

# **SOCIAL POLICY AFTER THE TREATY OF LISBON AND THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**

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## **Abstract**

After the Treaty of Lisbon has entered into force the Charter of Fundamental Rights of the EU has gained the same legal value as the Treaty on EU and the Treaty on Functioning of the EU. Bearing in mind that the EU Charter contains social rights and principles, as well as the fact that its relevant provisions endeavour to deal with the issue of application and interpretation of these rights within the EU law, the paper will endeavour to highlight what influence this can bring about for the EU social and employment policies.

## **Keywords:**

Charter of Fundamental Rights of the EU; Community Charter of Fundamental Social Rights of Workers; Convention for the Protection of Human Rights and Fundamental Freedoms; European Social Charter; Revised European Social Charter; Social Rights; Principles; Court of Justice; Interpretation

## **1. THE JOURNEY OF SOCIAL RIGHTS IN THE EUROPEAN UNION**

Back in 1951 and in 1957 when the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Atomic Energy Community and the Treaty establishing the European Economic Community were signed, the establishment of the abovementioned Communities as political and economic projects took place. It was especially the four fundamental freedoms<sup>1</sup> which focused on the economic aspect of these Communities thus leaving any social dimension aside. It became clear only later that the social advantages the Communities should automatically have resulted in have not appeared. That is why the social dimension of the integration within Europe was highlighted by Jacques Delors, the 1985 – 1995 president of the European Commission, who was well aware of the fact that economic objectives of the common market have to be intertwined with the harmonisation of social legislation.<sup>2</sup> One of the means how to reach this was the adoption of a declaration constituting the Community Charter of Fundamental Social Rights of Workers.<sup>3</sup> It was

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<sup>1</sup> *ie* free movement of goods, persons, services and capital.

<sup>2</sup> Jacques Delors revealed his plan in 'L'Espace Social Européen' (1986) 2 EC Bull. 12.

<sup>3</sup> Hereafter referred to only as the „1989 Community Charter“.

adopted and proclaimed at the meeting of the European Council held in Strasbourg on 9 December 1989 and it contained fundamental social rights of workers which were not – at that time – recognised neither by primary nor by secondary European Union<sup>4</sup> law.<sup>5</sup>

Despite its solemn proclamation the 1989 Community Charter has never gained legally binding status. Nevertheless, its influence on legal initiatives of the European Commission in the field of social policy was remarkable<sup>6</sup> and the EU succeeded in adopting numerous legal acts (predominantly directives) dealing with partial questions of labour law.

This *status quo* characterised by the absence of legally binding catalogue of fundamental (and social) rights started to change in 2000, when the Council, European Parliament and the European Commission solemnly proclaimed the text of the Charter of Fundamental Rights of the European Union<sup>7</sup> at the Nice European Council. The text of this charter contained not only civil and political rights, but also social and economic ones. However, like the 1989 Community Charter, the 2000 version of the EU Charter was not legally binding, although – again like the 1989 Community Charter – it gained much respect.<sup>8</sup>

The legal status of the EU Charter should have changed due to the Treaty establishing a Constitution for Europe<sup>9</sup> which integrated the text of the EU Charter into its normative text *via* making it its Part II. Owing to the unsuccessful referenda in France and in the Netherlands in 2005 the EU Constitution has never become a piece of EU primary law, hence retaining the declaratory status of the EU Charter.

Finally, thanks to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community<sup>10</sup> which entered into force on 1st December 2009 the EU Charter made it to its legally binding status. Thus it reached level which has never been gained by the 1989 Community Charter and by the rights enumerated herein. However, due to the efforts of making the Treaty of Lisbon less constitutional, the text of the EU Charter is

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<sup>4</sup> Hereafter referred to as the „EU“. The author will use term not only for the EU as such but also for its predecessors – for the European Coal and Steel Community, European Economic Community, European Community and the EU (1993 – 2009).

<sup>5</sup> With the exception of equal pay for men and women.

