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Fundamental Rights Protection in the European Union post Lisbon Treaty

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INTRODUCTION

The 1957 Treaty establishing the European Economic Community (EEC) has long been silent on the protection of fundamental rights within the legal order of the Community. Although it did refer to the principle of non-discrimination on the basis of nationality and some workers' rights, the Treaty lacked a proper bill of rights. It has been suggested that the idea of including a comprehensive bill of rights was rejected on the grounds that this may be wrongly construed as an undue extension of the powers of the EEC when its primary goal was the attainment of economic integration by establishing a common market. Furthermore, another organisation was already in charge of protecting fundamental rights in Europe: the Council of Europe, founded in 1949.

The lack of specific and exhaustive provisions for the protection of fundamental rights has not meant, however, the absence of legal protection. As early as 1969, and to answer the concerns expressed by some national courts, the European Court of Justice (ECJ) finally held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see Case 29/69). From then onwards, the ECJ has regularly interpreted or reviewed the validity of EC measures in the light of fundamental rights as protected in the Community legal order. Yet for all these legal developments, the EC still lacked a codified declaration of rights of its own. As a result, it has been regularly argued, most notably by the European Commission in a 1979 memorandum, that the EU should seek accession to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Such a change, however, was held by the ECJ to constitute a fundamental constitutional change, which could not be implemented without a prior revision of the founding Treaties (see Opinion 2/94). This legal impasse finally convinced EU leaders to consolidate EU fundamental rights in a single document essentially to enhance the visibility of those rights. After much acrimonious debate, the Charter of Fundamental Rights of the EU (the Charter) was "proclaimed" on 7 December 2000.

With the entry into force of the Lisbon Treaty last December, the Charter has finally become a legally binding and core element of the Union's legal order. This is not, however, the sole major change – albeit undoubtedly the most controversial – brought about by the Lisbon Treaty as the EU has also gained the constitutional power to seek accession to the ECHR. Before offering a concise yet critical overview of the legal impact of these two key changes, or rather the likely impact in the case of EU accession to the ECHR, the content of the main amendments made to Article 6 TEU, the key treaty provision as far as EU respect for fundamental rights is concerned, will be briefly described.

1. MAIN AMENDMENTS MADE TO ARTICLE 6 TEU

EU Member States have long advertised their determination "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality, and social justice" (Preamble of the Single European Act, 1986). Yet no treaty provision specifically dealt with the general matter of fundamental rights protection until the 1992

Maastricht Treaty when a new Article F(2), essentially codifying the case law of the Court, provided that the EU must respect fundamental rights as general principles of law. This treaty provision, which became known as Article 6(2) TEU following the entry into force of the Amsterdam Treaty, was further amended to make clear that the EU is based inter alia on the principle of respect for fundamental rights (Article 6(1) TEU). Overall, Article 6 TEU did not bring about a radical legal change. By contrast, the “new” Article 6 TEU, as amended by the Lisbon Treaty, illustrates, if one dare say, both a quantitative and qualitative jump. Following some protracted negotiations and unfortunate compromises, two key reforms survived the “abandonment” of the Constitutional Treaty. Indeed, the new Article 6 TEU not only makes the Charter legally binding, it also provides that the EU shall accede to the ECHR. The post Lisbon role reserved for the general principles of law and the reforms relating to the jurisdiction of the EU courts will also be briefly alluded to.

1.1 Change to the legal status of the Charter by cross-reference

The first most significant and immediate change relates to the status of the Charter. As amended by the Lisbon Treaty, Article 6(1) TEU provides that the EU “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties” (our emphasis).

This change to the legal status of the Charter follows a prolonged battle as regards the question of whether and, if so, how the Charter should be made legally binding. To put it rather schematically, Tony Blair’s government was particularly keen to neutralise any legal effects it may produce by opposing any incorporation into the founding treaties. The British government’s intransigence initially paid off and the Charter was merely “proclaimed” by the Council, in association with the European Commission and the European Parliament. The rather ambiguous nature of the notion of proclamation has not precluded the Charter from having a “soft” impact on the case law of EU courts. As explained, for instance, by Advocate General Kokott, while the Char-

ter “does not produce binding legal effects comparable to [EC] primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order” (Opinion in Case C-540/03, para. 108). In practice, EU judges, in a large number of cases, have found it useful to refer to the Charter as a substantive point of reference to assist their interpretation.

For most observers, and more importantly, most national governments, this situation was not satisfactory. The incorporation of the Charter into the 2004 Constitutional Treaty as its Part II was, therefore, largely welcomed. This broad support also explains why the European Council’s decision to abandon this latter text in June 2007 did not lead to the abandonment of the Charter. However, the text of the revised Charter – some changes were in particular made to the “horizontal articles” (see infra Section 2.1.2) during both the negotiations on the Constitutional Treaty and, to a minor extent, the Lisbon Treaty – has not been reproduced into the main body of the Treaties or even in a Protocol annexed to the EU Treaties. Instead, Article 6(1) TEU makes a “cross reference” to the text that was “re-proclaimed” in Strasbourg on 12 December 2007, one day before the signing of the Lisbon Treaty. One may deplore this choice from a didactic or readability point of view but legally speaking, the final result remains very much the same: the painful but ultimately successful ratification of the Lisbon Treaty means that the EU Charter has now become a cardinal element of the Union’s body of “primary”, that is, “constitutional” rules. The fact that the text of the Charter is available as a stand-alone document in the EU’s Official Journal (OJEU C 83/391, 30 March 2010), rather than reproduced in the substantive text of Treaties, whose consolidated version was published in the same issue of the Official Journal (OJEU C 83/01, 30 March 2010), is irrelevant in that respect. Before reviewing at greater length the impact of the change to the legal status of the Charter, the provision dealing with EU accession to the ECHR should be briefly presented.

