Economic and labor rights in the European Union after Lisbon: an institutional approach

PhD Student **Konstantinos MARGARITIS**[1]

Abstract

Economic and labor rights belong to the core of business action, since they constitute the institutional framework for actors involved in business, employers and workers. Since the European integration is progressing, we may speak of a European environment for business, a common market in European legal terms, which became the main aim for the Communities since 1957. At the end of 2009, with the enforcement of the Lisbon Treaty amendments, important changes were brought in the fundamental rights protection in EU, mainly with the enactment of the EU Charter of Fundamental Rights. For a better understanding of the framework of economic and labor rights in EU, the traditional economic freedoms and provisions of the Charter will be examined in this paper in order to draw conclusions on the level of protection of such rights and the modifications that the Lisbon Treaty have brought in EU legal order with reference to economic and labor rights.

Keywords: *economic freedoms, labor rights, Lisbon Treaty, opt-out protocol.*

JEL Classification: K31, K33

I. Introduction

Beyond dispute, the establishment of the European Economic Community (EEC) in 1957 constituted an innovative procedure; based to a large extent on principles of economic integration and development though. The Treaty of Rome can be understood as the institutional framework for economical and monetary union with the establishment of a common market to be the far reaching aim. This can be easily proved by the grammatical structure of article 2 EEC Treaty, where the economic growth and stability as well as the rise of living standards were demonstrated as main targets of the Community.

In that sense, every progress towards European integration could be seen growing of the common market in Europe. The traditional economic freedoms guaranteed since the establishment of the EEC assisted in that target by setting the framework for liberalization of the basic economic activities which refer to goods, workers, services and capital. Beyond this perspective, the growing activities of the Union triggered the dialogue for the creation of a catalogue of rights within the EU legal order, interconnected to the Union's main characteristics. Under this approach, the EU Charter of Fundamental Rights was created in 2000; rights of economic nature and labor rights related to enterprises are also included therein. After the amendments forwarded with the Treaty of Lisbon, the Charter gained

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[1] Konstantinos Margaritis - National and Kapodistrian University of Athens, Greece, konstantinos_margaritis@yahoo.com

legal value of EU primary law; according to article 6, par. 1 Treaty on European Union (TEU), the Charter shall have the same legal value as the Treaties.

The aim of this paper is to critically present the current situation with reference to economic and labor rights in the EU after the Lisbon Treaty. This presentation will be based on two pillars: the economic freedoms, predominately found in the Treaties and the rights included in the EU Charter of Fundamental Rights. The analysis contributes to the better understanding of the complete institutional framework of economic and labor rights protection in EU.

II. The traditional economic freedoms[2]

Since the establishment of the EEC the four traditional economic freedoms have been the main tool for achieving the aim of common market in Europe. Therefore their presence on the Treaties after the Lisbon amendment is not a surprise, but most a confirmation of the Union's main function. Although this approach implies a less favorable environment for fundamental rights, a general framework of fundamental rights protection, basically economic rights, could be observed within the concept of Community freedoms, which emanated from them and as an inextricable part, completed their implementation.

Title II of Part 3 of the Treaty on the Functioning of the European Union (TFEU) refers to the free movement of goods. It is explicitly stated the establishment of a custom union and the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect as well as the adoption of a common customs tariff in their relations with third countries. From the very beginning, the concept of "goods" was delineated in various cases which ruled that everything valuated in money that can be object of commercial transactions could falls into the concept of "goods".[3]

In addition, custom duties of fiscal nature are also prohibited. This implies every tax burden in any way related to the free movement of goods. This burden does not have to be necessarily characterized directly as "charge" but also burdens that substantially have equivalent effect to charges are not in compliance with Union law. The Court of Justice constantly prohibited every form of tax charges related to issues of free movement of goods in Community member states.[4] Finally, under articles 34 and 35 TFEU, all quantitative restrictions on imports and exports are generally prohibited between member states, unless there is a reason of public morality, public policy or public security, protection of health and life of humans, animals or plants, protection of national treasures possessing artistic, historic or archaeological value or protection of industrial and commercial property.

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[2] See also on the issue Konstantinos Margaritis, *Fundamental Rights in the EEC Treaty and within Community Freedoms*, "CES Working Papers", Iasi, vol. V, 2013, pp. 51-65.

[3] ECJ C-7/68 Commission vs. Italy [1968] ECR 423, par. 2.