<sup>6</sup> Commission (EC), ‘Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers’ (Communication) COM (89) 568 final, 29th November 1989.

<sup>7</sup> Hereafter referred to only as the „EU Charter“.

<sup>8</sup> It has been cited by the Advocates General (eg by Sir Francis Jacobs in his opinion delivered in the case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para. 39), by the General Court (eg in case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365), even by the European Court of Human Rights in Strasbourg (eg in case *Goodwin v UK* (App no 28957/95) (2002) 35 EHRR 18, paras. 58 and 100). Eventually, also the Court of Justice used the EU Charter to underpin its arguments, eg in case C-131/03 *R.J. Reynolds Tobacco Holdings, Inc. et al. v Commission* [2006] ECR I-7795, para. 122.

<sup>9</sup> [2004] OJ C310/01; hereafter only the „EU Constitution“.

<sup>10</sup> [2007] OJ C306/01; hereafter referred to only as the „Treaty of Lisbon“.

neither reproduced in the Treaty on the European Union<sup>11</sup> nor in the Treaty on the Functioning of the EU,<sup>12</sup> in its protocols or annexes.

Although the journey of the EU Charter to its legally binding character was everything but straightforward, it is worth looking at the reasons which have underlain the emergence of such document containing a wide range of fundamental rights in the field of EU law. Firstly, the intergovernmental conference taking place in 2000 considered that the primary objective of EU Charter was to give the EU primary law, more precisely its change to be brought about by the Treaty of Nice,<sup>13</sup> a social dimension which was still considered to be lacking. Another important aim was to make the fundamental rights more visible to the EU citizens.<sup>14</sup>

## 2. LEGAL RANKING OF THE EU CHARTER AND ITS MEANING FOR THE SOCIAL RIGHTS ENCOMPASSED THEREIN

The legally binding status of the EU Charter ensues from art 6 (1) *in fine* TEU. However, this provision merely *mentions* the EU Charter and *refers to it* (emphasis added).<sup>15</sup> It is therefore questionable whether the EU Charter ranks among sources of EU primary law.

As it has been established by many scholars dealing with EU law,<sup>16</sup> the sources of EU primary law are: the treaties, their protocols (together with agreements annexed to these protocols<sup>17</sup>), annexes to the treaties and the accession treaties.<sup>18</sup> Taking cognisance of this one could be led to a conclusion that the EU Charter is something different than a „true” source of EU primary law. This argument can be even further substantiated by the fact that the whole text of the EU Charter should have been incorporated in the EU Constitution. Thus, it can be

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<sup>11</sup> [2010] OJ C83/01; hereafter „TEU“.

<sup>12</sup> *ibid*; hereafter only „TFEU“.

<sup>13</sup> [2001] OJ C80/01.

<sup>14</sup> One must however not forget that – legally speaking – the EU Charter, especially its newly established legally binding character, produces also different effects than just visibility of fundamental rights within the EU.

<sup>15</sup> „[...] [the EU Charter] shall have the same legal value as the [TEU and TFEU].“ As seen by Pítrová, Lenka, in ‘Listina Základních práv Evropské unie’ in Gerloch, Aleš, Šturma, Pavel *et al.*, *Ochrana základních práv a svobod v proměnách práva na počátku 21. století v českém, evropském a mezinárodním kontextu* (Auditorium, Praha 2011) 427 the EU Charter has become part of EU primary law „by reference“.

<sup>16</sup> *eg* Kaczorowska, Alina, *European Union Law* (Routledge-Cavendish, Oxon 2009) 206.

<sup>17</sup> As was the case of the Protocol on Social policy (*ie* a protocol annexed to the Treaty on EU [1992] OJ C191/01) and the Agreement on Social Policy which was referred to by this protocol. The General Court in its decision in case T-135/96 *UEAPME v Council* [1998] ECR II-2335 finally stated that also an agreement referred to by a protocol represents a source of EU primary law.