1.2 EU accession to the ECHR

New Article 6(2) TEU provides that the Union “shall accede” to the ECHR – this provision therefore requires EU action rather than merely offering an option – and

that “*such accession shall not affect the Union’s competences as defined in the Treaties.*”

This provision is the by-product of a long and convoluted history. Proposals for accession of the Community to the ECHR have indeed been discussed on and off since the late 1970s. Following the ECJ’s opinion holding that EU accession requires treaty revision as it would result in a substantial change to its system for protection of human rights, this idea was put to the back burner until it re-emerged at the time of the drafting of the Constitutional Treaty. For the first time, it was also agreed that the Charter would be transformed into a legally binding instrument and that the adoption of an EU Bill of Rights and EU accession to the ECHR should be pursued as complementary rather than alternative goals.

Numerous arguments have been offered in support of EU accession to the ECHR. It is worth briefly mentioning the most significant ones if only to realise that legal concerns may not be the decisive ones. First and foremost, EU accession has been defended on the ground that it would be symbolically important as it would send a positive message stressing the EU’s commitment to fundamental rights protection internally as well as externally. Secondly, EU accession would also give a strong signal of the coherence between the EU legal system and the national ones. To the non-specialist, it may indeed be quite difficult to understand why the EU is not formally bound by the ECHR whereas EU member states are all members of the Council of Europe and accession to the ECHR is one of the conditions of entry into the EU. More legalistic arguments have been offered. For instance, EU accession to the ECHR has been defended on the ground that it will eventually afford citizens protection against EU acts similar to that which they already enjoy against national measures. It is also often assumed that such a step is required to preclude any potential divergence in human rights standards between the ECJ and the ECtHR. Viewed in this light, the fact that the ECJ would come under direct, external and specialised judicial supervision in the same fashion as national courts, is seen as a desirable development.

While EU accession to the ECHR raises a certain number of issues (See *infra* Section 3), the fact that the EU is

not currently a party to the ECHR has not precluded the ECJ from relying heavily on its provisions as well as the case law of the ECtHR when developing its fundamental rights jurisprudence via the notion of general principles of law.

1.3 Fundamental Rights as General Principles of Law

As amended by the Treaty of Lisbon, Article 6(3) TEU provides that “*Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.*”

In doing so, the new Article 6(3) TEU closely reflects the formerly existing provision, which itself merely acknowledged an early jurisprudence of the ECJ according to which respect for fundamental rights forms an integral part of the general principles of law protected by the Court. The Court’s early case law also made clear that in identifying particular fundamental rights and interpreting their content, the Court draws “*inspiration*” from the constitutional traditions of the Member States (Case 11/70) and from international human rights treaties (Case 4/73). As regards the ECHR, it is worth stressing that the ECJ rapidly recognised its “*special significance*” amongst those international treaties even though this expression was not explicitly used before a 1989 ruling (Joined Cases 46/87 et 227/88). And while the ECJ has no jurisdiction to apply the ECHR, as it does not constitute a formal source of EU law, the ECJ has extensively referred to its provisions as well as the case law of the ECtHR to assist its interpretation of EU human rights standards.

By continuing to refer to the concept of general principles of law, the EU Treaty enables the EU courts to eventually go beyond the fundamental rights protected by the Charter and/or the ECHR. This may prove important as, for instance, the interpretation and application of the EU Charter is made extremely complex by a series of confusing “*horizontal clauses*” to be examined *infra*. The change to the legal status of the EU Charter also raises the question of whether the general principles of law may, or rather should progressively become, as suggested by several influential actors, a subsidiary and complementary source of

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EU fundamental rights by contrast to the EU Charter, which should be considered the “*primary source*”. From this perspective, EU courts should only rely on general principles of law where there is a need to remedy the Charter’s eventual lacunae. In any event, it is quite clear that general principles of law are here to stay.

1.4 Miscellaneous

As a Union formally based on the principle of the rule of law, the EU is supposed to offer a complete set of legal remedies and procedures in order to ensure that its institutions, as well as its Member States where relevant, adopt measures in conformity with the EU’s “*constitutional*” rules. The ECJ has also regularly held that the rule of law means that natural and legal persons must be able to challenge the legality of any act that affects their EU rights and obligations. Put simply, there was a clear need here to bridge the gap between theory and reality as the unfortunate “*three-pillar*” structure created by the Maastricht Treaty has long meant that EU measures could not always be subject to judicial review. By ending the previous patchwork of confusing restrictions imposed on the jurisdiction of the ECJ and marginally reforming the law of legal standing for individuals in annulment actions, the Treaty of Lisbon offers a series of positive changes which should be briefly mentioned as they are likely to impact on the protection of fundamental rights.

