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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))
(00000/2011 – C7-0000/2011 – 2011/0000(NLE))

Committee on Constitutional Affairs

Rapporteur: Andrew Duff

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

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) (00000/2011 – C7 0000/2011 – 2011/0000(NLE))

The European Parliament,

- having regard to the letter from the Czech Government to the Council of 5 September 2011 on a draft protocol on the application of the Charter of Fundamental Rights of the European Union (the 'Charter') to the Czech Republic,
- having regard to the letter from the President of the European Council to the President of the European Parliament of, concerning a draft protocol on the application of the Charter to the Czech Republic,
- having regard to Article 48(3), first subparagraph, of the Treaty on European Union (TEU), pursuant to which the European Council consulted Parliament (C7-0000/2011),
- having regard to Article 6(1) TEU and to the Charter,
- having regard to Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the TEU and to the Treaty on the Functioning of the European Union,
- having regard to the conclusions of the meeting on 29 to 30 October 2009 of the heads of state or government of the Member States, meeting within the European Council,
- having regard to the declarations concerning the Charter annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, in particular, declaration No 1 by all the Member States, declaration No 53 by the Czech Republic, declarations No 61 and 62 by the Republic of Poland,
- having regard to the Resolution 330, 12th Sitting, of the Senate of the Parliament of the Czech Republic on 6 October 2011,
- having regard to Rule 74a of its Rules of Procedure,
- having regard to the report of the Committee on Constitutional Affairs (A7-0000/2011),

Whereas:

- A. The heads of state or government, meeting within the European Council on 29 to 30 October 2009 agreed that they would, at the time of the conclusion of the next accession treaty and in accordance with their respective constitutional requirements, attach to the Treaties a Protocol concerning the application of the Charter to the Czech Republic,
- B. On 5 September 2011, the Czech Government, in a letter from its Permanent Representative, submitted to the Council a proposal, in accordance with Article 48(2) TEU, for the amendment of the Treaties concerning the addition of a Protocol concerning

the application of the Charter to the Czech Republic,

- C. On 11 October 2011, the Council submitted to the European Council, in accordance with Article 48(2) TEU, a proposal for the amendment of the Treaties concerning the addition of a Protocol on the application of the Charter to the Czech Republic,
- D. In accordance with the first subparagraph of Article 48(3) TEU, the European Council has consulted Parliament as to whether the proposed amendments should be examined,
- E. Pursuant to Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter as having the same legal value and binding force as the Treaties,
- F. The Protocols to the TEU and to the Treaty on the Functioning of the European Union form an integral part thereof, and therefore an additional Protocol establishing special rules with regard to the application of parts of the law of the Union to a Member State requires a revision of the Treaties,
- G. Pursuant to Article 6(1) TEU, second subparagraph, the Charter does not extend in any way the competences of the Union as defined in the Treaties,
- H. Pursuant to Article 51 of the Charter, the provisions of the 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. Those authorities must 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. 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, as confirmed by declaration No 1,
- I. Paragraph 2 of declaration No 53 by the Czech Republic provides that the Charter "does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field", thereby establishing that the integrity of the legal order of the Czech Republic is guaranteed without having recourse to an additional instrument,
- J. 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,
- K. An important function of the Charter is to raise 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 level of rights protection,
- L. The Czech Senate, in its above-mentioned resolution of 6 October 2011, opposed the application to the Czech Republic of Protocol No 30 on the grounds that it would reduce standards of protection of fundamental rights and freedoms of Czech citizens. The Czech

Senate also questioned the constitutional circumstances in which the matter was first raised,

- M. The political situation may sometimes evolve to supersede earlier political understandings between governments,
- N. The linking of the Czech request to extend the application of Protocol No 30 to the Czech Republic with the accession of Croatia to the Union could complicate the ratification of the Croatian Accession Treaty,
 - 1. Calls on the European Council to decide not to examine the proposed amendment of the Treaties;
 - 2. Instructs its President to forward this resolution to the European Council, the Council, the Commission and the national parliaments, and to the government and parliament of the Republic of Croatia.

EXPLANATORY STATEMENT

1. The government of the Czech Republic seeks to join its state to Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.
2. In order to understand the meaning of the Czech initiative, it is necessary to examine the nature and effect of the British and Polish Protocol since the coming into force of the Treaty of Lisbon on 1 December 2009. There has been some academic commentary on this Protocol which your rapporteur has studied.¹ He has also consulted lawyers eminent in this field.

There was little relevant case law until the Court of Appeal (England and Wales) made a preliminary reference to the European Court of Justice (ECJ) on the relevance of the Protocol to an asylum case.² The High Court inclined towards the view that Protocol No 30 could be construed as a general opt-out from the Charter, assuming that the Charter does not have direct effect in the UK.

In the Court of Appeal, however, the representative of the UK government argued helpfully that the purpose of the Protocol is "not to prevent the Charter from applying to the UK, but to explain its effect". The Opinion of Advocate-General Trstenjak was delivered on 22 September 2011.

3. It is worth recalling that all three states most relevant to this discussion approached the matter of the Charter from different directions. The UK sought to limit the possibility that the Charter would give the EU new cause to legislate in areas, notably labour law, which would breach its infamous 'red lines'. The then prime minister told the House of Commons: "It is absolutely clear that we have an opt-out from both the Charter and judicial and home affairs".³

Poland, on the other hand, was keen to stop the Charter from curbing its own right to legislate in matters of public morality, family law, abortion, gay rights etc.⁴ Bizarrely, Poland also sought to emphasise, in adopting the British Protocol which was defensive against social rights as laid down in Title IV, that it (unlike the UK) "fully respects social

¹ 1. Patrick Layden QC and Tobias Lock, *Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National Constitutions: UK National Report*, FIDE XXV Congress, September 2011.