<sup>18</sup> Or, to put it more simply – all elements of EU primary law are reproduced within the wording of the treaties.

stated that EU Charter is – at least – a „specific“ source of EU primary law.<sup>19</sup>

The fact that the EU Charter has the same legal value as the TEU and TFEU is important from the point of view of review of legality as well as preliminary reference proceedings.<sup>20</sup> Here, the Court of Justice would be at no pain to declare that source of EU secondary law which would be found to be contrary to one or more provisions of the EU Charter is void<sup>21</sup> or invalid.<sup>22</sup>

However, the relationship of the EU Charter to the EU primary law measures is not this straightforward. When being questioned on the compliance of EU primary law and of the EU Charter, the Court of Justice would most probably enter the exercise of balancing the fundamental rights against the rights encompassed in the EU primary law<sup>23</sup>. *Via* this reasoning a twofold value of fundamental rights included in the EU Charter can be distinguished.

Therefore the question arises – how can one be sure about the stance of the Court of Justice towards fundamental rights established by the EU Charter and towards their ranking within the EU primary law?

### **3. THE EU CHARTER AND SOCIAL RIGHTS AND PRINCIPLES**

The EU Charter provides for number of fundamental trade union rights and labour and social standards,<sup>24</sup> hereby encompassing the „provisions which are at heart of labour law and industrial relations“<sup>25</sup> in the EU. Moreover, it gives the social and economic rights the same status as to the civil and political ones, hence elevating the character of social rights as fundamental rights and making them „constitutional“.

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<sup>19</sup> Another argument might be that the EU Charter is – beyond any doubt – *not* a source of EU secondary law (emphasis added). It takes none of the forms recognised by art 288 TFEU, nor is it any other act of EU institutions not expressly mentioned in art 288 TFEU – since it has been drafted by the Convention and it was merely proclaimed by EU institutions.

<sup>20</sup> Arts 263 and 267 TFEU respectively.

<sup>21</sup> Under art 264 first indent TFEU.

<sup>22</sup> Under art 267 first indent b) TFEU. The Court of Justice has declared a provision of secondary act invalid in case C-236/09 *Test-Achats v Council* (Court of Justice 1st March 2011), paras. 33 and 34 (this holds true even though the squashed article was a provision of Council Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37, *ie* a source of EU secondary law adopted before the EU Charter obtained its legally binding force).

<sup>23</sup> Such „balancing exercise“ was undergone *eg* in case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659, paras. 69 – 80.

<sup>24</sup> Bercusson, Brian, *European Labour Law* (Law in Context Series, 2nd edn CUP, Cambridge 2009) 210.

<sup>25</sup> *ibid* 384.

The EU Charter contains also such social rights and principles<sup>26</sup> which are truly specific and concrete in nature and which were previously not considered as fundamental rights.<sup>27</sup> However, it has to be mentioned that the EU Charter has omitted some social rights which are recognised by relevant international law instruments.<sup>28</sup> Thus the advantage of perceiving the social rights as fundamental ones is outweighed by the fact that there are still two categories of such rights.

“The principal provisions relating to ‘social matters’ can be found in Title III [of the EU Charter] entitled ‘Equality’ and Title IV, ‘Solidarity’, although two key rights, the right to freedom of association and of assembly and the freedom to choose an occupation and the right to engage in work, are found in Title II ‘Freedom’ and the prohibition of slavery and forced labour is found in Title I ‘Dignity’”.<sup>29</sup>

The fact that social rights are encompassed in the legally binding EU Charter brings about these consequences:

1. supremacy of social rights enumerated in the EU Charter over conflicting national legal provisions;
2. possibility of directly effective EU Charter provisions containing social rights;
3. their influence on interpretation and application of EU law and on its implementation by the Member States;
4. influence of the Court of Justice of the EU on the social rights provided for in the EU Charter.

*ad 1:*

Provisions of the EU Charter could not have been considered as being supreme before the EU Charter gained legally binding status. By now all national provisions implementing EU law and infringing upon the social rights of the EU Charter have to be disapplied.<sup>30</sup>

*ad 2 and 3:*

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<sup>26</sup> The difference between rights and principles as contained in the EU Charter is not clear and their distinction is worth deeper analysis. However, for the present purposes it suffices to say that the EU Charter contains and differentiates both of these and that it also provides for different models of their application and interpretation.

