

INTERPRETATION OF INDIRECT DISCRIMINATION AFTER THE ENACTMENT OF THE CHARTER OF FUNDAMENTAL RIGHTS OF EUROPEAN UNION

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Abstract in original language

Článek se zabývá otázkou, zda a jak se změnila interpretace zákazu nepřímé diskriminace ve smyslu českého antidiskriminačního zákona po přijetí Lisabonské smlouvy, jejíž součástí je Listiny základních práv Evropské unie. V první části článku je vymezena nepřímá diskriminace, ve druhé části článku jsou rozebírána relevantní ustanovení Listiny EU s ohledem na judikaturu ESD.

Key words in original language

interpretace, nepřímá diskriminace, Charta základních práv Evropské unie, proporcionalita, české soudy, Lisabonská smlouva

Abstract

The article answers the question whether and how the interpretation of prohibition of indirect discrimination, contained in the Czech Anti Discrimination Act, has been changed after the ratification of Lisbon Treaty that includes Charter of Fundamental Rights of the European Union. First part of this article describes the concept of indirect discrimination, the second part analyses the relevant provisions of the European Union`s Charter with regard to the judgments of the ECJ.

Key words

interpretation; indirect discrimination; Charter of the human rights of the European union; proportionality; Czech courts; Lisbon treaty

1. INTRODUCTION

In This article represents part of my work about the interpretation of the indirect discrimination in the Czech republic. The question that has to be answered in this article is simple: how – if ever – the enactment of the Charter of Fundamental Rights of the European Union influenced the interpretation of the indirect discrimination by the Czech courts. First of all, I should define the term indirect discrimination, used in the Anti Discrimination Act, after that, I will describe the relevant provisions of the Charter of Fundamental Rights of the European Union ("European Union`s Charter" hereinafter).

2. DEFINITION OF INDIRECT DISCRIMINATION

The prohibition of the so called indirect discrimination is contained in the Czech Antidiscrimination Act number 198/2009 collection on equal treatment and on legal means of protection against discrimination. The Anti Discrimination Act itself is a result of the

more than five years long implementation of the European Union directives, namely the Council Directive number 2000/78/EC (establishing a general framework for equal treatment in employment and occupation) and the Directive number 2006/54/EC (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation). The Czech Anti Discrimination Act came into force on 1st of September 2009. Two months later the Lisbon treaty (including the Charter of Fundamental Rights of the European Union) came into force as well.

Despite the fact that the Anti Discrimination Act entered into force on 1st of September 2009, more than two years ago, only very few cases of discrimination have been decided before the Czech courts yet. I did a little research: I asked all courts in the Czech republic to tell me the numbers of judgments in which the discrimination under the provisions of the Anti Discrimination Act has been asserted by one of the parties. I also asked the courts to tell me numbers of pending legal proceedings in which one of the parties asserted that he or she has been discriminated. As for the results, all the Czech courts have passed only 4 judgments in so far and started 11 legal proceedings that are currently pending on the courts. Another 2 legal proceedings have been settled out of court.¹ Due to these facts my article about the interpretation of the indirect discrimination will be much more theoretical than practical.

2.1 PRIMARY DEFINITION OF INDIRECT DISCRIMINATION

We may recognise two definitions of indirect discrimination, contained both in the EU directives and the Anti Discrimination Act.

According to the general definition contained in section 3 paragraph 1 of the Anti Discrimination Act, the indirect discrimination occurs where an apparently (prima facie) neutral provision, criterion or practice would put one person² at a particular disadvantage compared

¹ It should be noted here that the electronic database of decisions used by Czech courts does not allow to search for the cases of (direct or indirect) discrimination so many of the courts had to ask the judges whether they had been decided any cases of discrimination under the Czech Anti Discrimination Act or not. So the results of my research are not flawless.