[4] ECJ C-24/68 Commission vs. Italy [1969] ECR 193, ECJ joint cases C-2/69 and C-3/69 Diamantarbeiders [1969] ECR 211, ECJ C-87/75 Conceria Daniele Bresciani vs. Amministrazione Italiana delle Finanze [1976] ECR 129.

The liberal spirit prevailing with reference to free movement of goods consequently empowers the general economic freedom as a fundamental right of the citizens. In an attempt to define economic freedom, it applies when institutions and policies allow voluntary exchange and protect individuals and their property within the legal order. Hence, the key ingredients of economic freedom are personal choice, voluntary exchange, freedom to compete in markets and protection of person and property. The protection of economic freedom is guaranteed as fundamental right in liberal European Constitutions; for example, article 18, paragraph 1 of the Finnish Constitution, article 41 of the Italian Constitution, article 38 of the Spanish Constitution and article 5, paragraph 1 of the Greek Constitution and constitutes a special aspect of development of personality of the person in society.

Under the Treaty provisions, this particular right is not simply guaranteed, but also promoted to the maximum. The creation of a common market in Europe with the gradual abolishment of restrictions with reference to movement of goods provides further opportunities for increasing exports and trade; a fact that leads a growing number of citizens to participate in economic life of Europe by exercising in practice their right to economic freedom. In that sense and by taking the theoretical approach of Adam Smith into account that economic freedom leads to economic growth, the whole Union structure is based exactly on that right of economic freedom in order to achieve the targets of economic growth, stability and the rise of living standards as stated in article 3, par. 3 TEU.

Regarding the free movement of workers, it is instituted in Chapter 1, Title IV of Part 3 TFEU. Article 45, par 2 prohibits any form of discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work. This was the initiative for entrenchment of non discrimination in labor affairs in Europe which has been also the topic in various Court cases.[5] The prohibition of discrimination based on nationality is a special provision and a supplement to the general prohibition of discrimination on any basis which is guaranteed in a series of provision in EU primary law (article 153, par. 1, point i TFEU, articles 21 and 23 EU Charter of Fundamental Rights).

The principle of non discrimination among workers is further explained in paragraph 3. It contains the right to accept offers of employment actually made, to move freely within the territory of Member States for this purpose,[6] to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action, to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in

[5] ECJ C-379/87 Groener vs. Minister for Education [1989] ECR 3967, ECJ joint cases C-267/91 and C-268/91Keck and Mithouard [1993] ECR I-6097, ECJ C-18/95 F.C. Terhoeve vs. Inspecteur van de Balstingdienst Particulieren/Ondememingen Buitenland [1999] ECR I-345.

[6] ECJ C-53/81 D. M. Levin vs. Staatsecretaris van Justitie [1982] ECR 1035.

regulations to be drawn up by the Commission. It has been widely argued[7] that this principle has direct effect so that it could be appealed to the courts of the member states. The protection of workers refers to every form of discrimination based on nationality, either directly based on nationality of the worker, or indirectly, based on different criteria that reach the same outcome.[8] Finally, the principle of non discrimination among workers is not absolute; it is limited on the grounds of public policy, public security or public health and referred only in private sector not in public according to article 35, paragraph 4 TFEU.

Apart from the recognition of non discrimination as a fundamental right, the free movement of workers contributes to the development of another fundamental right, that of freedom of work. The core of this particular right consists of the right to freely choose and change working environment.[9] Under the establishment of the Community, this right of choice is highly improved in the sense that not only many more opportunities are provided to workers from a greater range of occupations, but also the possibility to compare working conditions in the member states and choose accordingly.

Nevertheless, as it has been mentioned above, the aims of the Union are basically economical. Being development in such an institutional environment, free movement of workers is unavoidably related to economic prosperity. Thus, working for rehabilitation does not fall on the scope of article 45 TFEU.[10] To sum up, the approach on free movement of workers seems to seek a balance between the concept of worker as a production unit that contributes to the common market and the financial growth of Europe on one hand and the opportunity of the worker as a human being to choose to work in another country for improving his living standards and at the same time not being discriminated on the ground of his nationality on the other.[11]

As referred in article 56 TFEU, restrictions on freedom to provide services within the Union should be abolished in respect of nationals of member states who are established in a member state of the Union other than that of the person for whom the services are intended. In that sense the right of establishment is a prerequisite for the free movement of services to take place as without the guarantee of the former, the latest cannot be exercised. Hence, the strong

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[7] Roger Blanpain, *European Labour Law*, Kluwer Law International, Alphen aan den Rijn, 12th edition, 2010, pp. 276-277.

