

Baseline report on the potential for strengthening the fundamental rights situation through a stronger use of the EU Charter of Fundamental Rights in Poland

Office of the Commissioner for Human Rights
(Ombudsman) (Poland)



35 YEARS
COMMISSIONER
FOR HUMAN RIGHTS
1988 – 2023

Iceland
Liechtenstein
Norway grants



Norway grants

Warsaw, October 2023

report prepared by Marta Sznajder and Cezary Węgliński
edited by Mirosław Wróblewski

Table of contents

Table of contents	3
Introduction	4
Methodology	5
The use of the Charter outside courts at national level since its entry into force	6
The use of the Charter in the legislative process	6
Developments regarding the Charter focal points	9
The use of the Charter in administration at national, regional or local level, including by law enforcement authorities	10
The use of the Charter in judicial training and training for civil servants in public administration and the parliament	15
The use of the Charter in awareness raising initiatives and by civil society organizations (including academia)	16
The Charter and the courts since its entry into force. Chosen case-law examples of the Charter's potential	17
Poland / Supreme Administrative Court / III OSK 3746/21 / 28 June 2022	17
Poland / Supreme Administrative Court / I ONP 1/14 / 30 May 2014	18
Poland / Supreme Administrative Court / II GSK 3236/17	18
Poland / Supreme Court / BSA I-4110-1/20 / 5 December 2019	19
Poland / Supreme Court / III UZP 4/18 / 2 August 2018	20
Poland / Supreme Court / II PK 199/16	21
Poland / District Court in Nowy Sącz / I Ns 376/19 / 19 April 2019	22
Future potential role and added value of the Charter to strengthen the fundamental rights situation at national level	23
Conclusion	27



Introduction

This Baseline report provides an overview of the use of the Charter of Fundamental Rights of the European Union by various national bodies. The purpose of this report is to outline the current role the Charter plays within the judiciary, executive, legislature, the NHRI and civil society as well as to assess its potential future role in strengthening the protection of fundamental rights at the national level.

The report is structured in the following way: the first part focuses on the use of the Charter at national level since 1 December 2009, firstly presenting the use of the Charter outside courts (i.e. in the legislative process, administration, at national, regional and local levels, including law enforcement authorities, in judicial training, training for civil servants in public administration and parliament, in awareness raising initiatives as well as by civil society organizations, including academia) and, secondly, the use of the Charter in courts. The latter section describes and analyses six national court judgments where the EU Charter of Fundamental Rights played a relevant role. The judgements have been selected in a purposeful manner, in order to present those delivered by the highest courts (including the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court) and those deemed the most relevant to the legal development, and/or where the Charter most clearly affected the outcome of the case. Finally, the report discusses the future potential role and added value of the Charter in strengthening the fundamental rights situation at national level. The section builds on existing examples of promising practices, and points to the future, explaining how legal practitioners can best unfold the Charter's potential and aiming to provide operational proposals ("10 keys to unlocking the Charter's potential").

Methodology

In terms of methodology, the report largely relies on desk research complemented by empirical findings. The desk research was supported by the FRA data of recent years, sourced from i.a. [Charterpedia](#), the *Charter chapters of the Fundamental Rights Reports: 2022; 2021; 2020; 2018; 2017; 2016; 2014; 2013; 2012* or the [EU Charter of Fundamental Rights - Use and added value in EU Member States](#).

The empirical findings were gathered in a two-fold manner. On the one hand, building on the internal know-how of the Commissioner for Human Rights, the report could to a certain extent outline the use of the Charter by national bodies and their potential to strengthen fundamental rights protection on the basis of the cases brought to the Commissioner for Human Rights in the past. On the other hand, in order to gather a better insight, various bodies and institutions which, to a certain extent, fall within national human rights structures were asked to reply to a questionnaire focused on cases those institutions had received with regard to the violation of fundamental rights protected by the EU Charter of Fundamental Rights. A majority of the institutions replied at the time of finishing this report.¹ The empirical findings gathered from the answers of the institutions constitute a preliminary research outcome which contributes to a better understanding of the challenges and opportunities for the use of the Charter by national bodies with a human rights remit and their potential for strengthening fundamental rights protection through a stronger use of the Charter.