² Despite the fact that the Czech legislators used the word „one person“ instead of "persons", the Czech courts will have to compare two social groups not an individual (possible victim of discrimination) with the social group. This conclusion is based on the decisions of the European Court of Justice in which two social groups have been compared, usually by statistical evidence of the disproportionate effect of prima facie neutral provision, criterion or practice on certain social group. See, for example, decision of the European Court of Justice from the 27th June 1990, C-33/89, *Maria Kowalska v Freie und Hansestadt Hamburg*; decision of the European Court of Justice from the 27th October 1993, C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health*

with other persons unless that provision, criterion or practice is objectively justified by legitimate aim and the means of achieving that aim are appropriate and necessary.³ This means that the Czech courts should carry out the test of proportionality to decide whether the unequal (or disadvantageous) treatment can be considered as an indirect discrimination or not.⁴

The Anti Discrimination Act provides protection only to the particular social groups defined on one or more characteristics that distinguish them from the other groups and may serve as grounds for indirect discrimination. Such characteristics (or discrimination grounds) are enumerated in the section 2 paragraph 3 of the Act.⁵ It should be noted here that the Czech legislators went beyond the EU directives by adding "nationality" as one of the discrimination grounds. However, the legislators failed to add this discrimination ground on the list of discrimination grounds used by the section 133a of the Civil procedure code which means that in the cases of indirect discrimination on the ground of nationality, the court would not be able to shift the burden of proof from the victim of indirect discrimination to the discriminator.⁶ In the case of indirect

Authority and Secretary of State for Health; decision of the European Court of Justice from the 23th October 2003, C-4/02 and C-5/02, Hilde Schönheit v. Stadt Frankfurt am Main a Silvia Becker v Land Hessen.

³ The section 3 paragraph 1 of the Anti Discrimination Act: "Indirect discrimination shall be deemed to be such conduct or omission, when on the ground of any apparently neutral provision, criterion or practice one person is disadvantaged in comparison with other, on the grounds given in Section 2 paragraph 3 of the Act. It shall not be deemed indirect discrimination when this provision, criterion or practice is objectively justified by the legitimate aim and means of achieving that aim are appropriate and necessary."

⁴ Boučková, P. et al: Antidiskriminační zákon. Komentář. Prague: C.H.Beck, 2010, p. 156.

⁵ The section 2 paragraph 3 of the Anti Discrimination Act prohibits indirect discrimination on a ground of racial or ethnic origin, nationality, sex (including pregnancy, maternity or paternity nad sexual identification), sexual orientation, age, disability, religion, belief or opinions.

⁶ The section 133a of the Civil procedure code (Act number 99/1963 Coll.) states that: "If the complainant claims facts before the court from which it can be derived that there has been direct or indirect discrimination by the defendant:

a) based on sex, racial or ethnic origin, religion, belief, opinions, disability, age or sexual orientation in the area of working activities or other paid employment including access thereto, occupation, business or other self-employment including access thereto, membership of employees' or employers' associations and membership of, and involvement in, professional chambers

b) based on racial or ethnic origin in the provision of healthcare and social care, in access to employment and vocational training, access to public

discrimination based on the other grounds than contained in the Anti Discrimination Act the victim should seek legal protection under the relevant provisions of the Czech civil code.⁷

2.2 SECONDARY DEFINITION OF INDIRECT DISCRIMINATION

The second definition of indirect discrimination, contained in the section 3 paragraph 2 of the Anti Discrimination Act⁸ is limited to the disabled persons only and may occur in a case that the employer or the provider of public services refuses or fails to take "appropriate measures" to enable a person with a disability to have access to certain employment or use certain services available to the public. The employer or provider are obliged to take appropriate measures unless such measures represent an unreasonable burden to them. The Czech legislators went beyond the directive 2000/78/EC that prohibited such form of indirect discrimination only in the area of employment and working conditions. However, it is difficult to understand why the Czech legislators limited the obligation to take appropriate measures to the public services only. Selling goods publicly as well as providing

contracts, access to housing, membership of special-interest associations and in the sale of goods in a shop or supply of services, or

c) based on sex in access to goods and services, it shall be the defendant's responsibility to demonstrate that the principle of equal treatment has not been violated."