<sup>27</sup> *eg* the Constitution of the Slovak Republic (act No 460/1992 Coll. as amended), whose Title II Chapter 5 also contains social and economic rights, does not recognise the rights of the elderly (art 25 EU Charter), workers’ right to information and consultation within the undertaking (art 27 EU Charter), right to access to placement services (art 29 EU Charter) and the right to reconcile family and professional life (art 33 (2) EU Charter) as fundamental social rights.

<sup>28</sup> Such is the case of the right to fair remuneration which is recognised by the European Social Charter (art 4), by the Revised European Social Charter (art 4) and by the 1989 Community Charter as well (point 5).

<sup>29</sup> Barnard, Catherine, *EC Employment Law* (Oxford EC Law Library, 3rd edn OUP, Oxford 2006) 29.

<sup>30</sup> In line with well-established doctrine of the Court of Justice of the EU (*eg* case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para. 21) that an EU measure renders the conflicting provision of national legal order inapplicable.

As far as direct effect of the social rights of the EU Charter is concerned it has to be clarified from the outset that not all provision containing social rights are capable of being described as directly effective. This is predominantly due to the fact that the content of these rights depends on the rules of EU law and/or on national laws and practices which also deal with these rights.<sup>31</sup> Hence, only some of these rights can be directly relied upon due to the fact that they meet all the conditions prescribed for the direct effect.<sup>32</sup> However, those social rights which are not capable of exerting direct effect still have to be interpreted in a way which enables uniform interpretation and application of EU law and its observance by the Member States.

*ad 4:*

By virtue of art 51 (1) EU Charter the Court of Justice of the EU as one of the EU institutions is also bound by the EU Charter and thus has to respect its provisions. Moreover, in accordance with art 19 (1) second sentence TEU it also has to secure the application and interpretation of EU law, nowadays meaning also the application and interpretation of the EU Charter.

As it has already been shown<sup>33</sup> – as the EU law stands now – one can be sure that the Court of Justice will invalidate any EU secondary act which is contrary to the EU Charter. Such opinion of Court of Justice can also assure us that it will also declare any national measure implementing EU law incompatible with EU legal order once it will infringe upon the EU Charter. However, the relationship of the EU Charter *vis-à-vis* EU primary law remains to be seen.

Moreover, the case-law of the Court of Justice of the EU can – and most probably will – be at hand to elaborate on the social rights as established by the EU Charter. The question of what influence can the Court of Justice of the EU have on the interpretation and application of social rights and principles contained in the EU Charter is dealt with below.<sup>34</sup>

#### **4. INTERPRETTION AND APPLIATION OF THE EU CHARTER IN THE FIELD OF SOCIAL POLICY AND EMPLOYMENT – A THORNY ISSUE**

In line with art 52 (2) EU Charter the rights which are contained in the EU Charter and which are also recognised by the Treaties shall be exercised under the conditions and limitations as set by the Treaties. However, *eg* grounds for non-discrimination stated in art 21

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<sup>31</sup> *ie* workers' right to information and consultation within the undertaking (art 27 EU Charter), right of collective bargaining and action (art 28 EU Charter), protection in the event of unfair dismissal (art 29 EU Charter) and social security and social assistance (art 34 EU Charter).

<sup>32</sup> As established by Court of Justice in 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3, 12 and 13. Directly effective social rights contained in the EU Charter hence could be *eg* non-discrimination (art 21 EU Charter), equality between women and men (art 23 EU Charter) or right of access to placement services (art 29 EU Charter).

<sup>33</sup> Ch 2.

<sup>34</sup> Ch 4.

(1) EU Charter are much wider than those set out by art 19 TFEU.<sup>35</sup> Hence there can be a discrepancy between the content of these rights although the drafters of the EU Charter aimed at exactly opposite solution.

