation of Article 1 (2) due to the fact that Solidarity rights were not referred to in these cases. The Advocate General Trstenjak, however, did pay attention to this aspect of the Protocol in her Opinion delivered on 22 September 2011:

"Under Article 1(2) of Protocol No 30, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as such rights are provided for in their respective national laws. With the statement that Title IV of the Charter of Fundamental Rights does not create justiciable rights applicable to Poland or the United Kingdom, Article 1(2) of Protocol No 30 first reaffirms the principle, set out in Article 51(1) of the Charter, that the Charter does not create justiciable rights as between private individuals. However, Article 1(2) of Protocol No 30 also appears to rule out new EU rights and entitlements being derived from Articles 27 to 38 of the Charter of Fundamental Rights, on which those entitled could rely against the United Kingdom or against Poland. Because the contested fundamental rights in the present case are not among the social fundamental rights and principles set out in Title IV of the Charter of Fundamental Rights, however, there is no need to examine in any greater detail here the question of the precise validity and scope of Article 1(2) of Protocol No 30. It is sufficient to refer to the 10th recital in the preamble to Protocol No 30, according to which references in that protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter."

The result is that although there is no complete opt-out from the Charter, the effect of the Charter might be limited in the UK and Poland regarding social rights. Article 2 of the Protocol is also only relevant, in effect, as regards social rights. "The question would then arise whether those social rights were in any event granted by the 'general principles of EU law' – which pre-existed the Charter, which are still preserved in force by Article 6(3) of the Treaty on the European Union, and which do not appear to be restricted by the Protocol as regards the UK and Poland."⁴⁶

Could the exception granted to the UK and Poland (and eventually to the Czech Republic) be overcome by the Court of Justice of the EU using the indirect ways in the future? While the Charter is limited to the EU institutions and Member States applying the EU law, the Court's case law has no such limitation. "Moreover, the ECJ is a well-known protector of the single market and the four freedoms. Thus if some human rights (particularly the solidarity rights) are more restricted in one Member State than in others, the ECJ could regard it as a hindrance to the single market or infringement of the said freedoms and promote the protection of such rights only on the basis of the provisions of the fundamental Treaties without any regard to the Charter."⁴⁷

However, should the current UK readiness to quit the European Union project become more than rhetoric, the Protocol will remain only one of the manifestations of British Euroscepticism. As the UK gradually admitted "despite the rhetoric of various British politicians (including former Prime Minister Tony Blair) the Protocol simply does not read as an opt-out as it seeks to clarify the application of the EU Charter. The judgment in N.S. simply confirms that plain reading"⁴⁸. Calling the Protocol an opt-out was more of a political manoeuvre than a legal argument and it may be seen as a concession to British Euroscepticism.

On the other hand, Croatia will become a full member of the EU in July 2013 which may or may not restir the fading interest in the Protocol on behalf of the Czech

⁴⁶ PEERS, S.: Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"? Statewatch analysis ISSN 1756-851X. Available at: <http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf> (Last visit on 21 January 2013)

⁴⁷ JIRÁSEK, J.: Application of the Charter of Fundamental Freedoms of the EU in the United Kingdom and Poland according to the Lisbon Treaty. In: *Europeanization of the National Law, The Lisbon Treaty and Some Other Legal Issues. Sborník příspěvků z konference Cofola 2008 13.-14.5.2008*. Brno: Masarykova univerzita, 2008. 1-9 pp. ISBN 978-80-210-4630-6

⁴⁸ MURPHY, C.: The EU on Asylum, Greece and the UK Protocol on EU Charter. Available at: <http://www.humanrights.ie/index.php/2011/12/28/nsjudgment/> (Last visit on 21 January 2013)

Republic, although with the current CJ EU case law track even the Czech may be discouraged in its pursuit. Moreover, the Czech Parliament is said to be unlikely to ratify the Protocol with the necessary qualified majorities and the Protocol may remain the president Václav Klaus initiative only. Doubts persist about the willingness of the Czech Parliament to complete ratification of the new protocol aimed at extending the application of Protocol No 30 to the Czech Republic.⁴⁹ The Czech Parliament ratified the Treaty of Lisbon without any reservations or qualification concerning full adherence by the Czech Republic to the Charter and the Czech Senate opposed the application of Protocol No. 30 on the grounds that it would reduce standards of protection of fundamental rights and freedoms of Czech citizens.⁵⁰ The Czech Republic is actually currently considered to be in a trap - firstly, it expects European Council to keep its promise, secondly it does not wish to step back and appear indecisive. The exclusion of the Czech Republic from the application of the Protocol was backed up also by the Czech Helsinki Committee.⁵¹

As for Poland, the European Parliament Committee on Constitutional Affairs Rapporteur Andrew Duff in his report⁵² stated that "subsequent to the entry into force of Lisbon, the Protocol appears to have been completely disregarded by the Polish judiciary. A constitutional mechanism has been devised whereby Poland could decide to amend or to withdraw from the Protocol. The possibility of withdrawal is now a matter of political debate in Poland."

Professor Niamh Nic Shuibhne is of the opinion that the formulation of the content of the protocol raises questions "beyond the substance of the fundamental rights. It highlights also (ab)use of the discourse or message of rights."⁵³ We may conclude along with the European Parliament Committee on Constitutional Affairs that "on the basis of academic evidence and case-law, Protocol No 30 does not exempt Poland and the United Kingdom from the binding provisions of the Charter, it is not an 'opt-out', it does not amend the Charter and it does not alter the legal position which would prevail if it were not to exist. The only effect it has is to create legal uncertainty not only in Poland and the United Kingdom but also in other Member States. (...) An important function of the Charter is to increase the prominence of fundamental rights and to make them more visible, but Protocol No 30 gives rise to legal uncertainty and political confusion, thereby undermining the efforts of the Union to reach and maintain a uniformly high and equal level of rights protection."⁵⁴ The future Court of Justice case law may unveil more about the role of the Protocol in the field of social rights.

⁴⁹ Third draft report on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE)) Committee on Constitutional Affairs Rapporteur: Andrew Duff 2011/0817(NLE)11.12.2012

⁵⁰ Resolution 330 of 6 October 2011

⁵¹ See <http://www.helcom.cz/en/view.php?cisloclanku=2012040401>

⁵² Third draft report on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE)) Committee on Constitutional Affairs Rapporteur: Andrew Duff 2011/0817(NLE)11.12.2012

⁵³ SHUIBNE, N.N.: The realty to rights: From rhetoric to opt-out (Editorial). In: *European Law Review*. 2009, vol. 34, December. 815-816pp. ISSN p.816

⁵⁴ Third draft report on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE)) Committee on Constitutional Affairs Rapporteur: Andrew Duff 2011/0817(NLE)11.12.2012