⁷ Section 13 of the Civil code (Act number 40/1964 Coll.):

1. The individual shall be entitled in particular to demand that unlawful violation of his or her personhood be abandoned, that consequences of this violation be removed and that an adequate satisfaction be given to him or her.

2. If the satisfaction under paragraph 1 appears insufficient due to the fact that the individual's dignity or honour has been considerably reduced, the individual shall also have a right to a pecuniary satisfaction of the immaterial detriment.

3. The amount of the satisfaction under paragraph 2 shall be specified by the court with regard to intensity and circumstances of the arisen infringement.

⁸ Section 3 paragraph 2 of the Anti Discrimination Act: "Indirect discrimination on grounds of disability shall also mean refusal or failure to take appropriate measures to enable a person with a disability to have access to a certain employment, working activities, career progression or other promotion, to use employment advice, or participate in other vocational training, or to use services available to the public, unless such a measure represents an unreasonable burden."

of education or health care do not fall within the ambit of section 3 paragraph 2 of the Anti Discrimination Act.⁹

Despite the using of vague term "appropriate measures", the Czech courts may resolve cases of indirect discrimination of disabled persons relatively easy because the section 3 paragraph 3 of the Anti Discrimination Act provides four well-defined criterias to determine whether the appropriate measure demanded by the disabled person represents an unreasonable burden or not.¹⁰ Section 3 paragraph 4 of the Act contains the same request as the article 5 of the directive 2000/78/EC so the measures required by the Czech legal regulations do not represent an "unreasonable burden" to the employer or provider of public services and have to be considered as appropriate measures automatically.¹¹

It is obvious from the two definitions of indirect discrimination that the prohibition of indirect discrimination must be interpreted

accordingly to the relative conception of equality (because not every case of different treatment can be considered as a discrimination under the Anti Discrimination Act)¹² and

accordingly to the material equality (because under the formal equality where the same provision is used to deal with the de iure same social groups there can be no discrimination).

⁹ Boučková, P. et al: Antidiskriminační zákon. Komentář. Prague: C.H.Beck, 2010, p. 167.

¹⁰ Section 3 paragraph 3 of the Anti Discrimination Act: "In determining whether any specific measure represents an unreasonable burden, regard shall be given to: the degree of benefit which the person with a disability has from the implementation of the measure; to the financial tenability of the measure for the natural or legal person intended to implement the measure; to the availability of financial and other assistance for the implementation of the measure and to the capacity of substitute measures to satisfy the needs of the person with the disability."

¹¹ Section 3 paragraph 4 of the Anti Discrimination Act: "A measure which a natural or legal person is obliged to take in accordance with special provisions shall not be considered to be an unreasonable burden."

¹² According to the judgments of the Czech constitutional court the "right to the equal treatment" must be interpreted accordingly with the relative conception of equality. The absolute conception of equality would lead to severe social problems. See, for example, judgment of the Czech constitutional court from the 7th June 1995, Pl. ÚS 4/95; judgment of the Czech constitutional court from the 11th June 2003, Pl. ÚS 11/02; judgement of the Czech constitutional court from the 16th October 2007, Pl. ÚS 53/04; judgment of the Czech constitutional court from the 22nd January 2008, Pl. ÚS 54/05.

It should be also noted that the prohibition of indirect discrimination aims at achieving the equality of opportunities (because if it aims at achieving the equality of results then it will be unnecessary for the victim of indirect discrimination to prove the disadvantageous effect of the apparently neutral provision. Contrary, it should be sufficient enough to prove the existence of disproportionality between two social groups). The main purpose of the prohibition of indirect discrimination is to guarantee equality of opportunities as it is clear from the second definition of indirect discrimination of disabled person. For example, the employer does not have a duty to choose a disabled person instead of normal one. The employer has a duty to provide only the access to the employment for the disabled person. Thus the overall purpose of the prohibition of indirect discrimination is to provide equal opportunities.