[8] ECJ C-152/73 Sotgiu [1974] ECR 153, ECJ C-419/92 Scholz [1994] ECR I-505. See also Emiliana Baldoni, *The Free Movement of Persons in the European Union: A Legal-historical Overview*, “PIONEUR Working Paper No. 2”, Florence, 2003, p. 7, the document is available online at http://www.aip.pt/irj/go/km/docs/aip/documentos/estudos%20publicacoes/centro%20 documentacao/ Capital%20Humano/I.Livre_Circulacao_Trabalhadores/A3.Projecto_Pioneur/Free _Movement.pdf.

[9] Jean Mayer, *The concept of the right to work in international standards and the legislation of ILO member states*, “International Labour Review”, New Jersey, vol. 124, 1985, pp. 225-242.

[10] ECJ C-344/87 Bettray vs. Staatsecretaris van Justitie [1989] ECR 1621.

[11] Paul Craig, Grainne de Burca, *EU Law: Text, Cases and Materials*, Oxford University Press, Oxford, 3rd edition, 2003, p. 701.

connection between the fundamental right of establishment and the economic freedom of services is proven in that provision.

The definition of the concept of "service" is attempted in article 57 TFEU. Consequently, always by taking into account the economic spirit of the Union, services are provided generally for remuneration; a fact that was confirmed in case law where the term "profitable" service was used,[12] in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Thus, the liberalization of the common market is substantially completed, a main target for the Union from the very beginning, by covering all aspects of trade in modern economy.

The principle of non discrimination on the ground of nationality or residence applies in case of non abolishment of restrictions within the free movement of services, according to article 61 TFEU. Moreover, the legal status of the service provider (natural or legal person) cannot be used as a basis for discrimination for the purposes of freedom of services (article 62 combined with article 54 TFEU). Free movement of services can be limited only under specific circumstances. The first one is related to issues of public policy, public security and public health. The second pertains to activities that are connected with the exercise of official authority, even occasionally. More specifically, the provisions of free movement of services are deactivated when any natural or legal person pursues activities of state authority; any opposite approach would violate the core of national sovereignty of the member state.

As a major economic factor, provisions on capital could not be excluded from TFEU. According to liberal approaches, free movement of capital, like the free movement of goods, increases the right of economic freedom which leads to economic growth within society.

In terms of fundamental rights protection, the principle of non discrimination is also included in the relevant Treaty provisions. Article 63 TFEU states that all restrictions on the movement of capital between member states and between member states and third countries shall are prohibited. In that provision, third counties are also included in the non discrimination clause. In that sense, article 63 is one of the very few cases where the protection of third country nationals is guaranteed in the Union Treaties. This confirms the focus of the Union on the total abolishment of any type of restrictions on the free movement of capital. Also the measures on the movement of capital to or from third countries involving direct investment, including investment in real estate, establishment, the provision of financial services and the admission of securities to capital market shall be adopted to the greatest extent possible.

The limitation of free movement of capital is similar to that of free movement of services, so to say issues of public policy, public security and public health and activities which in the State concerned are connected, even occasionally,

[12] Ernst Steindorff, *Freedom of Service in the EEC*, "Fordham International Law Journal", New York, vol. 11, 1987, p. 351, the document is available online at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1180&context=ilj. See also ECJ C-279/80 Webb [1981] ECR 3322.

with the exercise of official authority. Additionally, in exceptional circumstances, if movements of capital to or from third countries cause or threaten to cause serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months.

To summarize this part, the establishment and further development of economic freedoms within the legal order of the Union was indeed purposed to support the idea of the common market in Europe. Even so, if we see the other side of the coin, one should not misjudge the liberalization that those freedoms brought to the concept of economic rights in EU. The right of participation in the economic life, including working opportunities, has been impressively strengthened; through the Treaty provisions, the domains and the method of such right are explained.

III. Economic and social labor rights in the EU Charter of Fundamental Rights

A general outcome derived from the upgrade of the legal status of the EU Charter as primary law in the Lisbon amendment is the subsequence upgrade of protection of fundamental rights in EU at the same level as the traditional economic freedoms. Although the exercising of economic freedoms is vital for the proper function of the common market, the expansion of Union competence in other domains requires the protection of rights of other nature in EU level and as a result, a compromise between economic freedom and fundamental rights in case of conflict.