The empirical research has also covered the analysis of chosen case law of national courts and administrative authorities' decisions. The evidence has been also accompanied, where relevant, by some discourse analysis with the use of quantitative data research tools on textual corpuses.

¹ Between 24 January 2023 and 3 February 2023, questionnaires were sent to 47 institutions. By the time of finishing the report [May 2023], 42 had provided responses.

The use of the Charter outside courts at national level since its entry into force

The use of the Charter in the legislative process

Procedural problems in the assessment of the Charter compliance of legislative projects

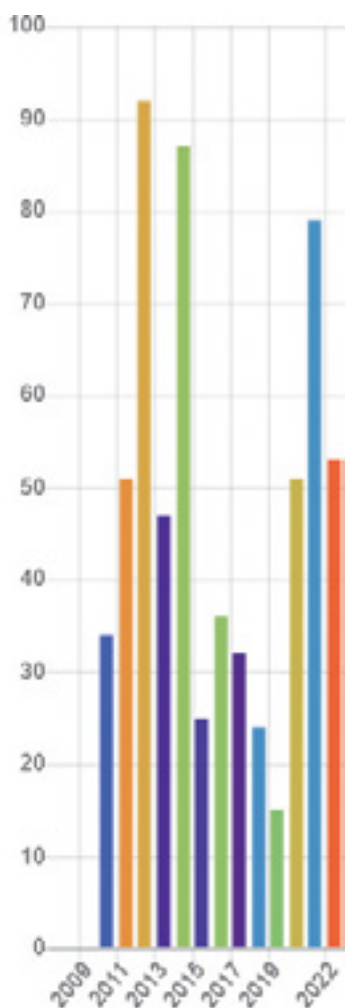
According to the rules governing the legislative process in Poland, all legislative initiatives have to be accompanied by a statement of reasons including impact assessment. Among other points, the assessment shall address the question of compliance of the project with EU law. The practice shows that usually the assessment is reduced to a very short declaration of compliance, especially in case of projects which do not expressly implement or refer to EU secondary law. Despite the facts that a special procedure for projects concerning EU law has been established internally in the Parliament with participation of specialised permanent committees and that such projects are distinctly enlisted and assigned with a special mark (*project implementing EU law*), the procedure is used almost exclusively for the government's legislative initiatives² and, in the majority of situations, in cases of projects where Poland, as EU Member State, acts upon delegation provided for in an EU secondary act or implements a given EU directive. Therefore, there is a systemic problem of lack of equivalent procedural safeguards of assessment of compliance for projects which may otherwise enter into the scope of application of EU law as defined in Article 51 para. 1 of the EU Charter of Fundamental Rights. This may, in part, result also from the low awareness of precise rules on defining this scope, as they have been interpreted in the Court of Justice case-law. In consequence, impact assessments of legislative projects would rarely address in detail EU law compliance in all relevant cases and, if they do, they relate to questions of compliance with specific EU law provisions rather than to the general question of compliance with the fundamental rights protected by the Charter.

Charter use practice in parliamentary discourse

As the scope of the present chapter is to be limited only to examples where the Charter appears to have made a real difference to the legislative or policy outcome, the **parliamentary discourse** (debates and readings across the legislative procedure) has been chosen **as the main research object** to identify cases where Charter provisions have been expressly invoked in the discussions on a given legislative project. With use of the Polish Parliamentary Corpus tool³, which gathers

² As for June 2023, only 4 non-governmental projects assigned to the special procedure for EU law implementation have been found.

³ Ogrodniczuk, M. (2018). Polish Parliamentary Corpus, In: Fišer, D., Eskevich, M., & de Jong, F. (Eds.) Proceedings of the LREC 2018 Workshop ParlaCLARIN: Creating and Using Parliamentary Corpora, 15–19. European Language Resources Association. http://lrec-conf.org/workshops/lrec2018/W2/pdf/11_W2.pdf [access: 21/06/2023].



transcripts of proceedings in the two Polish legislative bodies, the Sejm and the Senate, including the sittings of parliamentary committees, starting from 2010 when the Charter had already started to be formally binding in the Polish legal order up till the end of 2022, only 677 mentions of the Charter have been found. Such a score, in comparison with the mentions of the Constitution reaching 60 884 for the same period of time, shows that the presence of the Charter in Polish legislative process is still very limited when it comes to discussing fundamental rights issues.