The Czech legislators made almost verbatim copy of the European Union directives,¹³ so the definitions of the indirect discrimination in the Anti Discrimination Act are basically the same as the definitions used in the EU directives, including the vague terms that are explained in the decisions of the European Court of Justice. The interpretation of the European Court of Justice has to be accepted by the Czech courts deciding the cases of possible indirect discrimination, including the interpretation of the related terms such as reversed burden of proof or appropriate measures or solution of practical problems such as admissibility of statistics as a proof of evidence. The Czech courts must interpret the prohibition of indirect discrimination, contained in the Anti Discrimination Act, accordingly to the law of the European Union. That is why it is important to consider the effect of the Charter of Fundamental Rights of the European Union on the interpretation of the indirect discrimination.

3. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The main emphasis of this article is focused on the fact that the Charter of Fundamental Rights of the European Union has become legally binding after the ratification of the Lisbon Treaty. Because of the Article 6 of the Treaty of the European Union the Charter is on the same level as the Founding Treaties of the European Union. This solution is quite similar to the position of the Czech Charter of fundamental human rights and freedoms, which is on the same level as

¹³ Namely the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services and the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

the Constitution (according to the Article 112 paragraph 1 of the Constitution), but it is not a part of it.¹⁴

Despite the fact that the Czech president Vaclav Klaus managed to negotiate an opt-out from the Lisbon treaty, which is sometimes mistaken as an exemption from the whole Charter, the European Union's Charter is definitely legally binding for the Czech republic and its public bodies (including Czech courts). We may also presume that the Charter will remain legally binding in the near future.¹⁵ The reason for this assumption is that the content of the Czech opt-out should be the same as the content of the Protocol number 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. We may conclude that the fundamental rights, contained in the European Union's Charter, cannot be interpreted in a way which may extend the ability of the European Court of Justice to find the legal regulations of the Czech republic, are inconsistent with the European Union's Charter.¹⁶ Also, accordingly to the Article 2 of the Protocol number 30, where the European Union's Charter provision refers to national law, it may not be interpreted extensively or in a way that goes beyond the interpretation of the Czech legal regulations.¹⁷

The Czech opt-out from the European Union's Charter does not mean that the Charter cannot be applied by the Czech courts. Neither the Czech nor Polish nor British opt-out represent the complete exclusion from the European Union's Charter. The opt-out only prevents the courts, namely the European Court of Justice, from extensive interpretation of rights contained in the Charter, namely the rights contained in the Title IV of the Charter.¹⁸ Such conclusion can be

¹⁴ According to the judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, the European Union's Charter is undoubtedly part of the founding Treaties of the European Union.

¹⁵ Pitrová, L. „České záruky“ sjednané k Lisabonské smlouvě. Mezinárodní politika [online]. Prague: Ministry of Foreign Affairs of the Czech Republic, released 17th December 2010. Available from: <http://www.mzv.cz/jnp/cz/o_ministerstvu/archivy/z_medii/ceske_zaruky_sjednane_k_lisabonske.html>.

¹⁶ Right to the equality before the law and right not to be discriminated are contained in the Title III of the European Union's Charter.

¹⁷ Such conclusion is based on the teleological interpretation of the Protocol number 30. The grammatical interpretation of the Article 1 paragraph 2 of the Protocol number 30 is problematic because the wording of this provision indicates that the limitation contained in this provision may be relevant not only for the Title VI of the European Union's Charter, but also for the other Titles of the Charter.

¹⁸ Bončková, H. „Výjimka“ z Listiny základních práv EU: možné interpretace a dopady. *Dny práva – 2010 – Days of Law* [online]. Brno: Masaryk University, 2010, p. 8. Available from:

supported by the decision made by the Czech constitutional court that the Charter does not extend the field of action of the European Union and does not apply directly in the areas of legal regulation in which the Czech republic did not transfer its powers to the European Union. The Charter has two functions: to protect the individual's rights and to set up limits on the exercise of powers both of the European Union and national authorities.¹⁹

4. RELEVANT ARTICLES OF THE CHARTER

Let us move back to the European Union's Charter and its application related to the prohibition of indirect discrimination. Only several articles are relevant for the interpretation of indirect discrimination, namely articles number 1, 20, 21 and articles number 51 and 52.

