

# THE EFFICIENCY OF THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AFTER THE SO-CALLED LISBON REFORM. A LOOK AT SOME CRUCIAL ISSUES

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## **Abstract**

*The paper focuses on some crucial issues concerning the protection of human rights in the European Union after the entry into force of the Treaty of Lisbon. This so-called Lisbon Reform - in the context of issues emphasized by the authors of the paper - has changed hitherto existing legal environment considerably. Enlargement and strengthening of the protection of fundamental rights within the legal system of the European Union is an unquestionable fact. In the paper, particular attention is paid to the entry into force of the Charter of Fundamental Rights of the European Union together with the Protocol No. 30 (so-called Polish – British Protocol), as well as to the analysis of the perspectives and conditions of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Such accession is nowadays one of the most important challenges, both for the European Union and the Council of Europe. Its significant result will be the necessity of creation – through the strict co-operation of these two organizations – of the coherent and effective system of the protection of human rights.*

**Keywords:** *the protection of human rights, the European Union, The Charter of Fundamental Rights, The Lisbon Treaty, The Council of Europe.*

## **1. Introductory remarks**

The purpose of this article is a presentation of some current problems regarding the protection of human rights within the European Union. After the entry into force of the Treaty of Lisbon, either the current legal environment or perspectives of further amendments in this environment let us to express an optimistic opinion on the enlargement and strengthening of the protection of fundamental rights within the legal system of the European Union, which – by the way – have been postulated for a long time. There will be presented the most up-to-date, in our opinion, selected issues of the protection of fundamental rights in the European Union law. The stress will be laid on the meaning – in this context – of the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union<sup>1</sup> (further: Charter of Fundamental Rights) with its Protocol No. 30. Also, the stress will be laid on the analysis of perspectives and conditions of the European Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (further: European Convention on Human Rights).

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<sup>1</sup> See: Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 83 of the 30th of March, 2010 (Volume 53).

## 2. The Treaty of Lisbon and the protection of human rights in the European Union

The Treaty of Lisbon<sup>2</sup> that entered into force on the 1<sup>st</sup> of December 2009 has introduced amendments in hitherto existing treaties which were the basis of the European Union, i.e. the Treaty of the European Union (further: TEU), whereas the new Treaty on Functioning of the European Union (further: TFEU) has replaced hitherto existing the Treaty establishing the European Community<sup>3</sup>.

In the preamble of TEU in its new wording there is contained an utterance on ‘cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’. Obviously, TEU contains more utterances concerning the protection of human rights and such values like dignity, equality, respect for human rights, plurality, non-discrimination, tolerance, rich cultural and language diversity and mutual respect among nations. The European Union univocally defined its values in Art. 2 of TEU. Respecting and commitment to promote them are – according to Art. 49 of TEU – demanded conditions of applying to the Council to become a member of the European Union. Article 2 of TEU determines that ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. In turn, Art. 3(3) section 2 determines that [the Union] ‘shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child’, while section 4 of this provision determines that [the Union] ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced’. It is worthy to indicate also the Art. 3(5) of TEU which provides that [the Union] ‘in its relations with the wider world, shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’.

If we compare the wordings of Art. 3 of TEU and previous Art. 2 of TEU (before the entry into force of the Treaty of Lisbon), we can see brightly that there are better expressed aspects of the activity of the European Union in the field of protection of human rights, assurance of equality and non-discrimination. It is vital that the European Union’s axiology, expressed in Art. 2 of TEU, comprises values which observance is desired by the Union itself and which could be effectively guaranteed by the Union, especially by the possibility of initiation of the procedure provided in Art. 7 of TEU. On the grounds of Art. 7(2) of TEU<sup>4</sup>, the European Council, acting by unanimity on a proposal by one third of the Member States or by the European Commission and after obtaining the consent of the

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<sup>2</sup> See: Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th of December 2007, Official Journal of the European Union C 306 of the 17th of December 2007 (Volume 50).

<sup>3</sup> See: consolidated versions of the Treaty on the European Union and the Treaty on Functioning of the European Union, Official Journal of the European Union C 83 of the 30th of March, 2010 (Volume 53).

<sup>4</sup> See also Art. 354 of TFEU.