As regards the jurisdiction of the ECJ, the most important change relates to measures adopted in the area of Freedom, Security and Justice (new Title V, Part III of the TFEU), which will all come under the general jurisdiction of the Court. For instance, preliminary references will, for the first time, be possible from all national courts and tribunals on questions relating to asylum, immigration and civil law matters. Another reform worthy of note is the new “*urgent preliminary ruling*” procedure on the basis of which the ECJ, where applicable, can act with “*minimum delay*” in giving preliminary rulings at the request of Member States, where, for instance, an individual is in custody. Generally speaking, the ECJ nonetheless continues to lack jurisdiction in respect of law and order or security measures adopted by the Member States as well as over common foreign and security policy (CFSP) measures adopted by the

EU with one exception: the ECJ has gained jurisdiction over actions for annulment brought against decisions of the Council providing for restrictive measures (e.g. freezing of assets) against natural or legal persons in connection, for example, with combating terrorism. In any event, EU accession to the ECHR is likely to mitigate the ECJ’s lack of jurisdiction over CFSP measures as the ECtHR refuses to exclude such acts from being judicially reviewed.

As regards annulment actions and legal standing, the Treaty of Lisbon also enables private parties, for the first time, to challenge the legality of self-executing “*regulatory acts*” of direct concern to them – an already significant obstacle in practice – without having to prove as well they are also individually concerned. While this is a modest yet welcome change, one may regret that the Treaty of Lisbon does not provide for a special remedy to challenge EU measures allegedly violating EU fundamental rights, which could have been based on the remedies existing either in Germany or Spain. The EU courts’ already bloated caseload is nonetheless a powerful counter-argument and as long as access to the Strasbourg Court is effectively organised, a special remedy might not be justified on pragmatic grounds. This, however, should not have precluded conferring on the recently established EU Fundamental Rights Agency the right to bring annulment actions for the purpose of protecting fundamental rights.

2. LEGAL IMPACT OF THE NEW EU CHARTER’ STATUS

The question of whether the Charter post Lisbon Treaty is likely to have a significant legal impact is not an easy one to answer. In order to do so, one must not only assess whether the Charter should be mostly understood as a consolidating effort but also attempt to make sense of the general provisions that govern its interpretation and application. Less decisive albeit highly controversial aspects such as the justiciability of the Charter’s socio-economic rights or the British/Polish “opt-out” also deserve to be succinctly explored.

2.1 Consolidation or revolution?

While the adoption of a formal EU declaration of rights, along with EU accession to the ECHR, has long been

advocated, this idea was only successfully revived in January 1999 thanks to the German Foreign Affairs Minister, Joschka Fischer, who proposed the drafting of an EU “*Charter of Basic Rights*” primarily in order to remedy a perceived “*rights deficit*”. EU leaders proved accommodating and the European Council, at its Cologne meeting in June 1999, decided to convene an ad hoc body, later known as the Convention, and whose mission was to consolidate the fundamental rights applicable at EU level in a single text “*to make their overriding importance and relevance more visible to the Union’s citizens*” (Presidency Conclusions). It is therefore quite obvious that national governments did not wish to guarantee “*new*” rights but rather hoped to strengthen the EU’s legitimacy by making it easier for the layperson to rapidly appreciate the nature and extent of his or her fundamental rights under EU law. A key question is whether the content of the EU Charter illustrates a departure from the European Council’s instructions by guaranteeing new rights?

2.1.1 “*New*” v. existing rights

The Charter itself explains that it “*reaffirms*” - with due regard for the powers and tasks of the EU and for the principle of subsidiarity - fundamental rights as they result from various sources, including the ECHR, national constitutional traditions and international obligations of Member States, the Social Charters of the EU and the Council of Europe as well as the case law of the ECJ and the ECtHR.

A rapid look at the Charter’s fifty “*rights, freedoms and principles*” should lead the reasonable observer to conclude that the Charter may indeed be best described as a gifted crystallization of existing fundamental rights contained in the sources previously mentioned. What’s more, the language used by the drafters of the Charter also reflects existing national, EU and international provisions. However, it is possible to argue that some of the Charter’s rights are “*new*” to the extent that the ECJ has yet to explicitly guarantee them as general principles of law. In fact, a little more than half of the Charter’s rights codify already binding general principles of Union law. What may also be said to be “*new*” is not the modern and innovative rights the Charter occasionally refers to

(e.g. the right to the protection of personal data, the right to a high level of environmental protection, etc.), but rather the fact that these rights, while arguably not new rights, as they already enjoy some protection under various legal instruments, had not hitherto been regarded as fundamental rights in the EU context. To put it differently, while rights such as the right to good administration or the right of access to preventive health care already enjoyed a variable degree of protection under EU law and in most Member States on the basis of national law and/or international law obligations, their consecration as fundamental rights was still missing.