The contribution of the Court of Justice was vital in the solution of the problem; initially by developing the principle of fundamental rights protection in European level and in the absence of a complete catalogue, by creating a list of rights, on a case by case basis, that deserved protection in EU legal order. More specifically, even before the Charter is granted legal status, the Court tried to compromise economic freedoms and fundamental rights without being based on Charter provisions. In the cases of *Schmidberger*[13] and *Omega*,[14] it was explicitly confirmed that the protection of a right can justify the limitation on the exercising of economic freedoms.

In *Schmidberger*, one of the main economic freedoms, the free movement of goods was set in comparison to the freedom of expression and the freedom of peacefully assembly. The Court defined both categories as equally important but also possibly restricted; the compromise was achieved by balancing the conflicting interests on the basis of the principle of subsidiarity.[15] Finally, the Court justified

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[13] ECJ C-112/00 Schmidberger [2003] ECR I-5659.

[14] ECJ C-36/02 Omega [2004] ECR I-9609.

[15] For the compromise between fundamental rights and economic freedoms in EU see Vassilios Skouris, *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance*, "European Business Law Review", Alphen aan den Rijn, vol. 17, 2006, pp. 225-239,

the restriction of free movement of goods on the protection of fundamental rights. The same approach was taken in *Omega*, where issues related to human dignity validated the limitation of another economic freedom, the free movement of services.

Even thought the Court has expressed the opinion to guarantee the effective protection of fundamental rights, their institutional status before the Treaty of Lisbon was insufficient. In parallelizing the fundamental rights protection in EU with a puzzle, the Court under its stable opinion has put the pieces that its institutional role allows, the institutional absence of the Charter was depriving the main piece from the effort of balancing fundamental rights and economic freedoms. In that sense, the only option of the Court was to refer to interpretation of fundamental rights of external legal orders, such as the ECHR and the common constitutional traditions of the member states. Although this method proved to be generally reliable, it reflects rights as guaranteed in other legal orders that do not have the same special characteristics of the Union. As a result, the Court had to fill this gap by adopting those rights in Union standards.

Under the Lisbon amendment, the situation has dramatically changed. Now the Court has the legal "arsenal" needed to judge on issues related to fundamental rights, with Union terms. From a legal perspective, fundamental rights and economic freedoms have the same value within the constitutional order of the Union; moreover, in some cases economic freedoms are also expressed as rights within the Charter, such as the right to provide services in article 15, par. 2 or the freedom to conduct a business in article 16. Under this perspective, the hierarchical approach between economic freedoms and fundamental rights has been officially abolished.

From a political point of view, the institutional upgrade of the Charter is extremely important because it demonstrates the concrete will for fundamental rights protection in EU which subsequently raises the sense of legal certainty and security on EU citizens. The new institutional environment initiates the double level protection. At first, the EU institutions have to abide by the provisions of the Charter during the legislative and executive process and secondly, the member states when implementing EU law are bound by the same obligation.[16] In that sense, the possibility of fundamental rights violation in secondary European legal acts is obviated to a greater extent, since control for compliance is conducted in both the act itself and the implementing law.

On the topic of the rights included in the Charter, the insertion of economic rights specifically protected in the EU legal order was a dominant opinion from the very beginning of the dialogue concerning fundamental rights protection in EU.

Costas Kombos, *Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity*, "European Public Law", Alphen aan den Rijn, vol. 12, 2006, pp. 422-460.

[16] Olivier de Schutter, *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*, "NYU Jean Monnet Working Paper 07/04", New York, 2004, p. 22, the document is available online at http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040701.pdf.

The nature and characteristics of the Union as an organization with economic orientation perfectly justifies the inclusion of second and third generation rights,[17] next to traditional civil rights. This approach completely responds to the needs that derive from the Union actions for its citizens.

A pivotal economic right included in the Charter appears in article 16, the freedom to conduct business. This is the core right of economic factors in order to forward their business plans, from which other rights also derive. From the general freedom to conduct business, freedom to exercise an economic or commercial activity derives which is also based on a long standing case law of the Court of Justice[18] and is in perfect line with the economic aims of the Union. The freedom of contract is a subsequent right deriving also from the freedom to conduct business. The freedom of contract includes the free choice as regard to if and under which circumstances a contract will be concluded as well as with which part, the public included. Forced contracts are not allowed. This freedom also includes the free will of the parts to decide on the content of the contract always in accordance with the laws. Freedom of contracts is also recognized by the Court of Justice.[19]

The limitation of freedom to conduct business may be found in the interpretative clause of article 52, par. 1 of the Charter. A general limitation is described there, when necessary for the general interest recognized by the Union or for the need to protect the rights and freedoms of others, always under the principle of proportionality. The concept of "rights and freedoms of others" in the sense of economic freedom implies the right of other people within society to conduct businesses in their respective field of interest. Therefore the right to economic freedom by one person should not hamper the same freedom of another person. This is the basis of prohibition of illegal competition which strictly violates the right of a certain amount of people to apply their economic interests via economic freedom.