European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2 of TEU, after inviting the Member State in question to submit its observations. If a Member State causes such serious and persistent breach of Art. 2 of TEU, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question (which has breached Art. 2 of TEU), including the voting rights of the representative of the government of that Member State in the Council. It is a well-known fact that the Council, in spite of extension of competences of the European Parliament in the field of creation of the European Union law, still is the most important legislative body in the European Union. So, it is possible a situation where a state failing to comply with the fundamental values of the European Union would lose the power of having influence to shape a law created by the European Union organs and – at the same time – it still would be bound by this law. For sure, such sanction would be very severe. Therefore, in the legal system of the European Union there exists a mechanism which makes possible for the European Union Member States to observe and react in case of breach by any Member State of Art. 2 of TEU, including the principle of human rights protection. The mentioned mechanism has been known to the community law since the entry into force of the Treaty of Amsterdam<sup>5</sup> and afterwards it has been improving by provisions of the Treaty of Nice on the grounds of the practical experiences connected to the *casus* of Austria of 2000, after attaining the authority of the populist political party ÖVP of Jörg Haider<sup>6</sup>. However the Treaty of Lisbon has changed in some measure the procedure of statement of the discussed breach.

On the other hand, by virtue of provisions of the Treaty of Lisbon also Member States gained – in Art. 50 of TEU – a confirmation of the possibility of withdrawal from the Union in accordance with their own constitutional requirements (admittedly such possibility existed previously but there weren't proper internal legal regulations within the European Union).

It seems that from the point of view of guarantees for the protection of human rights, the above-mentioned possibility is of fundamental meaning. According to the case-law of constitutional courts and tribunals of the states of the European Union (including, for instance, the German Federal Constitutional Court and also the Polish Constitutional Tribunal) – Member States have a status of '*Herren der Verträge*' – 'Masters of Treaties' and they have a right to the 'ultimate word' in the aspect of transferring the entitlement to fulfill competences from a level of the state to a level of the European Union. It is imaginable a situation, where the European Union organs could breach – in course of their activity – standards of the protection of human rights guaranteed to citizens of each country of the European Union (e.g. see so-called Solange I formula<sup>7</sup> from the case-law of the German Federal Constitutional Court)<sup>8</sup>. The situation like the mentioned one was

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<sup>5</sup> Cf. S. Hambura, M. Muszyński, *Traktat o Unii Europejskiej z komentarzem. Traktat z Nicei z komentarzem*, Bielsko – Biała 2001, p. 139.

<sup>6</sup> Cf. A. Florczak, *Ochrona praw człowieka w systemie prawa wspólnotowego* [in:] L. Koba, W. Waclawczyk (eds.), *Prawa człowieka. Wybrane zagadnienia i problemy*, Warszawa 2009, p. 107.

<sup>7</sup> See: judgment of the Federal Constitutional Court of the Federal Republic of Germany of the 29th of May, 1974 (file No. BvL 52/71).

<sup>8</sup> The Federal Constitutional Court of the Federal Republic of Germany in seventies of the last century firmly declared for primacy of the Constitution (*Grundgesetz*) over the community law in the context of fundamental rights and reserved itself a right to control the compatibility of community acts of secondary law with fundamental rights guaranteed by the Constitution till the guarantees of these rights will be ensured on the community level. Then, this point of view had been evolving. The evolutions in this field are pointed out by S.

indicated as possible on frequent occasions in judicial decisions of domestic authorities on the protection of constitutionality of law in various Member States of the European Union<sup>9</sup>. At the time it would be able to appear the necessity of withdrawal from the European Union. Such possibility – since the entry into force of the Treaty of Lisbon – has been provided by Art. 50 of TEU.

So, Art. 7 of TEU gives for the European Union the power to react in case of breach by a Member State rules expressed in Art. 2 of TEU (including the principle of protection of human rights). In turn, Art. 50 of TEU enables a Member State to defend against acts of the European Union extremely incompatible with principles of democracy or the protection of human rights. Such defense has a shape of taking a decision on withdrawal from this organization. Obviously, both of the mechanisms weren't introduced to the Treaties only for the reason to be used frequently, but the efficiency of such solutions may be contained in fact of their wording and expression.

Also, it is worthy to mention that the new Art. 9 of TEU provides that the European Union complies with the principle of equality of its citizens in every its acts and forms of activity.