Furthermore, in accordance with art 52 (3) first indent EU Charter the rights contained in the EU Charter should be accorded the same meaning and scope as in the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>36</sup> as far as rights contained herein and also in the EU Charter are concerned.<sup>37</sup> However, the problem with social rights is that not all of them are included in ECHR.<sup>38</sup>

Moreover, this article enables the EU to provide for more extensive protection of those rights which are laid down by the ECHR. However, then the question arises what will be the content of every particular right; and whether the consistency between the Court of Justice's case-law on fundamental rights and relevant decisions of the European Court of Human Rights will be hereby assured. Another question which can also emerge is what if a decision of the Court of Justice of the EU affords any of these rights greater protection than is provided for on the basis of the ECHR despite the fact that (one or more) Member State(s) would not agree with such extensive interpretation. Such judicial activism will make the Court of Justice of the EU a true human rights court and will also make the Member States guarantee even more fundamental rights protection than they were willing to afford.

Further guidance as to the interpretation of social rights can be found in art 52 (3) second indent EU Charter dealing with constitutional traditions common to the Member States. However, it is questionable whether social rights contained in the EU Charter can be interpreted uniformly since not all social rights have to stem from the constitutional traditions common to the Member States.<sup>39</sup> Could this then mean that one social right can be interpreted differently by each Member State when it is implementing EU law? Will each Member State follow its own constitutional traditions? Or will it be guided by those "common" ones?<sup>40</sup> Finally, the very same reasons may make the

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<sup>35</sup> The EU Charter contains these extra non-discrimination grounds: colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth.

<sup>36</sup> Hereafter only as the „ECHR“.

<sup>37</sup> So-called coherency rule.

<sup>38</sup> As far as rights relating to social policy and employment are concerned, only prohibition of slavery and forced labour (art 5 EU Charter and art 4 ECHR), freedom of assembly and of association (art 12 EU Charter and art 11 ECHR), non-discrimination (art 21 EU Charter and art 14 ECHR) and right of collective bargaining and action (art 28 EU Charter and art 11 ECHR) are established by both of these instruments.

<sup>39</sup> Take *eg* the right to strike, which is a sensitive issue especially for the United Kingdom of Great Britain and Northern Ireland.

<sup>40</sup> The question is whether there is really something like "the constitutional traditions common to the Member States". One can also argue that only the Court of Justice of the EU knows what these are since it refers to them on a regular basis (*eg* in case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd*. (Court of Justice 6th September 2012), para. 52).

interpretation of social rights established in the EU Charter problematic also for the EU institutions.

In addition to this art 52 (7) EU Charter expressly mentions that for the sake of interpretation of the EU Charter due regard should be given to Explanations Relating to the EU Charter.<sup>41</sup> However, these explanations are not a source of EU law and hence can not be perceived as binding.<sup>42</sup> Therefore any guidelines which they aim to provide regarding the social rights are not relevant.

An additional rule which is available in order to interpret EU Charter's social rights is the so-called stand-still clause contained in art 53 EU Charter. According to this provision and as far as social rights are concerned, protection granted to these rights should be at least the same as it is established by, *inter alia*, international agreements to which *all* Member States are parties (emphasis added). As the explanations to the EU Charter mention at various places, social rights contained in the EU Charter were inspired – among others – by the European Social Charter and by the Revised European Social Charter.<sup>43</sup> Despite the fact that the European Social Charter has been ratified by all 27 EU Member States and thus it can serve the purpose anticipated by art 53 EU Charter, its modernised version – the Revised European Social Charter – has been ratified only by 18 of them.<sup>44</sup> Hence it cannot be used to guarantee the level of protection as foreseen by the stand-still clause.

Moreover, the effort of art 53 EU Charter to rely upon relevant international agreements ratified by all Member States can be halted because of an additional circumstance. The EU Member States are completely free as to their decision to ratify or not ratify any international legal instrument dealing with the topic of social rights.<sup>45</sup> Therefore it also holds true that they can decide to denounce such international agreement and hence make art 53 EU Charter dysfunctional.