It is, nevertheless, noteworthy to highlight some tendencies across time of the Charter use in the Polish parliament and its developments as well as main topics that have been linked expressly and directly with the Charter as a separate legal basis for a given fundamental right or freedom at stake. **The bar chart on the left represents the number of the Charter mentions per years**, which allows – with a certain margin of error – to track some hypothetical key moments of these developments.

Followingly, it is possible to observe that the Charter mentions were distinctively numerous in the periods 2011-2014 (particularly in 2012 and 2014) and 2020-2022 (particularly in 2021). A relative increase in Charter mentions could be identified also in the period around the year 2016.

2011-2014

The first peak period of the Charter use can be probably explained, to a large extent, by the effect of novelty of the Charter as such. A closer individual look at the mentions from this period allows to make a hypothesis that a major part of them do not reflect the real number of the Charter applications as a benchmark for legislative purposes. Around half of the mentions from this period relate to debates concerning the scope of the application of the Charter in Poland and disputed ‘ratification’ of the Charter by Poland even after 2009 (the entry into force of the Charter) due to the lack of clarity concerning the legal consequences of the so-called Polish-British Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. This represents, rather, a metaquestion on the status of the Charter as such and the possibility of its use in the legislative process. Therefore, it can be argued that the real breakthrough in the Charter application occurred later. It should be noted, however, that during that period, despite the fact that the Charter compliance was less intensively debated, the Charter mentions seem to be more regular and cover more regulation areas and specific legal projects than in the preceding few years when these projects could, in majority of cases, be linked with the area of rule of law and organisation of justice. **The identified Charter mentions related to:**

- gender parity of candidates on electoral lists (gender equality; project adopted with lower *quota* than provided for in the original proposal; 2011);

- national legislation in the area of the Common Agricultural Policy implementing the CJEU case law (judgment in case *Volker und Markus Schecke*, C-92/09 and Hartmut Eifert, C-93/09 of 2010) (protection of privacy and disclosure of beneficiaries' identity; March 2012);
- legal initiative introducing civil unions (question of EU law and same-sex partnerships recognition; project abandoned; 2013);
- ratification of ACTA (Anti-Counterfeiting Trade Agreement) (protection of privacy, access to information and culture, freedom of expression; agreement ratified despite massive protests and Polish personal data protection authority's negative opinion; 2012);
- ritual slaughter (freedom of religion as guaranteed in the EU legislation on animal welfare; legislation changed following the Polish Constitutional Tribunal judgment in case K 52/13 partly referring to EU law and the Charter; 2014);

2016-2017

During **this period the identified Charter mentions, less frequent than before, related to the amendment to the Police Act** (electronic surveillance and protection of privacy and personal data; the act adopted regardless of strong opposition to the project; 2015-2016). The proposed modification of the Police Act prompted the Inspector General for Personal Data Protection to intervene, with her opinion referring to the Charter, notably to the respect for private and family life (Article 7) and the protection of personal data (Article 8) (Inspector General for Personal Data Protection, Letter of 31 August 2015). A negative opinion was presented also by the Commissioner for Human Rights.

Quite importantly, the period covers the adoption of the first legislative projects (Act on the Constitutional Tribunal, Act on Ordinary Courts Organisation) constituting parts of the reform of the justice system in Poland which, in the end, contributed to the so-called rule of law crisis. The Charter mentions in this context are less numerous than in the following years as the independence of justice was, at the time, examined rather internally from the perspective of the Polish Constitution, than from the point of EU law which entered into the parliamentary discourse later on, after the first reactions of EU authorities (notably after the launch of infringement procedures against Poland for the breach of the value of rule of law and the principle of effective judicial protection). **In light of judicial reforms in Poland, the importance of Article 47** (right to an effective remedy and to a fair trial) **of the Charter was highlighted in the parliamentary debate on the separation of powers and the independence of the justice system.** The Commissioner for Human Rights expressed concerns relating to the Charter especially with regard to the amendment of the retirement regime of the Supreme Court judges as there was already, at the time, some established case-law of the CJEU in similar issues.