Article 21(1) of TEU, in the wording proposed by the Treaty of Lisbon, provides that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

An analysis of new provisions introduced by the Treaty of Lisbon to Treaties being the basis of the European Union, as well as of regulations which were functioning up to the present on the grounds of community and union law (but they were amended or supplemented) leads to note that the creators of the new treaty reforming the European Union had the idea of more explicit prominence of the axiology of the European Union basing above all on respect of principles of democracy, protection of human rights and the rule of law. These exertions being grounded on the introduction of provisions strengthening mentioned values should be greeted with approval and estimated univocally positively.

### **3. The Charter of Fundamental Rights and the Protocol No. 30 (so-called Polish – British Protocol)**

However, the most important issue – from the point of view of considerations given here – is the question of the Charter of Fundamental Rights and its status in the system of sources of law of the European Union. Article 6 of TEU, in wording given by the Treaty of Lisbon, admitted to the Charter of Fundamental Rights the equiponderant status to Treaties (see Art. 6(1) of TEU). By the way it is also very important that Art. 6(2) of TEU provides the accession of the European Union to the European Convention on Human Rights. Whereas according to Art. 6(3) of TEU, fundamental rights as guaranteed

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Birenat. Cf. S. Biernat, *Prawo Unii Europejskiej a prawo państw członkowskich* [in:] J. Barcz (ed.), *Prawo Unii Europejskiej. Zagadnienia systemowe. Prawo materialne i polityki*, Warszawa 2006, pp. I-266 – I-268.

<sup>9</sup> See e.g. judgment of the Constitutional Tribunal of the Republic of Poland of the 11th of May 2005 (file No. K 18/04) on constitutionality of the Accession Treaty (point 6.4 of the statement of reasons). Cf. K. Witkowska-Chrzczonek, *Konstytucyjnoprawny wymiar członkostwa Rzeczypospolitej Polskiej w Unii Europejskiej* [in:] J. Galster (ed.), *Podstawy prawa Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*. Zarys wykładu, Toruń 2010, p. 427.

by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, are the part of the Union law as general principles of law.

The Charter of Fundamental Rights isn't an integral part of the Treaties but it has a binding force equal to the Treaties (these documents have the same legal value) - it is set out in Art. 6(1) of TEU. It should be noted that the Charter of Fundamental Rights was an integral part of the Treaty establishing the Constitution for Europe which, however, didn't come into force.

Provisions of the Charter of Fundamental Rights neither enlarge competences of the European Union nor create its new competences, so the Charter doesn't extend the scope of application of the Union law outside the limits of competences of the Union. Moreover, by virtue of Articles 51 and 52 of the Charter its provisions are addressed and may be applied to institutions and bodies of the European Union with due regard for the principle of subsidiarity, as well as to Member States but only in the sphere where they implement the European Union law.

So, duties of the Member States resulting from the Charter of Fundamental Rights base on, above all, the activity in harmony to the Charter and also they base on the elimination from the Member States' domestic legal systems of such regulations which are repugnant to the Charter. Rights and principles deriving from the Charter of Fundamental Rights must be exercised on terms and within the bounds determined by them. Withal in courts it is allowed to refer to provisions containing principles only for purposes of putting an interpretation of the legal acts and control their legality. So, they cannot be a basis for undertaking positive actions by the institutions of the European Union<sup>10</sup>.

It seems that more detailed analysis of legal effects of the Charter of Fundamental Rights surpasses the scheme of this study. Let's just remark that the European Union needed very much of the legal act which would catalogue the fundamental rights of citizens and inhabitants of this organization. Making valid the Charter caused the strengthening of the protection of human rights in the European Union. However, it seems that a few-year judicial practice getting stability in consequence of the entry into force of the Charter of Fundamental Rights will show the real functioning of this mechanism.