4.1 ARTICLE 1

The Article number 1 declares that the: "human dignity is inviolable. It must be respected and protected." According to the Explanations relating to the Charter of Fundamental Rights („Explanations“ hereinafter): "the dignity of human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights." The human dignity is defined by the European Union's Charter as a basic human right. This is a considerable advancement in the understanding of the human dignity as compared to the United Nation's Universal Declaration of Human Rights whose Article 1 states that: "all human beings are born free and equal in dignity and rights." The advancement lies in a fact that the the fundamental rights in the European Union are not aimed at the defending one person's rights only. The emphasis on the human dignity as a basic human right can be considered as a transition from the passive defence of human dignity to its active enforcement in the form of creating the conditions needed to preserve the human dignity in practice. The Universal Declaration of Human Rights declares only formal conditions of the human dignity in the meaning that no human being can be treated as an object of the conduct of another person. The European Union's Charter declares that the human dignity must be considered as a basic element for exercise all other rights, including the right to be treated equally and the right not to be discriminated. This means that the Article number 1 of the Charter demands providing substantive conditions to exert the basic human right to dignity.

We may conclude that the Article number 1 provides the basis for the interpretation of the other basic human rights contained in the Charter. The Czech courts should emphasize the human dignity especially in

<[http://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/11_evropa/Bonckova_Helena_\(4511\).pdf](http://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/11_evropa/Bonckova_Helena_(4511).pdf)>.

¹⁹ Judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, pages 38 and 39.

cases where the courts may presume that there has been indirect discrimination on a ground of age (Article 25 of the Charter) or in cases where the courts may presume that the working conditions of workers (Article 31 of the Charter) or the social security assistance, including housing assistance (Article 34 of the Charter) have a discriminatory effect on some social group. Also the Czech courts should interpret the Article 1 of the Czech Charter of fundamental rights and freedoms in areas (or policies) in which the European Union exercises its exclusive or shared competences accordingly to the Article 1 of the European Union's Charter.

4.2 ARTICLE 20

The Article 20 of the Charter simply states that: "everyone is equal before the law". Unlike some other international treaties dealing with the protection of basic human rights (i. e. European Convention on Human Rights) the equality is not limited to the other rights contained in the Charter. Someone may conclude from this that the equality before the law under the European Union's Charter is independent, non-accessory basic human right. However, such conclusion seems wrong.

According to the Explanations the Article 20 corresponds to a general principle of equality before the law that is included in constitutions of all member states and that "...has also been recognised by the European Court of Justice as a basic principle of Community law".²⁰ Thus the Article 20 of the Charter does not contain the "law" but does contain only the "principle", with all the consequences described in the Article 52 paragraph 5 of the Explanations. The right conclusion is that the equality before the law is not an independent, non-accessory basic human right. On the other hand, such principle is still essential for resolving the cases of prima facie indirect discrimination.

For the Czech courts, including the Czech constitutional court, the interpretation of the Article 1 of the Charter of fundamental rights and freedoms, containing the principle of equality before the law, remains the same as it was before the Lisbon treaty has been ratified. According to the Czech constitutional court: "...principle of equality before the law is the essence of the Czech constitutional law. The principle is the fundamental both for the interpretation and the application of the law and it must be preserved with caution. This basic postulate is supplemented by the Article 3 paragraph 1 of the Charter of fundamental rights and freedoms...In the form of discriminatory or

²⁰ See, for example, judgment of the European Court of Justice from the 13th November 1984, case 283/83, *A. Racke v Hauptzollamt Mainz*; judgment of the European Court of Justice from the 17th April 1997, case 15/95, *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux* and judgment of the European Court of Justice from the 13th April 2000, case 292/97, *Kjell Karlsson and Others*.