The largest category of economic actors and at the same time the one in the most unfavorable position is the one receiving and consuming the products; therefore their rights should be exceptionally protected. Article 38 of the Charter sets a high level of consumer protection within EU legal order which shall include protection of consumers from deceptive advertisements which prerequisites a clear description of products. Specifically, rules on consumer protection provide with strict criminal framework in cases of circulation of dangerous products for public health.

Another economic right in the Charter is referred in article 15, par. 2. According to article 15, par. 2 every citizen of the Union has the freedom to seek

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[17] The second generation refers to economic and cultural rights while the third generation refers to collective rights related to issues of universal interest, such as the right to peace, the right to development etc. See on the issue, Allan Rosas, Martin Scheinin, *Categories and Beneficiaries of Human Rights* in Raija Hanski, Markku Suksi (eds.), *An Introduction to the International Protection of Human Rights*, Abo Akademi University, Institute for Human Rights, Turku, 1999, pp. 49-64.

[18] ECJ C-4/73 Nold [1974] ECR 491, ECJ C-230-78 SpA Eridiana and others [1979] ECR 2749.

[19] ECJ C-240/97 Spain v Commission [1999] ECR I-6571.

employment, to work, to exercise the right of establishment and to provide services in any member state. In this provision, the Charter encompasses two of the founding four economic Treaty freedoms, the free movement of workers and the free movement of services along with the freedom of establishment as a prerequisite to provide services. This right is guaranteed for every citizen of the Union in order to establish an economic action. The reasons for limitation should be respectively based on the relevant Treaty provisions as dictated in the interpretative clause of article 52, par. 2 of the Charter; specifically, public policy, public security and public health and activities that are connected with the exercise of official, public authority.

Regarding labor rights, the situation was completely different. Beyond dispute the action of the Union could violate labor rights, such as right of employment or right to strike, member states seemed reluctant to agree on their inclusion on a possible catalogue of fundamental rights. This position is illustrated on the example of the Community Charter of Fundamental Rights of Workers, adopted in 1989. This Charter included rights of workers in the European level in order to create a strong social dimension in the field of common market.[20] It also reflected the very first attempt to establish a catalogue of rights in EU legal order. Nevertheless, the Charter was not unanimously validated because of disagreement on behalf of the United Kingdom.[21] This lack of political consensus among the member states based on the fundamental differences of their respective constitutional traditions, led to the perception that a possible inclusion of labor rights would create many issues, so it should be avoided.[22] On the other hand, provisions that guarantee labor rights compose the social basis where business action is developed.

The discussion on inclusion of social and labor rights was a major issue during the Convention proceedings that led to the creation of the Charter. The finally predominant opinion favored of a complete catalogue of fundamental rights, which should in principle include social labor rights. The expanded political action and the subsequent legislation initiative of the Union should be analogical to the protection of rights included in the fields of expansion. In addition, the special characteristics of the Union as an autonomous legal order are interrelated to labor rights, since labor force is the key for development of the common market. Finally, the inclusion of such rights in the Charter would improve their visibility within society, so that legal certainty would be increased.

A different approach supported the inclusion to the Charter only of those of the social labor rights which respect and materialization could be guaranteed by the Union within its field of competences. Hence, the rights included in the Charter

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[20] Lammy Betten, Nickolas Grief, *EU Law and Human Rights*, Longman, London, 1998, p. 70.

[21] The United Kingdom had finally signed the Charter in 1998, after the winning of the Labour Party in the 1997 general elections in UK.

[22] Rudolf Bernhardt, *The protection of fundamental rights in the European Community*, Bulletin of the European Communities, Supplement 5/76, Brussels, 1976, pp. 67-69, the document is available online at http://aei.pitt.edu/5378/1/5378.pdf.

should belong to the field of competence of the Union; otherwise the Treaties would have been violated in the sense of indirectly expanding competences of the Union by overlooking the regular process. In that sense, in cases of expanded inclusion of social labor rights, even of those not covered by the Union actions, there would be a possibility that citizens could appeal against the Union for violation of a right that its application prerequisites specific action for which EU is not even competent.