It's worthy to pay attention to the issue of so-called Polish-British Protocol attached to the Treaty of Lisbon (the Protocol No. 30). During the Lisbon Summit taking place from the 18<sup>th</sup> to the 19<sup>th</sup> of October, 2007 (and devoted to negotiations on the Treaty), when the agreement on a new Treaty has been reached, the Polish Government decided to join the British Protocol which limits the application of the Charter of Fundamental Rights in following words: 'Article 1(1). The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, 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(2). 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'. Whereas Art. 2 says: 'To the extent that a provision of the Charter refers to national laws and practices, it shall only

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<sup>10</sup> Cf. M. Wyrzykowski, *Wiele hałasu o nic? Racjonalizowanie irracjonalności na przykładzie Protokołu polsko – brytyjskiego do Karty Praw Podstawowych UE* [in:] J. Wawrzyniak, M. Laskowska (eds.), *Instytucje prawa konstytucyjnego w dobie integracji europejskiej*. Księga Jubileuszowa dedykowana Prof. Marii Kruk-Jarosz, Warszawa 2009, p. 502.

apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom'. Also Ireland gave notice of the possibility of join the Protocol No. 30 but finally this country didn't make such decision<sup>11</sup>. In Polish doctrine there appeared a dispute if the Protocol No. 30 has any legal value and what really means its acceptance. The main reason of adherents of a standpoint that the Protocol changed nothing was an obvious fact that Poland was bound by the Art. 6 of TEU being the source of the general principle of the European Union law – i.e. the principle of protection of fundamental rights. However, other representatives of the Polish doctrine presented the opinion that the application of the Charter in Poland will have a narrow scope because such is the aim of the Protocol. Nevertheless, in Polish literature there is widespread opinion that consequences of acceptance of the Polish-British Protocol for the scope of binding and application of the Charter of Fundamental Rights are not clear<sup>12</sup>. However, the crucial role here will be played by the judicial decisions. The analysis of judicial practice in process of time lets to give a final answer, if and – in case of need – what kind of part is played by the Protocol.

A reason of great reservedness of the Polish Government in that days to the Charter of Fundamental Rights was frequently repeated although entirely pointless argument that Poland – joining the Lisbon Treaty together with the Charter of Fundamental Rights – will be compelled to regulate in the sphere of law as well as to approve relationships between persons of the same gender (needless to add that it's the matter of regulation lying out the competences of the European Union). It was one of the factors which caused, in consequence, that Poland joined the so-called Polish-British Protocol<sup>13</sup>.

The effect of misgivings of the Polish President and the Polish Government negotiating the Treaty of Lisbon about the imposition of moral standards, especially – the absolute ban of discrimination (including also discrimination because of sexual orientation) – was a notification of two interpretative declarations which were attached to the Final Act of the Intergovernmental Conference adopting the Treaty of Lisbon<sup>14</sup>. These are: the Declaration No. 61 on the Charter of Fundamental Rights of the European Union and the Declaration No. 62 concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom. First of these declarations proclaims that 'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity'. And the second one proclaims that 'Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union'.

It's also worthy to note that the Charter of Fundamental Rights created room for doubts and was the reason of lively discussions in another countries.

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<sup>11</sup> Cf. J. Barcz, Przewodnik po Traktacie z Lizbony. Traktaty stanowiące podstawę Unii Europejskiej. Stan obecny oraz teksty skonsolidowane w brzmieniu Traktatu z Lizbony, Warszawa 2008, p. 61.

<sup>12</sup> Cf. e.g. M. Jeżewski, Karta Praw Podstawowych w Traktacie Reformującym Unii Europejskiej [in:] C. Mik, K. Gałka (eds.), Prawa podstawowe w prawie i praktyce Unii Europejskiej, Toruń 2009, p. 34.

<sup>13</sup> See: Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, attached to the Treaty of Lisbon.

<sup>14</sup> Cf. A. Wyzomska, Umocnienie ochrony praw podstawowych [in:] J. Barcz (ed.), Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej, Warszawa 2008, p. 193.