This new “*labelling*” does not, however, automatically transform them into directly enforceable individual rights because of the change to the status of the Charter. This is in reality true of all the Charter’s rights, freedoms and principles, which means that individuals have not gained new “*options*” to challenge the legality of EU measures or national measures where relevant. Similarly, it does not mean that the EU has gained new powers, or that the EU Charter has now become the equivalent of the US Bill of Rights as we shall see below. EU Courts, however, must now pay due regard to the new “*status*” conferred on the Charter’s rights. This should especially matter in the situation where a Charter’s right, not already protected as a general principle of law, must be balanced with conflicting EU “*constitutional*” norms. “*Sufficient weight*” would have to be given to those rights recognised in the EU Charter. And where EU courts must review the legality of EU measures or national measures falling within the scope of EU law, contrary EU “*legislation*” will have to be annulled and incompatible national provisions set aside. In other words, the major legal effects one can infer from the Charter’s new legal status is that it will further encourage judicial references to the Charter, whose provisions should also more decisively guide the EU judiciary when adjudicating fundamental rights claims or more generally, in its task of ensuring that in the interpretation and application of the EU Treaties, the law is observed. A less significant consequence of the Charter’s legally binding status is that it might also constrain the EU courts’ interpretative power when it comes to the use of general principles

of law, although Article 6(3) TEU continues to formally enable the EU courts to develop their case law on this “*autonomous*” basis if they so wish.

2.1.2 An enlargement of the EU’s powers through the backdoor?

In addition to the question of whether the Charter guarantees new rights or merely restates existing ones, concerns have been expressed in relation to the traditional “*competence creep*” issue. To answer those concerns, not only does the Charter contain a series of rather awkward and at times, unnecessary “*horizontal clauses*,” i.e. general provisions describing in particular the Charter’s scope of application and how its provisions ought to be interpreted, new Article 6(1) TEU also makes clear that the Charter’s provision “*shall not extend in any way*” EU competences “*as defined in the Treaties*.” The same provision further stipulates that the Charter’s rights, freedoms and principles are to be interpreted in accordance with its “*horizontal*” provisions “*and with due regard to the explanations*” prepared by the Bureau of the Charter Convention in 2000 and that set out the sources of those provisions. Rather pointlessly, if not embarrassingly, national governments also agreed to a Declaration where they assert, yet again, that “*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 by the Treaties*.”

As a result, it seems ludicrous to equate legally binding status with an enlargement of the EU’s powers through the backdoor. The Charter cannot offer, in itself, a legal basis for the EU to legislate. The fact that certain Charter rights concern areas in which the EU has little or no legislative power to act – for instance, the right to strike – is no contradiction but merely illustrates the drafters’ wish to make clear that the EU must avoid indirect interference with such rights. In practice, this means, for instance, that Member States may in fact be able to more easily justify national measures that constitute restrictions on the EU’s “*four freedoms*” such as the freedom to provide services, by reference to the Charter’s rights or principles over which the EU has no competence.

2.1.3 A Federal Bill of Rights?

Another point of contention is whether the ECJ has now been empowered to review any provision of national law in the light of the Charter. Even in areas where the EU can legislate, the reach of the Charter is not boundless. The Charter itself confirms that national authorities, when acting outside the scope of EU law, are not bound by its provisions. In other words, it is still a condition for the EU courts in exercising their jurisdiction that the relevant national measures fall “*within the scope*” of EU law. While this may be seen as a fairly ambiguous notion, it is simply wrong to affirm that individuals have now gained the right to institute judicial proceedings on the basis of any provision of the Charter, in any situation, against any measure adopted by national or EU public authorities. If anything, the Charter may be criticised for apparently narrowing the current reach of EU fundamental rights law as it contains a provision which provides that the national authorities must respect EU fundamental rights “*only when they are implementing Union law*” (Art. 51(1)) whereas the case law of the ECJ makes clear that EU fundamental rights are binding on national authorities when they (i) apply provisions of EU law which are based on protection for fundamental rights; (ii) enforce and interpret EU rules or (iii) invoke EU derogation rules relating to the fundamental economic freedoms such as the free movement of goods. One may only hope that the ECJ will eventually remedy the drafting deficiencies of the Charter on this point. What is nevertheless crystal-clear is that the EU Charter is not going to enable the ECJ to act in a similar fashion to the US Supreme Court, that is, to define a “*federal*” standard against which all national rules may be evaluated and eventually set aside. The crucial point is that fundamental rights guaranteed by national constitutions and/or the ECHR are complemented, not superseded by the Charter. While one may legitimately express some concerns with regard to the possibility of future judicial activism and the potential federalising effect of the Charter, the ECJ, if only for “*diplomatic*” reasons, is likely to show self-restraint in order not to let the fundamental rights “*genie*” get out of the bottle. One should note, in passing, that some Member States actually took advantage of the constitutional drafting process to seek to further constrain the interpretative power of the EU courts by

including a provision which compels them to interpret the Charter's rights resulting from the constitutional traditions common to the Member States, "*in harmony with those traditions*" (Art. 52(4)). Put succinctly, this is likely to prove a largely futile caveat as the EU courts may simply avoid deciding what rights fall within this category and what constitutes an "*harmonious*" interpretation.

2.2 Selected aspects

2.2.1 Justiciability of the Charter's socio-economic rights or the uneasy distinction between rights and principles

The Charter has sometimes been denounced as a potential hindrance for businesses by allegedly making new socio-economic rights equally as enforceable as more traditional political and civil rights. Undeniably, the Charter goes beyond the rights contained in the ECHR by including a rather impressive and "*progressive*" set of economic and social rights in its Title IV entitled Solidarity. Yet one must emphasize that the socio-economic rights referred to in the Charter are mostly drawn from the 1961 Council of Europe's Social Charter (revised in 1996), the 1989 Community Charter of Fundamental Social Rights of Workers and several EC Directives.