2020-2022

Following a similar logic as described above, **the Charter mentions in the period of 2020-2022 in parliamentary discourse proliferated after the development of the CJEU case law** ascertaining certain provisions of the Polish justice reform acts as incompliant with EU law, including the Charter and its Article 47. Thanks to that, the Charter has become a strong argumentative tool in parliamentary debates on new legislative proposals concerning the reform, some of them expressly

aiming at implementing EU law requirements confirmed by the Court. This has been especially the case of the legislative procedures concerning the Act on the Supreme Court and disciplinary proceedings against judges. Many Charter mentions have also appeared after the adoption of the so-called conditionality mechanism and the establishment of the Charter horizontal conditionality in the area of EU funds implementation (2022).

Other mentions of the Charter concerned:

- changes in the national broadcasting legislation on the rules concerning foreign ownership of broadcasting companies (the project aimed at restricting the terms for issuing licences to broadcasters owned by foreign capital) (media pluralism and freedom of expression; the project vetoed by the President of the Republic of Poland; 2021);
- so-called LGBT-free zones and pro-family charters;
- use of PEGASUS surveillance software by Polish intelligence and police authorities (parliamentary questions; 2022);
- abortion law (Charter referred to after critical reactions from EU authorities including the European Parliament);

Observations

As results from the previous observations, **the Charter's use in the legislative process in Poland is rather limited** and the Charter has rarely played a decisive role in guiding the legislator's final choice. Despite the lack of considerable successful uses of the Charter in the parliamentary work, there is a growing tendency of referring to the Charter as a benchmark for compliance of legislative proposals with fundamental rights requirements. This can be partly explained by the turnover in the Polish Constitutional Tribunal's activity which is less frequently seized with real individual constitutional rights questions and, in general, the number of the judgments delivered by the Tribunal has substantially diminished. In this context, EU fundamental rights law, especially when accompanied by an already established CJEU case-law on a given issue (as demonstrated in the few cases mentioned above), has become a distinct competing reference offering a potentially higher level of scrutiny for the protection of individual rights and freedoms.

Developments regarding the Charter focal points

It has been confirmed by the Ministry of Development Funds that Poland has established the EU Charter Focal point within the structures of the Prime Minister's Chancellery (Department of the Committee for European Affairs). It, however, remains unclear what its competences and undertakings as the Charter focal point are. We plan to request information on its competences and activities in further course of the research.

The use of the Charter in administration at national, regional or local level, including by law enforcement authorities

In terms of the use of the Charter in administration, at national, regional or local level, including by law enforcement authorities, several bodies will be discussed. As presented in previous reports, **the human rights structures in Poland are complex and involve various administrative bodies.**

The key body to mention here is **the Commissioner for Human Rights** (Ombudsman), a constitutional body for the protection of fundamental rights and freedoms in Poland, organisationally independent of other public authorities. The Constitution specifies that the mission of the Commissioner is to uphold the freedoms and rights of individuals and citizens, as set out in the Constitution and in other normative acts, whilst the scope and manner of the Commissioner's activities are determined by law. In accordance with the broad definition of the Ombudsman's mandate in the Constitution, the catalogue of fundamental rights and freedoms that are taken into account by the Commissioner also includes the Charter of Fundamental Rights and other provisions and general principles of EU law. In his or her activities, the Ombudsman is obliged to ensure that these rights are respected. In addition to individual interventions, this duty is also exercised on a general plane in the form of general intervention letters to the relevant bodies, indirect legislative initiatives (legislative inspiration) and motions to the Constitutional Tribunal if the infringement identified is of a systemic nature. The Ombudsman's recommendations are not binding and require, for their implementation, the cooperation of other public authorities. In addition to such activities, the Ombudsman's duty is to monitor and report on the state of observance of fundamental rights and freedoms in Poland, which is reflected in the annual information presented by the Ombudsman to the Sejm and the Senate of the Republic of Poland and in other types of reports published by the Office of the Ombudsman. The Ombudsman also regularly undertakes consultation, educational and promotional activities in the field of protection of fundamental rights and freedoms.⁴