#### **4. Perspectives of accession of the European Union to the European Convention on Human Rights**

The idea of accession of the European Union to the European Convention on Human Rights is not new and it was promoted – for more than 20 years – either by various organs of the European Union (especially by the European Commission and the European Parliament) or Member States<sup>15</sup>. The European Commission as far back as in 1979 and then in 1990 submitted to the European Council formal proposals of accession of the European Communities to the European Convention on Human Rights. To be sure the previous Art. 6(2) of TEU providing that ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’, the European Convention on Human Rights in fact percolated through the community law but even so there exist many reasons for the formal accession of the European Union to the European Convention on Human Rights. Of course, the most relevant issue is to guarantee of possibly wide and effective protection of human rights in the relation between individual and the European Union. Moreover, the European Union imposing high demands for states being candidates to join its structure, must prove itself that it wants and can satisfy conditions laid down to the others. Its necessary to take into account that the Member States of the European Union - making decisions on successive amendments of the Treaties – regularly enlarge competences to which performing the organs of the European Union are entitled. So, the field where the European Union gains new competences still grows bigger. In consequence, the European Union organs can create law in new and new spheres and this law has a direct effect in relation to citizens of the Member States of the European Union, bringing them new rights and also duties, in other words - shaping their position as individuals. Because of it the EU citizens ought to have an access to effective mechanisms of the protection of their rights. Undoubtedly, in common opinion one of the most effective mechanisms of the protection of rights is an individual complaint to the European Court of Human Rights and only accession of the European Union to the European Convention on Human Rights would give the EU citizens ability to initiate such procedure. The strength of the complaint mechanism in the system of the European Convention on Human Rights contains itself in two elements: in binding character of judgments of the European Court of Human Rights as well as in implementation mechanism which is applied by the Committee of Ministers of the Council of Europe<sup>16</sup>. This Committee requires from states the application of measures of individual nature (i.e. the carrying out a judgment in a case and, not rarely, the acquittal of sums of money on the title of award of damages and compensation for the injury) and also of measures of general nature. The purpose of these measures is to prevent the situation of renewal of similar infringements of the Convention in future and they have a form, for instance, of amending law or changing of the practice of public authority bodies and so on. There is a need to note that the Charter of Fundamental Rights and the European Convention on Human Rights have, however, other destinies. When the Charter of Fundamental Rights is for the European Union something like inner ‘Bill of Rights’

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<sup>15</sup> Cf. I. Justyńska, *Zasada poszanowania praw człowieka w europejskim prawie wspólnotowym*, Toruń 2009, p. 204.

<sup>16</sup> Cf. M. Balcerzak, *Proceduralne gwarancje ochrony praw człowieka* [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona. Podręcznik dla studentów prawa i administracji*, Toruń 2005, p. 147.

demarcating the bounds of the power for the European Union institutions, the European Convention on Human Rights and its mechanisms give the odds of the external control of the European Union activities<sup>17</sup>. The accession of the European Union to the European Convention on Human Rights would make also possible the reaching of major uniformity of the European system of the protection of human rights.

Let's recall that for a long time there was no possibility of the accession of the European Union to the European Convention on Human Rights. Such accession was denied especially by the European Court of Justice, which, otherwise, has begun to take under consideration the European Convention on Human Rights in its judicial decisions since seventies of the last century, but in its commonly known opinion No. 2/94 it held that '(...) No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field. (...) Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. (...) It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention'<sup>18</sup>.

Barely the Treaty of Lisbon has created legal mechanisms which rendering the accession of the European Union to the European Convention on Human Rights possible. The Treaty of Lisbon even obligated the European Union to the accession to the European Convention on Human Rights by the wording of the Art. 6(2) of TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

The Treaty of Lisbon determined the procedure of accession of the European Union to the European Convention on Human Rights, admittedly not enacting the separate provision in relation to this issue, but it predicted this accession clearly in Art. 218 of TFEU in conjunction with Art. 216 of TFEU. New Art. 218 of TFEU determines the procedure of negotiating and concluding international agreements by the European Union with the third countries or with international organizations. Detailed reconstruction of this relatively complicated procedure would outreach the framework of this paper. However, it seems necessary to point at regulations referring closely to the dilemma of accession of the EU to the European Convention on Human Rights.

According to Art. 218(6) point a) (ii) of TFEU, the Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement, but for adopting such decision by the Council it is necessary to obtain the consent of the European Parliament, if the agreement concerning the accession of the European Union to the European Convention on Human Rights. Due to Art. 218(8) section 2 sentence 2, 'The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements'. So, the accession of the European Union to the European Convention on Human Rights requires the approval of the European Parliament (not only its consultation), unanimity in the Council

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<sup>17</sup> Cf. I. Justyńska, op. cit., p. 204.

<sup>18</sup> See: opinion No. 2/94 of the European Court of Justice (pursuant to Article 228 of the EC Treaty) of the 28th of March, 1996, pp. I-1787, I-1789.



and additionally the approval of the Council decision on concluding the agreement on accession of the European Union to the European Convention on Human Rights by all Member States, according to their constitutional requirements.