The relatively complex concept of justiciability, i.e. the quality of a legal provision of being actionable before a court, explains most of the misrepresentations made in relation to the Charter as regards the enforceability of its socio-economic provisions. Only classic fundamental rights (e.g. freedom of expression) are said to be fully justiciable, meaning that they confer on any legal person an individual prerogative that can be judicially enforced on a third party and, in particular, on public authorities without the need for legislative implementation. This view is misguided to the extent that some socio-economic rights are also capable of "*hard*" legal enforcement. That is the case, for instance, for rights relating to the worker's status such as the right to strike or the right to join a union. The situation gets more complex as regards positive socio-economic rights (e.g. right to education, right to engage in work, etc.), rights that imply positive action from public authorities to secure access to the benefits or services

these rights guarantee. Without entering into a debate about whether the programmatic nature of such rights undermines the concept of subjective rights or the concept of human rights itself, it is important to clarify their practical scope in order not to disappoint some or worry others. A distinction between justiciability and invocability of interpretation may be useful. In a few words, without legislative implementation, positive socio-economic rights do not have direct effect. Accordingly, private parties cannot directly rely on them before a court to claim access to or the creation of a particular benefit or service. If these socio-economic rights are not justiciable per se, courts, however, have to apply them as "*principles*" to be taken into account, in particular when interpreting or reviewing the legality of legislation.

This is a decisive aspect, which reflects the current situation under the EU Charter. Indeed, following some British lobbying, additional amendments were made to the Charter in 2004 to make clear beyond any doubt that its provisions which contain principles "*may be implemented*" by EU acts or by national acts when the Member States are implementing EU, and that the Charter's principles "*shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality*" (Article 52(5)). While not indispensable and inelegantly phrased, this provision recalls a traditional distinction between directly enforceable and programmatic rights. To describe these programmatic rights as principles makes no legal difference. In other words, the Charter's principles, as with the positive socio-economic rights protected by numerous constitutional texts, call for "*concretisation*" through legislative or executive acts. As previously shown, it does not mean that they completely lack legal effect. They will become significant for courts when they have to interpret or review EU secondary legislation or national measures falling within the scope of EU law.

Not completely satisfied with its success on the semantic front, the British government's mistrust of socio-economic rights led to the unfortunate incorporation in 2004 of a new Article 52(6) according to which "*full account shall be taken of national laws and practices as specified in this Charter*". This may seem superfluous

as most of the “solidarity” rights were only guaranteed in accordance or under the conditions provided for by EU law and national laws and practices. This caveat does not make much sense because the Charter, by definition, can only apply to situations governed by EU law, in which case any conflicting provision of national law must be set aside. The reference to national laws and practices may merely be construed as obliging EU institutions to formally take them into account before agreeing on new EU legislation. In any event, the opportunity to further constrain the Charter’s scope, and preclude its application in Britain, proved too tempting when the EU leaders had to agree on a successor to the defunct Constitutional Treaty. A new Protocol was then devised in order to satisfy the British government’s “wish ... to clarify certain aspects of the application of the Charter” (Recital 8). This Protocol, which the Polish President Lech Kaczynski also decided to sign up to, shall eventually apply to the Czech Republic following some last-minute agreement with the Czech President in October 2009 provided that it is unanimously ratified at the time of the conclusion of the next Accession Treaty.

2.2.2 The Protocol on the Application of the EU Charter to Poland and to the United Kingdom

A rapid reading of the UK and Polish Protocol should suffice to realise that it does not offer any general “opt-out” or genuine derogation regime from the Charter. It rather clarifies its “application” in relation to the national laws and administrative action of these two countries. In other words, Protocol no. 30 does not render the Charter wholly inapplicable in the UK and Poland. A brief assessment of the two ineptly worded provisions contained in this Protocol confirms that it was essentially devised for reasons of domestic politics.

For instance, by providing that the EU Charter “does not extend the ability” of the ECJ, or any court or tribunal of the UK/Poland “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,” Article 1(1) of the Protocol merely restates the obvious as the Charter itself provides that it does not and cannot be relied on to extend the

powers of EU institutions, including the ECJ, but does so, however, in an incredibly awkward manner by referring in particular to the puzzling notion of “ability” rather than the traditional notion of jurisdiction. And generally speaking, this provision will not preclude the ECJ from ruling that UK or Polish rules or practices are contrary to EU fundamental rights which are guaranteed as general principles of Union law or which are further developed by other provisions of EU law. Article 1(1), therefore, serves no useful legal purpose.