² 2. Steve J. Peers, *EU Justice and Home Affairs Law*, OUP, 2011.

³ 3. Catherine Barnard, *The EU Charter of Fundamental Rights: Happy 10th Birthday?* in *European Union Studies Association Review*, vol 24, no 1, winter 2011.

⁴ 4. Colin Turpin & Adam Tomkins, *British Government and the Constitution*, 7th ed., CUP, 2011.

² Case C-411/10, *NS v Secretary of State for the Home Department*.

³ Tony Blair to the House of Commons on 25 June 2007. He went on: "[I]n respect of the two areas that people worried about most—the Charter of Fundamental Rights, on which people said, “Well, that is going to apply in British law”, and judicial and home affairs—we have opt-outs. That is what is different. With the greatest respect, it is important that people actually pay some attention to the facts when mounting their argument". No wonder there is confusion.

⁴ Indeed, Poland obtained a Declaration 61 to that effect.

and labour rights" in the spirit of the Solidarity movement.¹

The Czech Republic, at the behest of its President, took the more eurosceptic stance. It achieved at the time of the Lisbon negotiations, its own categorical Declaration 53 which speaks of its concerns about the impact of the Charter on the principles of subsidiarity, conferral of competences, respect for national constitutions and international agreements.

The official grounds on which Mr Klaus insisted that the Czech Republic should join the Protocol was a sudden concern about the impact of the Charter on the validity of the Benes Decrees that dealt with the expropriation of the property and deportation of ethnic Germans from Czechoslovakia after the Second World War.² Nevertheless, such concerns were absent from the political debate until early 2009 and were not mentioned in submissions to the Czech constitutional court in either of the Lisbon judgments.³ Indeed, in the then government's official mandate for the negotiation of the Lisbon treaty it was a priority to establish a uniform standard of protection of human rights.

4. In the light of the available evidence, your rapporteur makes the following analysis.

(a) Preamble: The eighth recital of the Preamble establishes that the purpose of the Protocol is to "clarify certain aspects of the application of the Charter". The seventh and twelfth recitals make it clear that, regardless of the Protocol, all other EU law applies fully to Poland and the UK. The Protocol is only relevant, therefore, if the Charter were to add to the existing general principles of EU law, or be wider in scope, or to reduce the limitations on rights in comparison to the general principles. According to A-G Trstenjak, the Preamble reaffirms the "fundamental validity" of the Charter.

(b) Field of application: Article 1(1) supplements Article 51(2) of the Charter. Its intention is not to *extend* the ability of the courts to find that UK law is inconsistent with the Charter. However, neither does it seek to *curtail* the ability of the courts to assert a fundamental rights jurisdiction by reference to the provisions of the Charter. And in any case the courts must abide by fundamental rights as prescribed in the ECHR and as part of the general principles of EU law under the provisions of Article 6 TEU. The general principles enjoy constitutional status and may be relied upon by individuals in the courts. In this regard, people in Poland and the UK would seem to be in exactly the same position as people in all other EU states.

(c) Scope: The principles in Title IV are required to have become the subject of national legislation before they become justiciable. Article 1(2) confirms Article 51(1) of the Charter that the Charter does not create justiciable rights as between private individuals. It also attempts to clarify Article 52(1) of the Charter, and may have been conceived as an attempt to blunt the direct effect of the Charter. Yet it remains unclear which articles of Title IV would be regarded by the Court of Justice as having direct

¹ Declaration 62.

² Helena Bončková, Hubert Smekal, *Fragmentace společných hodnot? Výjimky z Listiny základních práv Evropské unie /Fragmentalization of Common Values? Opt-outs from the Charter of Fundamental Rights of the European Union*, in *Současna Evropa* 02, 2010.

³ Ústavní soud - 2008/11/26 - Pl. ÚS 19/08: Treaty of Lisbon I; Ústavní soud - 2009/11/03 - Pl. ÚS 29/09: Treaty of Lisbon II.

effect. And wherever Poland and the UK have provided for such rights in national law, there is no prohibition of justiciability on behalf of the ECJ. Moreover, as noted above, to the extent that Title IV represents general principles of EU law, the courts in Poland and the UK are bound to apply its provisions directly.

(d) Interpretation: Here, Article 2 of the Protocol seeks to clarify Article 52(4) and (6) of the Charter. Where the Charter refers to national laws and practices, it refers specifically, in relation to Poland and the UK, to Polish and British laws and practices, respectively. (It could hardly be otherwise.)

5. In conclusion, Protocol No 30 does not exempt the UK and Poland from the binding provisions of the Charter. It is not an 'opt-out'. It does not amend the Charter. Yet the very existence of the Protocol has given rise to legal uncertainty and political confusion.

Although no specific case law exists on the very precise validity and scope of the Protocol, if it were ever to be interpreted as having the effect of limiting the scope or force of the Charter's provisions, the result would be to lower the protection of fundamental rights afforded to people in Poland and the UK, and would therefore undermine the efforts of the EU to reach and maintain a uniformly high level of protection.

As it stands, however the Protocol would seem not to alter the legal position which would prevail if it were not to exist. That being the case, the effect of its provisions, if any, would seem to apply as much to other member states as it applies to Poland and the UK (or prospectively to the Czech Republic).¹

¹ One recalls, finally, that all Member States were moved to sign Declaration 1 on the Charter.