This approach seems more like an excuse for avoiding the inclusion of social labor rights in the Charter. One of the main targets of the Convention when formulating the Charter was its compliance with the Treaties and the avoidance of any indirect extension of the Union's competences.[23] Therefore, any positive opinion regarding every right was developed under this principle; the Charter would contain rights that the Union could guarantee. This is also proven by the terminology used in the Charter where the compliance of the rights with European law is stressed in the phrase "in accordance with Union law" as a part of such rights. Wherever there is no Union competence, the respective national legislation applies.

At the end, the Charter encompasses provisions that are related to work and labor rights. First of all, article 5, par. 1 and 2 prohibit slavery and forced labor. The inclusion of this provision highlights the repulsion of the Union in cases of compulsion and coercion in the field of work and completes the concept of human dignity in working environment. This provision is influenced by the relevant ECHR articles therefore should be interpreted accordingly. In that sense, in the EU legal order, any work required to be done in the ordinary course of detention, any service of a military character or in case of conscientious service exacted instead of compulsory military service, any service exacted in case of an emergency or calamity threatening the life or well-being of the community or any work or service which forms part of normal civic obligations, is initially not characterized as forced labor.[24]

Furthermore, the freedom of association is guaranteed in article 12 of the Charter. From the aspect of labor right, the right of establishment and of joining trade unions for the protection of worker's interests is included in all levels. Although based on article 11 of the ECHR, article 12 has a horizontally broader scope; it applies at all levels including European level. Hence, under article 12 of the Charter trade unions may be formed in Union level for participating as social partners in the dialogue described in articles 152 TFEU.

Most of the labor rights are contained in Title IV entitled "solidarity". More specifically, it contains the workers' right to information and consultation within the undertaking (article 27), the right of collective bargaining and action (article 28), the right of access to placement services (article 29), the protection in the event of unjustified dismissal (article 30), the fair and just working conditions

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[23] Γιώργος Παπαδημητρίου, *Ο Χάρτης Θεμελιωδών Δικαιωμάτων: Σταθμός στη Θεσμική Ωρίμανση της Ευρωπαϊκής Ένωσης*, εκδόσεις Παπαζήση, Αθήνα, 2001, pp. 18-19.

[24] Article 4, par. 3 ECHR.

(article 31), the prohibition of child labor and protection of young people at work (article 32) and the social security and social assistance in cases of industrial accidents among others (article 34, par. 1).[25]

Article 29 refers to the right of access to a free placement service in all member states, promoting the Union in a common market place. Additionally article 31 ensures fair and just working conditions with special regulation for the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. Those rights are upgraded in EU primary law level since, until the Lisbon amendment; they were included in the Directive 89/391/EEC. Working conditions for a sensitive group of people (children and young) are specifically underlined. The minimum age of admission to employment may not be lower than the minimum school-leaving age, so that children should get at least basic education. For young people working conditions shall be appropriate to their age and they shall be generally protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Quite important labor rights are protected under articles 27, 28 and 30 of the Charter. Article 27 refers to the right of workers to early information and consultation in business. This right is consisted of two procedures: information and consultation. Information of workers means their possibility to form a complete estimation of a problem, based on actual facts, in order to prepare an effective opinion which will be taken into account in the consultation process. The consultation is based on the dialogue between management and workers in order to reach an agreement in the context of the business capacities. This right applies in accordance with Union law and the national legislation in the respective levels. In EU level, the right of information in good time and consultation is guided by article 154 and 155 TFEU which refer to the social dialogue in business.

Article 28 ensures the right of workers, but also employers to negotiate and conclude collective agreements as well as the right to take collective action to defend their interests. This right contains all stages of the negotiation process, from the beginning of discussions to conclusion of agreement. Like in article 27, the term “appropriate levels” of application of the right is also mentioned in order to clarify the distinction among cases of application of European law national legislation accordingly. The right of negotiation is also guided by articles 154 and 155 TFEU in the same way as the right to information and consultation.

The case of the right of collective action is quite different. Member states are obliged to respect this right on the basis of article 28 of the Charter but also as an expression of trade union of article 11 ECHR, nevertheless, the special forms of collective action is exclusively a matter of national legislation. For example, the

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[25] See also Brian Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, European Trade Union Institute, Brussels, 2002, Xenophon Contiades, *Social Rights in the Draft Constitutional Treaty* in Ingolf Pernice, Manuel Poiares Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003 - Draft of the European Convention*, Nomos, Baden Baden, 2004, pp. 59-74.

right to strike shall be respected, but the specific prerequisites for recognition of the right to strike are entirely set in the sphere of national legislation. In that sense, the Court of Justice has extremely limited competence to rule on a matter of violation of the right to strike; only in cases where national legislation totally forbids or allows in such a way that substantially the right to strike remains ineffective.