anti-discriminatory provisions respectively the principle of equality before the law is contained in many legal regulations."²¹

4.3 ARTICLE 21

The consequent Article 21 of the European Union`s Charter contains the general prohibition of all forms of discrimination. It is important to notice that the list of grounds upon which the discrimination should be based is demonstrative. Thus the Article 21 of the European Union`s Charter provides broader protection against discrimination than the European Union`s Directives, prohibiting discrimination on specified grounds only (such as sex, race or disability). The protection against discrimination, provided by the Charter, is even broader than the protection provided by the Article 14 of the European Convention on Human Rights, which also prohibits discrimination.²² However, for the Czech courts this should have a little practical effect because of the limited scope of the Charter and also because of the Article 3 paragraph 1 of the Czech Charter of fundamental human rights and freedoms that basically contains the same list of "discriminatory" grounds as the Article 21 of the European Union`s Charter.

4.4 ARTICLES 51 AND 52

For the correct interpretation and application of the European Union`s Charter is necessary to evaluate its Articles number 51 and 52 in Title VII of the Charter (such evaluation is required in the Article 6 paragraph 1 of the Treaty on European Union).²³ Article 51 defines the scope of the Charter. According to the Article 51 paragraph 1 the provisions of the Charter are addressed to the institutions and bodies of the European Union and to the member states only when they are implementing law of the European Union (i.e. European Union`s Directives). The term "implementation of the EU law" must be interpreted extensively in accordance with the principle of effectivity (effet utile).²⁴ The application of the EU law by the member states,

²¹ Judgment of the Czech constitutional court from the 30th April 2009, II. ÚS 1609/08, pages 4 and 5.

²² Article 14 of the European Convention on Human Rights declares that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

²³ "The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

²⁴ The principle of effectivity has been defined in the judgments of the European Court of Justice, namely in the case 8/55 *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*; in the case 34/62, *Bundesrepublik Deutschland v Commission* or in the joint

implementation of the EU directives, including the application of the national law that has been adopted under authority of the European Union (which is the case of the Anti Discrimination Act) must be in accordance with the Charter. It is obvious that the Charter is mainly directed to the institutions of the European Union, not to the institutions of member states.²⁵ We may conclude that the basic human rights contained in the Charter has quasi-accessory character. This means that the citizens of the member states cannot refer to them directly in any situation. They may refer to them only to the extent of European Union`s law. For example, where the Czech legislators went beyond the European Union`s law during the enactment of the Anti Discrimination Act, the Charter could not be used.²⁶

The most important interpretative article of the Charter is the Article number 52 that narrowly defines the scope and interpretation of the laws and principles, contained in the Charter. Article 52 paragraph 1 set several conditions that have to be fulfilled to limit the exercise of the rights and freedoms recognised by the Charter. For example, the right not to be discriminated indirectly can be limited only by law and only in the case that the essence of the right not to be discriminated is respected. Concurrently such limitation may be made only when it is necessary and when the limitation pursues either objectives of general interest, recognised by the European Union²⁷ or the need to protect the rights and freedoms of others. From the wording of the Article 52 paragraph 1 is obvious that it contains the test of proportionality, that has been developed and used by the European Court of Justice.

According to the Article 52 paragraph 3 during the interpretation of basic human rights contained in the Charter it is necessary to take into account also the relevant provisions of the European Convention on Human Rights so far as they correspond to rights guaranteed by the

cases C-6/90 and C-9/90, *Andrea Francovich v Italy and Danila Bonifaci and others v Italy*. See also Tichý, L. et al: *Evropské právo*. 4th edition. Prague: C.H.Beck, 2011, p. 239-240.

²⁵ However it does not mean that the Czech authorities does not have to use the European Union`s Charter. According to the extensive interpretation of the term "implementing" the Czech authorities must interpret the provisions of the Czech legal regulations accordingly to the law of the European Union. See Tichý, L. et al: *Evropské právo*. 4th edition. Prague: C.H.Beck, 2011, p. 138.