Paragraph 2 of the same Article states that “for the avoidance of doubt, nothing in [the Solidarity’s title] 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.” This provision seems both superfluous and misleading. Firstly, as previously shown, the Charter’s Solidarity Title does not create judicially enforceable individual rights but lists a series of principles that must essentially guide the legislative action of EU institutions and may be relied on by EU courts when interpreting or reviewing the legality of EU legislation. Secondly, Article 1(2) cannot be effective with regard to the “solidarity” rights that were already guaranteed in EU law before the Lisbon Treaty and which have been further developed by EU legislation or can be subject to EU legislation because the EU has been conferred with the power to do so. Those socio-economic rights should continue to be exercised under the conditions and within the limits defined by EU law regardless of the British/Polish Protocol. And as is well known, any provision of EU law, which is sufficiently clear, precise and unconditional, must be given direct effect, i.e. is justiciable. Furthermore, where a socio-economic “principle” constitutes a general principle of Union law, and one should remember that the ECJ has retained the power to define new general principles of law under Article 6(3) TEU, the British/Polish Protocol becomes totally irrelevant. In other words, Article 1(2) of the Protocol should not be understood as giving the UK and Poland carte blanche to evade their other obligations under the EU Treaties and EU law generally. In the situation where the Charter guarantees a solidarity right, which no other provision of EU law already guarantees or develops (e.g. the right to strike, a right of access to preventive healthcare), one may assume it is

because the EU has not been granted the competence to legislate in this particular area. Accordingly, Article 1(2) does not provide any useful clarification. It has always been clear that the EU, on the sole basis of the Charter, cannot legislate in order to give a concrete meaning to a “solidarity” principle and eventually transform it into an individual enforceable right.

Finally, according to Article 2 of the Protocol, any provision of the Charter referring to national laws and practices shall only apply to Poland or the UK “to the extent that the rights or principles that it contains are recognised in the law or practices” of these two countries. This additional “clarification,” yet again, merely restates the obvious as the Charter already made clear, on British insistence, that those rights for which the EU has little or no legislative power would be guaranteed in the cases and under the conditions provided for by EU law and national laws and practices. This wording was justified on the grounds that it was critical to preserve the current allocation of powers between the EU and the Member States and the principle of subsidiarity. In practice, it means, for instance, that the right to protection against unjustified dismissal, unless further developed by EU legislation, must be interpreted and implemented in the light of national law.

To conclude, the UK and Poland have not secured the right to “opt-out” of the Charter. They did, however, obtain a Protocol that completely obscures rather than illuminates how the Charter should be interpreted and applied. To that extent, one cannot completely exclude that some national courts may find it difficult to make sense of the Protocol’s provisions. One may only hope for the ECJ to eventually clarify the legal effect (or lack thereof) of this “clarifying” text.

2.2.3 Relationship with ECHR

Before exploring some problematical issues as regards the obligation for the EU accession to the ECHR, the argument according to which the Charter sanctifies weaker standards than the ECHR is worth addressing. To put it concisely, this critique makes little sense. Not only does Article 6(3) TEU reiterate the traditional principle that fundamental rights, as guaranteed by the ECHR, “shall constitute general principles of the Union’s law,” Article 52(3) of the Charter also provi-

des that insofar as it contains rights which correspond to rights guaranteed by the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention”. In addition to this “minimum standard” rule, it is further specified that this provision shall not prevent EU law providing more extensive protection. It would seem, therefore, difficult to convincingly argue that the change to the legal status of the Charter is going to have a detrimental impact on the relationship between the EU and the Council of Europe’s systems of fundamental rights protection. In fact, the Charter has now simply taken a position in the EU equivalent to any legally binding national bill of rights. Furthermore, it may be reasonably argued that the Charter constitutes a more progressive and innovative instrument than the ECHR. Finally, there is no reason why the ECJ would not continue to pay due regard to the case law of the ECtHR when developing its fundamental rights jurisprudence.

As for the alleged “liberticide” character of Article 52(1) of the Charter, which provides that limitations on the exercise of the Charter’s rights must be inter alia provided for by law and be made only if they are necessary and genuinely meet objectives of general interest or the need to protect the rights of others, suffice to say here that this provision merely reproduces the usual conditions governing public interferences with the exercise of fundamental rights. The only original aspect of the Charter is that instead of repeating these conditions, for stylistic reasons, its drafters decided to adopt a general “derogation” scheme broadly similar to the one contained in the 1948 Universal Declaration of Human Rights. This is no basis for arguing that the ECJ may show less inclination to strictly interpret any limitation on the exercise of the rights recognised by the Charter. In any event, Article 53 further provides that “Nothing in this Charter shall be interpreted as restricting or adversely affecting” fundamental rights “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 [ECHR], and by the Member States’ constitutions.”

Finally, the Lisbon Treaty also paves the way for a possible accession of the EU to the ECHR, which means that EU measures, including ECJ rulings, will be sub-

ject, in due course, to the additional external and specialised check of the Strasbourg Court. This, however, is unlikely to prove as easy as a walk in the park.

3. PAVING THE WAY FOR EU ACCESSION TO THE ECHR

From being a legal obligation, following the entry into force of the Lisbon Treaty, EU accession to the ECHR has rapidly become a political priority as shown by the Commission's speedy announcement of its proposed negotiation directives on 17 March 2010. Yet procedural and substantive obstacles are many and it may therefore be wise not to move too hastily and take the risk of coming up with a shaky accession agreement.

3.1 Rationale and Procedure

From a legal point of view, it has often been argued that the most important reason for full EU accession to the ECHR – as opposed to functional accession, whereby EU institutions would submit to the control mechanisms of the ECHR, without the EU becoming a contracting party of the ECHR – may be the imperative to guarantee a congruent development of the case law of the ECtHR and the ECJ in the area of fundamental rights. Indeed, EU accession would finally enable the ECtHR to directly review EU measures by allowing natural or legal persons to bring applications against the EU before the Strasbourg Court under the same conditions as those applying to applications brought against national authorities, i.e. after they have exhausted domestic remedies. It would also enable the EU to defend itself before the Strasbourg Court as well as being represented in this very same Court with an EU judge.