Finally, article 30 includes the protection of worker in cases of unjustified dismissals. This right does not contain only the right of remuneration, but also the obligation on behalf of the employer to take appropriate protective measures so that the dismissal will be the final solution in order to be completely justified. For avoiding any misinterpretation, article 24 of the revised Social Charter, where article 30 is based, contains specific reasons that make a dismissal unjustified. Those reasons are related to legal action of the worker in the trade union, his position as worker representative, possible case against the employer, classical grounds of discrimination (color, gender, religious or political beliefs etc.), maternity or parental leave and temporary leave due to reasons of accident or illness. Therefore, a system of worker's protection is introduced in the sense that if even one of above mentioned reasons proves to be valid, the dismissal is not justified. Nevertheless, this right is also applied according to the national laws and practices.

IV. The opt-out Protocol

In Protocol no. 30 the specific application of the EU Charter of Fundamental Rights in the United Kingdom and Poland has been agreed.[26] Article 1, par. 2 deals with Title IV of the Charter and states that "in particular and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law".

Although under the opinion of the House of Lords expressed in a relevant report[27] that this protocol does not affect the application of the Charter in UK, the case of article 1, par. 2 is quite complicated. The provision is focused on Title IV of the Charter where most of the social labor rights are included. At first, one may agree with the perception expressed by the House of Lords, that substantially article 1, par. 2 of the Protocol 30 does not affect the application of the Title IV because of the structure of (most of) the rights included therein. Indeed, in certain labor rights, the application according to national legislation is anyway guaranteed which subsequently means competence of the member state. Perfect examples are the right of workers to information and consultation and the right of collective

[26] Initially, the Czech Republic expressed the will to adopt the Protocol no. 30. Up to now the country has not acceded, instead Declaration no. 53 with reference to the Charter was included on behalf of the Czech Republic.

[27] House of Lords, European Union Committee, *The Treaty of Lisbon: An Impact Assessment Volume I: Report*, 10th Report of Session 2007-8, HL Paper 62-I, par. 5.87, 5.103, point a and 5.111, the document is available online at http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf.

action which includes the right to strike. This is also the case in highly sensitive for the UK protection of workers from unjustified dismissal. Furthermore, this issue was raised in a recent case where the Court of Justice ruled that the right to collective action is not absolute, but can be restricted on the ground of EU law and national legislation and practice.[28] As stated in article 52, par. 6 of the Charter "full account shall be taken of national laws and practices as specified in this Charter", so that national provisions will apply within the respective legal order under the principle of subsidiarity. In that sense, article 1, par. 2 of Protocol 30 does not add any value.

On the other hand, there are provisions in Title IV where there is no reference to national legislation and practice, such as article 33 for the protection of family and professional life. Under this perspective, the provision is not covered by the interpretative clause of article 52, par. 6, article 1, par. 2 of Protocol 30 applies so that the respective right cannot be raised before a British or a Polish court. Furthermore, Protocol 30 limits the competence of the Court of Justice to rule on a case against UK and Poland that article 33 of the Charter shall have justiciable value, since the ruling would be applicable to the national legal orders concerned. To conclude, the main difference can be found in the concept of application of national law and practice; whether is included or not in the rights contained in Title IV.

The reasons that led the two member states in adoption of an opt-out protocol are completely different. In the UK, the Protocol 30 worked as a mean for the internal acceptance of the Lisbon Treaty. In a highly eurosceptic public sphere, the government could hardly promote the Lisbon agenda which led the passage to further integration in EU. Alternatively, the existence of an opt-out protocol stabilized in the British society the politically strong position of the UK within EU decision making process. This eurosceptic position was also expressed in the British media; especially with reference to the Charter, fears of distortion of British law from the rights included in the Charter emphasized the necessity for a political manoeuvre with an opt-out protocol.[29]

If we accept that the opt-out protocol was a necessary for political reasons, in Poland it could be characterized as an irrelevant action for the adoption of a totally different aim. This is explicitly proven by the Declaration no. 62 of Poland with regard to the opt-out Protocol. According to the Declaration, the country "having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labor rights, it fully respects social and labor rights, as established by European Union law, and in particular

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[28] ECJ C-438/05 International Transport Workers' Federation vs. Viking Line ABP [2007] ECR I-10779. See also, Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights* in Stefan Griller, Jacques Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Heidelberg 2008, p. 248.