²⁶ It should be noted here that the Czech constitutional court reached the same conclusion in its judgment from the 26th November 2008, Pl. ÚS 19/08, page 38. The Czech constitutional court referred to the judgment of the European Court of Justice from the 13th April 2000, case C-292/97, *Kjell Karlsson and others*.

²⁷ According to the Explanations to the European Union`s Charter the "objectives of general interest" are contained in the articles 3 and 4 paragraph 1 of the Treaty on European Union and in the article 35 paragraph 3, article 36 and article 346 of the Treaty on the Functioning of the European Union.

Charter. This means that the judgments of the European Court of Human Rights must be taken into account as well.

Article 52 paragraph 5 discriminates between the laws and principles and sets up rules under which it is possible to refer to the principles. The Articles of the Charter that contain principles can be used for the interpretation purposes only. Such Articles did not contain basic human rights basically. However, from the wording of the Charter and the Explanations it is not always evident whether some Articles contain principles or laws or both (i. e. Art. 23, Art. 33 and Art. 34).

Finally, the Article 52 paragraph 4 states that which the Charter recognises basic human rights as they result from the constitutional traditions common to the member states, those rights shall be interpreted in harmony with those traditions. This provision of the Charter is problematic because that for the correct interpretation of the Charter would be necessary to establish what are those rights. The Explanations refers to the common constitutional traditions in the comments to the Art. 10, Art. 17 par. 1, Art. 20, Art. 37 and Art. 49 par. 3 of the Charter. Under the presumption that all the other provisions of the Charter must be interpreted without regards to the common constitutional traditions, the Czech courts have to consider such traditions during the interpretation of the right to be treated equally before the law (Article 20), but not during the interpretation of the right not to be discriminated (Article 21).

Such conclusion is wrong despite the fact that it seems logical. First of all, the right to be treated equally before the law and the right not to be discriminated are linked together in many constitutions of the member states. It is problematic to separate them in a way that we may conclude that the common constitutional tradition should be taken into account only during the interpretation of the former but not of the later. That is why the Czech courts should take into account the common constitutional traditions in both cases.²⁸ As a supportive argument the Article 2 of the Treaty on the European Union contains the list of common principles (or social values) shared by all of the member states. The list contains inter alia human dignity, equality and non-discrimination.²⁹

²⁸ Such presumption may be supported by the judgment of the Czech constitutional court, declaring that: "...in the core of the European civilisation lies values common to all modern human cultures of the world. Such values are human freedom and human dignity; together they form a basis for the self determination of the human being." See judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, page 20.

²⁹ Article 2 of the Treaty on European Union: "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."

Another problem is the possibility of „mechanical“ interpretation of the Article 52 paragraph 4 of the Charter. If we accept that the prohibition of discrimination should be interpreted accordingly to the common constitutional traditions, it is necessary to answer following question: in how many constitutions of the member states the prohibition of discrimination must be guaranteed expressly to consider it as a common constitutional tradition? In all 27 member state`s constitutions? Or it is enough that the prohibition of discrimination is contained in majority of the member state`s constitutions? Or it is sufficient enough that constitutions of some member states expressly prohibit discrimination (which was the situation of the infamous Mangold v Helm case)?³⁰

However, such question is misleading. To answer the question, the Czech courts would have to do a large-scale comparison of the constitutional law of all the member states. Such proceeding would be in accordance with the proceeding of the European Court of Justice. From its judgments we may conclude that the European Court of Justice compares constitutional law of all the member states although in its judgments the court refers to only some constitutions of the member states.³¹

On the other hand, it is important to notice that all the member states had either to implement the European Union`s law, including necessary changes in their constitutional system or to use the "euroconformal" interpretation of their legal regulations.³²

³⁰ See judgment of the European Court of Justice from the 22nd December 2005, C-144/04, Werner Mangold v Rüdiger Helm.