As things currently stand, only national measures falling within the scope of EU law are effectively subject to the jurisdiction of the Strasbourg Court, i.e. acts of the Member States derogating from EU law or implementing EU secondary legislation. It may also be worth mentioning that the ECtHR initially held that it lacked jurisdiction to examine proceedings before, or decision of, the organs of the EC as the EC is not a party to the ECHR (10 July 1978, CFTD, no. 8030/77) before finally ruling, in the Matthews case (18 Feb. 1999, no. 24833/94), that it can review, in principle,

national measures that apply or implement EU Law. In this latter case, the ECtHR agreed to examine a British law implementing a treaty signed by all Member States of the EU and actually ruled against the UK. Yet the case law of the ECtHR has since demonstrated a high degree of deference to the extent that it exercises its control on the basis of the presumption that fundamental rights protection in the EU system can normally be considered to be "equivalent" to that of the Convention system (13 Sept. 2001, *Bosphorus*, no. 45036/98). Although this presumption can be rebutted on a case-by-case basis where it is shown that the protection of ECHR rights was manifestly deficient, the "*Bosphorus test*," overall, provides a low threshold when compared to the usual standard of supervision the ECtHR normally exercises.

Before returning to the question of whether EU accession to the ECHR may convince the Strasbourg Court to revise *Bosphorus* (see *infra* Section 3.2), some procedural points must be made.

Both the Lisbon Treaty and Protocol no. 14 to the ECHR, which amends the so-called control system of the Convention, have already paved the way for EU accession. This latter text, agreed in 2004 and which entered into force on 1 June 2010, not only provides a much necessary reform of the ECHR "*control system*" but also contains an article making provision for the EU to accede to the Convention (see new Article 59(2) of the ECHR). Reform of the ECHR system and EU accession to the ECHR are, in fact, closely connected. To put it differently, a profound structural reform of the ECHR "*control system*" has always been a prerequisite in order not to add to the massive backlog of approximately 120,000 pending cases before the Strasbourg Court as of 31 December 2009. In a few words, Protocol no. 14 aims to improve the effectiveness of the ECHR control system by providing mechanisms that should enable the Court to deal more promptly with clearly inadmissible applications and repetitive applications. Regardless of whether the changes made by Protocol no. 14 are going to prove sufficiently radical to address the continuing increase in the workload of the ECtHR, as regards the future EU accession, it must be made clear that "*further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view*" (Ex-

planatory Report, Protocol no. 14, § 101). It is generally assumed that these additional modifications will be included either in a new amending protocol or in the future accession agreement to be soon negotiated between the EU and the Council of Europe.

With respect to this future accession agreement, being no ordinary treaty, it must be negotiated and concluded by the EU in accordance with the specific requirements laid down in Article 218 TFEU. This means that the Council will have to unanimously agree to adopt the decision concluding the agreement after having obtained the consent of the European Parliament. Furthermore, the accession agreement will have to be approved by each EU Member State in accordance with their respective constitutional requirements. A Lisbon-type ratification drama cannot therefore be totally excluded. As if this was not sufficiently complicated, the accession agreement will also have to be approved by all 47 existing contracting parties to the ECHR, again, in accordance with their respective national constitutional requirements. This means that some non-EU countries might also be tempted to emulate Russia's past obstruction as regards the ratification of Protocol no. 14. Finally, the ECJ might even be asked to issue an advisory opinion as to whether the envisaged accession agreement is compatible with the EU Treaties. Notwithstanding these numerous procedural hurdles, a number of legal, technical and institutional issues have also to be addressed in the mandate now being devised between the Commission and the Council of the EU.

3.2 Some Problematical Issues

If we are to believe some newspapers, agreeing on a negotiation mandate is not proving an easy task but an agreement is likely to be found before the end of the Spanish Presidency. The Commission would then be in a position to negotiate the EU accession treaty to the ECHR with the Council of Europe.

Among the various divisive issues, one may first mention the reference made by the new EU Protocol no. 8 relating to Article 6(2) of the TEU, to the need to respect the "*the specific characteristics of the Union and Union law.*" This Protocol further refers to the obligation to preserve "*the specific arrangements for the Union's possible participation in the control bodies of*

the European Convention" and for the future accession agreement to offer "*mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.*" In addition, the agreement must ensure that EU accession does not "*affect the competences of the Union or the powers of its institutions.*" One should note, in passing, that this issue of competence appears to be particularly salient in relation to potential EU accession to the ECHR Protocols that have not been all ratified by the Member States of the EU. One option is for the Commission to be mandated to negotiate accession to all ECHR protocols that concern rights contained in the EU Charter before deciding at a later stage which of the ECHR Protocols the EU must sign up to. Last but not least, the future accession agreement must make clear that Member States of the EU will continue to be bound by Article 344 TFEU according to which they "*undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*"