[29] For the issue see Catherine Barnard, *The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?* in Stefan Griller, Jacques Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Heidelberg 2008, pp. 278-280.

those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union". Hence, Poland confirms its respect to the provisions of the Charter for which Protocol 30 substantially creates an opt-out. This Declaration may not have legal value equivalent to the Protocol, but in any case it constitutes a political commitment of the country to apply the provisions of Title IV of the Charter.

The substantive reason that triggered the opposition of Poland to the Charter is clarified in Declaration no. 61. 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 is underlined therein in which the Charter should not interfere. The rationale for this whole stance of Poland is related to issues of recognition of any form of same sex relations and adoption of children by homosexuals,[30] as well as abortions,[31] where the position of the Polish public authorities in those highly sensitive issues is traditionally negative.

Nevertheless, none of the provisions in the Charter could be interpreted in a way that interferes to the national legislation in the regulation of the above mentioned issues. Article 9 of the Charter which protects the right to marry and found a family is covered by the interpretative clause of article 52, par. 6 which means applied under national laws. It is apparent that the creators of the Charter did not have any intention to deal with issues of high sensitivity as the same sex relationships. In any case the acceptance of a Protocol concerning the opt-out in social labor rights should be avoided; the existence of Declaration no. 61 is clarifying the position of Poland sufficiently.

V. Conclusion

If we take the EU Treaties and the Charter as the constitutional basis, the EU does apply a specific economic model. The principle of open market economy and free competition may be found in a number of Treaty provisions regarding the economic and monetary policy of the Union.[32] In that sense, it is apparent that the Union does not follow the "economic neutrality" of the constitution, as regards its economic policy. The emphasis given on the traditional economic freedoms, since 1957, confirms that approach. The model of open market is explicitly and officially referred in the Treaties,[33] is binding and the member states and the Union shall act accordingly. This opens a further political matter regarding the position of communist parties within EU legal order.

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[30] Article 18 of the Polish Constitution describes marriage as a union of a man and a woman and family as motherhood and fatherhood.

[31] Abortion is allowed in Poland but under very strict circumstances.

[32] Articles 119, 120, 127 TFEU.

[33] Analogically speaking, this was also the case in the USSR Constitution of 1936 where article 4 dictated that the economic foundation of USSR is based on the socialist economic system. In the same line article 9, par. 1 of the 1968/1974 Constitution of the German Democratic Republic stated that the public economy of the State is developing according to the economic principles of socialism.

The provisions related to the four traditional economic freedoms remained substantially unchanged. Since, they were instituted to be the basis for the development of the common market from the very beginning, their position within the institutional system of the Union still remains at the highest level. But more than that, the four freedoms perfectly reflect the liberal spirit that the EU represents. The novelty brought by the Lisbon Treaty is related to institutionalization of balance among the economic freedoms and fundamental rights in the EU legal order via the Charter. For the first time, fundamental rights are guaranteed in primary law level equally to the economic freedoms. Therefore, this contributes to the promotion of European integration in other aspects as well, besides the common market.

The Charter introduces pivotal labor rights, for the first time, in the legal order of the Union. Some of the most important, such as the workers right to information and consultation, the right of collective bargaining and action and the protection in the event of unjustified dismissal are applied in accordance with national laws and practices. The reason for this approach could be traced on the fundamental political differences among the member states on the concept of social labor rights. As a result, the member states do not venture to transfer power in this field of policy to the Union. Nevertheless, the provisions of the Charter are of high value; on one hand they guarantee the protection of the rights included at EU level, on the other hand, they set a minimum level of protection which the member states should take into account. Under this perspective, the provisions of the Charter act as a normative basis for convergence among the member states in the field of labor rights.

With reference to Protocol no. 30, it indeed does not constitute a complete opt-out for UK and Poland on the application of the Charter in their legal orders. Nevertheless, the case of certain rights of Title IV is problematic since they do not contain the "national legislation" clause. Politically speaking, the opt-out protocol reflects an attempt of interpretative clarification regarding the Charter that, at the current level of integration, is needed in order to keep balance between the EU and the member states. Especially in the case of the UK which has traditionally demonstrated a more national-oriented profile, the opt-out protocol worked as a counterweight in order to accept the reformative Lisbon agenda.

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