³¹ See, for example, the judgment of the European Court of Justice from the 14th May 1974, case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission; judgment of the European Court of Justice from the 13th December 1979, case 44/79, Liselotte Hauer v Land Rheinland-Pfalz; judgment of the European Court of Justice from the 18th May 1982, case 155/79, AM & S Europe Limited v Commission.

³² The Czech Constitutional Court enunciated that: "if there are several possible interpretations of the constitutional law, including the Charter of fundamental rights and freedoms, and if only some of them lead to the fulfillment of the commitment which the Czech republic undertake to fulfill in connection with its membership in the European Union, then it is necessary to choose such interpretation that enables the fulfillment of such commitment, not the interpretation that actually prevents to fulfill such commitment...if there are – under the domestic methodology – several possible interpretations of the Czech constitution, and if only some of them lead to the fulfillment of the commitment which the Czech republic undertake to fulfill in connection with its membership in the European Union, then it is unavoidable to choose an interpretation that support the implementation of the Article 1 paragraph 2 of the Czech constitution." Judgment of the Czech constitutional court from the 3rd May 2006, Pl. ÚS 66/04.

If the member states did not take such steps to make their legal regulations to be in accordance with the requirements of the European Union's law, they would be held accountable (by the Commission or by the European Court of Justice) for the infringement of the commitments resulting from their membership in the European Union. In that case such state could not be considered as a de facto member state, at least in some area of legal regulation. We may presume that the constitutional traditions of the member states exist – at least in the areas in which the European Union exercises its powers. On the other hand even the euroconformal interpretation has its own limits – namely in the area of the so called "focus point of the constitution" as it is defined by the Czech (or German) constitutional court. Although the constitutional court admitted that it is obliged to use the principle of euroconformal interpretation of the law, such principle does not have a character of implied novelisation of the Czech constitution. The "focus point of the constitution" remained unchanged even after the ratification of the Lisbon treaty.³³ The Czech constitutional court also declared that the European Union's Charter is fully comparable to the Czech Charter of fundamental rights and freedoms as well as to the European Convention on Human Rights. Thus the European Union's Charter is in accordance not only with the "focus point of the constitution" but also with all of the provisions of the Czech constitutional law.³⁴

5. CONCLUSION

So, how the enactment of the Charter of Fundamental Rights of the European Union influenced the interpretation of the indirect discrimination by the Czech courts?

First of all, we must conclude that the Charter is legally binding document that the Czech courts could not ignore as it is on the same level as the Founding Treaties. The Charter is part of the primary EU law.

The Czech opt-out from the Charter only provides necessary affirmation to the Czech citizens that the courts, including the European Court of Justice, should not interpret basic human rights contained in the Charter extensively. The Czech opt-out is a political document only, not the source of the law. Even in the case that the opt-out will be adopted in the same form as the British or Polish opt-outs, the Czech courts should have to interpret the prohibition of indirect discrimination according to the relevant provisions of the Charter.

³³ See judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, pages 21 and 22.

³⁴ Judgment of the Czech constitutional court from the 26th November 2008, Pl. ÚS 19/08, pages 39.

The Charter is fully compatible with the Czech constitutional law, including the Czech Charter of fundamental rights and freedoms as it has been declared by the Czech constitutional court.

The scope of the Charter, defined in the Article 51, is limited. The Czech courts have to take the provisions of the Charter into account only when they will be implementing the EU law. Accordingly to the principle of effectivity (effet utile) the Czech courts will have to interpret the Anti Discrimination Act, including the Section 3, in accordance with the Charter, because of the fact that the whole Anti Discrimination Act can be considered as an implementation of the EU directives. Only in several cases where the Czech legislator went beyond the EU directives the Czech courts does not need to interpret the provisions accordingly to the Charter.

The Czech courts will have to interpret the provisions of the Anti Discrimination Act not only with regard to the principles and basic human rights contained in the Charter, but they will have to interpret such provisions accordingly with the decisions of the European Court of Justice.

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