Paradoxically, although Art. 6(2) of TEU imposes a commitment to the accession of the European Union to the European Convention on Human Rights, it is possible to imagine that – in practice – it would be able a lack of the mentioned accession if one (or a few states) would oppose to such decision, even though it or they ratified the Treaty of Lisbon before<sup>19</sup>. However, the situation like this would be harmful above all for citizens and residents of the European Union.

## 5. Conclusions

The development of the protection of fundamental rights in the European Union gathered a specific ‘impetus’ in the last ten years. It is reflected in a considerable degree by new provisions introduced to the treaties constituting foundations of the Union and making reference to protection of human rights, dignity of the human being and the widely understood axiology of human rights. For the most important achievements in this field, it should be undoubtedly recognized the proclamation of the Charter of Fundamental Rights on the Nice Summit on the 7<sup>th</sup> of December, 2000<sup>20</sup>, and then – granting by it the binding force which is equal to force of the treaties constituting foundations of the European Union (from the moment the Treaty of Lisbon became effective). The issue of the same importance is also adopting in the Treaty of Lisbon the procedure enabling the accession of the European Union to the European Convention on Human Rights what has been presented in the sphere of postulates for a few decades.

Undoubtedly, such an accession is nowadays one of the most important challenges both for the European Union and for the Council of Europe, because its result will be necessity of creation - through the strict and close co-operation of these two organizations – of the coherent and effective system of the protection of human rights<sup>21</sup>. It can be quite difficult task, because such a system should be created by taking into account a special character of the European Union. Above all, it is necessary to keep the autonomy of the European Union legal order, but it is also vital not to ignore the matter of the scope of prospective amendments in the European Convention on Human Rights and other legal documents connected with it<sup>22</sup>. In practice, the impact on the correct functioning of mechanisms of the system will also have a number of new individual complaints concerning the European Union, because if this number become considerable, it will be able to impress negatively on the operational effectiveness of the European Court of Human Rights.

Ensuring a high level protection of the fundamental rights will depend, in practice, on building a good cooperation and a dialogue between judicial organs included in the system as well as on establishing rights guaranteed for individuals by the European Union law on the basis of the Charter of Fundamental Rights and the European Convention on Human Rights<sup>23</sup>. It must be noted that the European Court of Human Rights will be

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<sup>19</sup> Cf. M. Jeżewski, *op. cit.*, p. 17.

<sup>20</sup> Cf. T. Astramowicz-Leyk, *Międzynarodowe systemy ochrony praw i wolności człowieka*, Olsztyn 2009, p. 98.

<sup>21</sup> Cf. H. Machińska, *Przystąpienie UE do EKPCz. Relacje instytucjonalno-prawne Unii Europejskiej i Rady Europy* [in:] J. Barcz (ed.), *Ochrona praw podstawowych w Unii Europejskiej*, Warszawa 2008, p. 263.

<sup>22</sup> Cf. *ibidem*.

<sup>23</sup> Cf. D. Kornobis-Romanowska, *Umocnienie statusu jednostek w UE po przystąpieniu UE do EKPCz. Konsekwencje dla ustawodawcy i sądów krajowych – następstwa praktyczne* [in:] J. Barcz (ed.), *Ochrona praw podstawowych w Unii Europejskiej*, Warszawa 2008, p. 314.

declaring incompatibility between acts of the European Union law and the European Convention on Human Rights, whereas the institutions of the European Union and the Member States will be responsible for ensuring the compliance of their actions with requirements setting by the European Convention on Human Rights<sup>24</sup>.

However, it seems to be of a great importance that an individual, after the accession of the European Union to the European Convention on Human Rights, will be able to assert its rights guaranteed in the Convention and to lodge a complaint against the European Union in case a Member State, regarding to this individual, applies an act of the European Union law (or use provided by the European Union law so-called derogation clause)<sup>25</sup>. Recalling these rights (and freedoms) will be possible directly versus the organs of the European Union and the jurisdiction will be held by both European Courts, i.e. by the European Court of Human Rights and the Court of Justice of the European Union. The individual will have the choice of the way depending on it, if the right (freedom) guaranteed by virtue of the Convention has been breached by the institutions of the European Union or by the Member State, for instance through the implementation of the European Union law to domestic legal order<sup>26</sup>.

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<sup>24</sup> Cf. *ibidem*, p. 313.

<sup>25</sup> Cf. *ibidem*, p. 314.

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