Maybe also this is the reason why neither the EU Charter nor its explanations mention at any place the International Labour Organisation<sup>46</sup> Conventions, although all 27 EU Member States are ILO members. Nonetheless, as all the EU Member States have ratified

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<sup>41</sup> [2007] OJ C303/17; hereafter only as the „explanations to the EU Charter“. These were drafted under the authority of the Praesidium of the Convention which prepared the text of the EU Charter in 2000. The explanations have been subsequently adjusted in order to take account of further changes made to the EU Charter provisions by the European Convention in 2007 and also in order to reflect the present developments of EU law.

<sup>42</sup> This is declared by these explanations as such – in the third sentence of their introductory paragraph.

<sup>43</sup> Both of these are Council of Europe treaties opened to ratification by all members of the Council of Europe.

<sup>44</sup> The Revised European Social Charter has not been ratified by 9 Member States, *ie* by the Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the United Kingdom of Great Britain and Northern Ireland (according to the situation on 30th November 2012).

<sup>45</sup> Save for the ECHR, which has to be ratified by all EU Member States and which also contains some fundamental rights relevant for the field of social policy.

<sup>46</sup> Hereafter referred to as the „ILO“.



the European Social Charter and also due to the fact that both – this Charter and ILO Conventions – are respected by the Court of Justice,<sup>47</sup> the EU Charter could at least refer to these international labour law instruments as to the means of inspiration. This could be helpful for the sake of finding a benchmark against which to compare the content of social rights contained in the EU Charter.

Bearing all this in mind it becomes crystal clear that by now the EU Charter does not provide for any real comparable rule which would ensure uniform interpretation and application of social rights contained herein.

Last but not least, the question remains whether and what influence will the EU Charter exert also on soft-law measures adopted within the social policy and employment titles of the TFEU. These non-binding and flexible instruments<sup>48</sup> are not legal acts *per se* within the meaning of art 288 TFEU (although some of these instruments used to be adopted as recommendation<sup>49</sup>). However, one can not exclude the applicability of social rights provided for in the EU Charter also on such non-legal measures – due to the wording of art 51 (1) EU Charter. But as far as the principles enshrined in the EU Charter are concerned – as these are (allegedly) present at least in Titles III and IV EU Charter<sup>50</sup> – art 52 (5) EU Charter undoubtedly states that they are relevant only for legislative and executive<sup>51</sup> acts of the EU and for acts of the MS when implementing EU law.

## CONCLUSION

The above mentioned thoughts and (un)resolved questions endeavour to reveal the fact that as far as social rights and principles provided for by the EU Charter are concerned, much remains to be said, explained and established.

However, it is also indisputable that the EU Charter brings considerable social dimension to the EU primary law by elevating social rights as such among fundamental rights, whilst also encompassing some „ordinary” social rights among the core

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<sup>47</sup> The Court of Justice has referred to their content at various occasions, *eg* in case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para. 43.

<sup>48</sup> These are often recalled as the Open Method of Coordination.

<sup>49</sup> *eg* Commission Recommendation (EC) 87/567 on Vocational Training for Women OJ [1987] L342/35. However, nowadays, they are mostly adopted as resolutions, *eg* Council Resolution (EC) 1230/2003 on Equal Access to and Participation of Women and Men in the Knowledge Society for Growth and Innovation OJ [2003] C317/6.

<sup>50</sup> The explanations at their last page reveal and also enumerate some articles of the EU Charter which should contain the principles; or at least a mixture of rights and principles. This statement is however not substantiated by any reasoning.

<sup>51</sup> It remains to be explained what instruments can be described as executive ones. The explanations to the EU Charter reveal that legislative or executive acts are those which are adopted by the EU in accordance with its powers. However, EU primary law does not use the term „executive act“ at any (other) place.

fundamental ones. Hence it can be expected that such an elevation can only help the social policy and employment titles of the TFEU to gain their proper meaning and thus contribute to making the EU even more (not only) economic oriented integration project.

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