

# **APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU IN THE UNITED KINGDOM AND POLAND ACCORDING TO THE LISBON TREATY**

**JAN JIRÁSEK**

Faculty of Law, Masaryk University

**VLADIMÍR TÝČ**

## **Key words**

European Union, Lisbon Treaty, human rights, Charter of Fundamental Rights of the European Union, legal force, the United Kingdom, Poland, Protocol, European Court of Justice.

## **The Charter in General, its Legal Force and its Inclusion in the Lisbon Treaty**

It is a well-known fact that the Charter of Fundamental Rights of the European Union (hereinafter “the Charter”) was solemnly proclaimed by the Presidents of the European Parliament, the Council of the European Union and the European Commission in Nice European Council on the 7<sup>th</sup> December 2000. The Charter was not annexed to the fundamental Treaties and its legal force remained undetermined. However, there are several reasons why the Charter should be legally binding. First, the Charter shall be binding at least on the European Parliament, European Commission and European Council due to the fact that the Charter was proclaimed by the presidents of these institutions. As the Commission put it nicely, “the institutions that have proclaimed the Charter, have committed themselves to respecting it”. The Charter could be therefore regarded as a binding inter-institutional agreement. Second, certain provisions of the Charter must be considered as binding on all institutions of the EU and also on Member States. These are provisions that consolidate the existing law (mainly the case law of the ECJ). Moreover, we cannot hide the fact, that the Charter has been already used by the European Court of Human Rights in its decisions and also the ECJ mentioned the Charter (although very carefully).

The debate on legal force of the Charter shall be finished when the Lisbon Treaty comes into effect. After the ratification process is finished, the Charter shall be legally binding for institutions of the EU and for the Member States when they are implementing Union law.

## **The Approach of the United Kingdom and Poland towards the Charter**

The United Kingdom expressed its general objection against a legal binding European bill of rights already during drafting the Charter. The British politicians were afraid that such bill of rights (administered by the ECJ) could mean more interference from Europe in British domestic affairs. Particularly, the British opposed a large concept of the so called rights of solidarity (Title IV of the Charter) because of very liberal conditions and rules governing this area in the UK. An acceptance of this part of the Charter as legally binding would visibly change the legal system of the United Kingdom. Therefore the UK decided to attach a special protocol to the text of the Lisbon Treaty in which an opt-out from the Charter was realized

The Polish reason to object the Charter is a more political one. The Polish government led by the Prime Minister Jaroslaw Kaczynski was not satisfied with the provision of the Charter prohibiting discrimination on the grounds of sex and with the definition of the right to marry and the right to found a family. These provisions aim among others to the legal recognition of the same-sex union; however, the Polish government assumed that such recognition would violate the country's cultural heritage. Therefore Poland joined the UK protocol. The new Polish government, formed after elections in October 2007, has no such objection. Nevertheless, the new government needed the support of Jaroslaw Kaczynski's party in order to reach the two-thirds majority required to ratify the Lisbon Treaty as a whole. As a result, the Polish attitude towards the Charter remained unchanged.

## **The Possible Practical Results**

Although there is not any express ban on applying the Charter in Poland and the UK in article 1 paragraph 1 of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (hereinafter "the Protocol"), this provision does not allow the ECJ and national courts to find out that some Polish or UK legal rules are incompatible with the Charter. Paragraph 2 of the article 1 of the Protocol seems to limit this general ban only to Title IV of the Charter (solidarity rights). However, such interpretation would be contrary to the aim of Poland which objects to rights contained in other parts of the Charter.

Therefore the second paragraph of art. 1 of the Protocol apparently has just an illustrative or explanatory character. The same could be said about two Polish declarations annexed to the Final Act of the conference that adopted the Lisbon Treaty, i. e. these declarations do not limit the scope of general ban on application of the Charter in Poland.

However, the idea of the Protocol that the Charter will not be applicable in Poland and the United Kingdom could be easily overcome by one important European actor – the ECJ. As mentioned above, fundamental rights as a general principle of EU law are protected through the case law of the ECJ until now. This case law is then based on legal cultures and constitutional traditions of Member States, on European Convention on Human Rights and other international human rights instruments and of course on the case law of the European Court of Human Rights. Although it is presumable that the ECJ will respect the provisions of the Charter and apply them, nothing can possibly prevent the court from adopting an extensive interpretation of the Charter and rule beyond its provisions. We must also bear in mind that the scope of application of the Charter is limited only to EU institutions and to the Member States when applying the EU law. However, the case law of the ECJ on the field of human rights 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.

In Conclusion, the United Kingdom and Poland will not be formally bound by the Charter provisions. However, if the ECJ decides that a certain human right (e.g. right to strike or right to live in a same-sex union) form a human right which is inherent with the EU or whose restriction could threaten the single market, the United Kingdom and Poland will be bound by this decision – and indirectly by the Charter. Nevertheless, such decision of the ECJ would be a political one and it is hard to say whether the ECJ finds courage to rule in this sense.

**Contact – e-mail:**

*jan.jirasek@nssoud.cz*