A particularly "*remarkable*" aspect of this EU Protocol no. 8 is the fact that it does not explain precisely what the specific characteristics of the EU and its laws are. As a result, its precise scope remains quite a mystery. From an institutional point of view, it may nonetheless be argued that it implies first and foremost the appointment of an EU judge to ensure both adequate representation of the EU within the Strasbourg Court and specialised expertise on the "*specific characteristics*" of EU law. The EU judge's mandate may either be similar to the other judges' terms of office – in the Strasbourg system each contracting party is represented by a judge – or its role may be more limited, which may mean, for instance, that the EU judge should intervene only in EU law-related cases although this last option seems rather unpractical. As regards the appointment of the EU judge, it is quite possible that the future agreement will make provision for an election by the Parliamentary Assembly of the Council of Europe from a list of three candidates presented by the EU. In all likelihood, the European Parliament will be associated to the short listing process to be conducted by the European Commission and/or the Council of the EU. It

may also have a right to appoint a certain number of representatives to the Parliamentary Assembly in order to participate to the election of judges to the ECtHR. The EU via the European Commission is also likely to have a representative on the Committee of Ministers of the Council of Europe in which case the EU representative would notably be able to participate in the supervision of the execution of the ECtHR judgments but this is, once more, relatively controversial and the EU representative might see his/her right to vote limited to cases involving EU law.

Concerning the substantive features of Union law, it appears that the future agreement must essentially respect the principle of autonomy of the EU legal order. In particular, EU accession to the ECHR must not jeopardize the interpretative autonomy of the ECJ. Yet, it is well established in the case law of the ECtHR that it is primarily for the national authorities, and notably the national courts, to interpret and apply domestic law. Furthermore, the ECtHR does not rule on the validity of national law but on their compatibility with the Convention on a case-by-case basis and in concreto. The application of these principles to EU institutions and EU law should preclude therefore any problem on that front.

More problematic is the necessary adaptation of the proceedings in both individual and inter-State disputes before the ECtHR. Individuals should be allowed to challenge both the EU and the Member State where relevant. Regarding the settlement of inter-state disputes, while there should be no restriction on non-EU countries initiating proceedings against the EU in the Strasbourg Court, the principle of autonomy of the EU constitutional order requires that EU Member States be precluded from relying on the relevant ECHR procedure (Article 33 ECHR) against the EU in the context of disputes solely concerning the interpretation or application of EU law. Any different solution would be contrary to Article 344 TFEU and generally speaking, it is important not to enable the Member States of the EU to circumvent the exclusive jurisdiction of the ECJ. Another important issue is whether the EU should be allowed to intervene as co-defendant in any case brought against a Member State before the ECtHR when the case raises an issue concerning EU law. We believe it

should and by the same token, Member States should also be allowed to intervene as co-defendant in a case brought against the EU subject to the same conditions. Generally speaking, it is important to ensure that proceedings by non-Member States and individual applications could properly involve Member States and/or the Union since according to the Convention, a contracting Party is responsible for all acts and omissions of its organs.

As regards the review of the compatibility of EU acts with fundamental rights, it is particularly important that the accession agreement pays attention not to affect the authority of the ECJ. This is why some have suggested the adoption of a specific mechanism whereby prior ECJ intervention would be made compulsory before any ruling of the ECtHR. Such a system, however, would lead to additional delays for the parties and would raise the risk of open conflict between the two European courts. As correctly observed in the EP resolution of 19 May 2010 on the institutional aspects of EU accession to the ECHR, "it would be unwise to formalise relations" between the ECJ and the ECtHR "by establishing a preliminary ruling procedure before the latter or by creating a body or panel which would take decisions when one of the two courts intended to adopt an interpretation of the ECHR which differed from that adopted by the other" (para. 15). It may be that no specific mechanism between the two European Courts is actually required and, as a consequence, the exhaustion of legal remedies will continue to be an essential feature in the post accession system of judicial protection. This means, in practice and to oversimplify, that no natural or legal person will be allowed to initiate proceedings in the Strasbourg Court unless it has exhausted the internal system of remedies – the preliminary ruling procedure (Article 267 TFEU) being an integral part of this system. It is particularly imperative, if only to respect the principle of subsidiarity inherent to the Convention and the effective functioning of the EU system of judicial remedies, that the ECJ be able to assess the validity of EU acts before that the ECtHR can review them.

Furthermore, as previously mentioned, the ECJ, in its fundamental rights jurisprudence, has long relied on the provisions of the ECHR and the case law of the

Strasbourg Court even though it had no obligation to do so. This “*specific feature*” of the ECJ’s jurisprudence explains, in part, why the ECtHR agreed to consider that the EU protects fundamental rights in a manner that can be considered equivalent to that for which the Convention provides and devises a “*manifest deficiency test*” in the Bosphorus case, that is, a low standard of scrutiny for EU measures. It has been argued that EU accession to the ECHR may impact the Bosphorus approach. Put differently, the ECtHR’s rather deferential approach may be dropped or extended. Those in favour of abandoning this doctrine argue that it is important to avoid any double standard between the State parties to the ECHR and the EU. An extension of the Bosphorus approach’s scope of application would mean, by contrast, that EU regulations or Commission decisions, for instance, would be subject, similarly to national measures that strictly apply or implement EU

law, to a low degree of judicial scrutiny in Strasbourg. In any event, the accession agreement will probably be decisive for the future of the Bosphorus approach.

As should be evident from the points made above, negotiating the accession treaty and securing EU accession to the ECHR is likely to prove a slow, onerous and difficult process. Political enthusiasm may therefore be soon tempered by the dry legal complexity this process entails.

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