Thus, the Commissioner for Human Rights' activity in this regard is relevant in the context of the implementation of programmes financed from EU funds in compliance with the provisions of the Charter of Fundamental Rights and the activities and results planned within the framework of the project carried out in cooperation with the EU Agency for Fundamental Rights, aimed at strengthening the mechanisms for compliance with the Charter of Fundamental Rights in the Member States, and taking into account the specific role of national institutions for the protection of fundamental rights and freedoms (NHRIs) will be of significant importance. The data gathered so far indicate that **the number of cases concerning EU funds, handled by the Office of the Commissioner for Human Rights oscillates around 20 annually** (without complaints concerning EU agricultural funds). These cases have been initiated mostly on the basis of individual complaints submitted by citizens, usually beneficiaries of EU programmes financed or co-financed from EU budget. As discussed elsewhere⁵, the major issues for the systemic compliance of EU funds implementation processes with the Charter in individual stages result

⁴ For a detailed description of the Commissioner for Human Rights' competences see "The role of national bodies with a human rights remit in ensuring fundamental rights compliance of EU funds (Baseline Report 1)", pp. 11-13 and "Mapping of national human rights structures (Polish chapter)", pp. 14-17.

⁵ "The role of national bodies with a human rights remit in ensuring fundamental rights compliance of EU funds (Baseline Report 1)", pp. 8-11.

from the lack of sufficient evaluation of programmes and individual contract projects at the design stage of these programmes and, in the majority of cases problems and inaccuracies are revealed only at the stage of execution of project contracts and clearance of funding. In these cases, it is usually already too late to take steps which would allow for full and effective application of the Charter, including not only the right to good administration (Article 41 of the Charter). However, in many of the discussed cases the Commissioner has decided to use his legal competences and participated in or initiated relevant administrative proceedings and has been filing actions and appeals in the concerned individuals' cases before administrative courts, including initiation of cassation proceedings before the Supreme Administrative Court. Regardless of the actions mentioned above, more general and broader actions of a systemic character (not only concerning individual proceedings) have been less frequent, except a few general statements addressed to competent Ministries and the Parliament with recommendations of relevant legislative amendments. The Commissioner for Human Rights, however, has not cooperated with the Commissioner for European Funds and has not received any kind of communication from this institution. It is worth noting that there are also no legal provisions providing for the obligation to undertake such cooperation. At the same time, it seems that such cooperation in practice could contribute to a more effective and systemic implementation of the Charter in Poland in the area of EU-funded programmes.

For instance, recently the Commissioner for Human Rights has relied on the Charter in his intervention letter addressed to the Minister of Development Funds and Regional Policy regarding the resolutions on so-called "LGBT-free zones", enacted by certain local and regional authorities. These resolutions have already been subject to court proceedings following the Commissioner's complaints, and consequently, all those challenged judicially have been held to be unlawful. However, not all local and regional authorities have implemented the court rulings. Thus, in the light of the new financial perspective, the Commissioner inquired how the Ministry aims to assess the compliance of EU funds with the horizontal principle of equal treatment and non-discrimination, as protected under Article 21 (1) of the Charter.⁶

Overall, **the Commissioner for Human Rights has often attempted to make use of the Charter in interventions concerning human rights violations by different national authorities.** As held above, the Charter has played an important role in cases related to LGBT+ rights. The right to private and family life, as protected under Article 7 of the Charter, has often been used as a safeguard against the decisions of the Polish Civil Registry Office (pol. Urząd Stanu Cywilnego, "USC"). This happened for instance in the case of a Polish child of a same-sex couple, born abroad, who was denied a transcription of a Polish birth certificate, necessary to obtain a Polish identity document, as Polish law did not accept parenthood of same-sex couples. In this case the Commissioner for Human Rights filed for the Voivodship Administrative Court in Kraków to request the Court of Justice for a preliminary ruling, which was delivered on 24 June 2022 (see Case C-2/21). The Court held that the Polish authorities are required to recognise the parent-child relationship, regardless of the parents' gender, for the purpose of permitting the child to exercise, without impediment, with each of their two parents, their right to move and reside freely within the territory of the Member States in accordance with the principle of the freedom of movement as well as the right to private and family life.⁷ Moreover,

⁶ <https://bip.brpo.gov.pl/pl/content/rpo-uchwaly-anty-lgbt-fundusze-europejskie-mfipr>

⁷ <https://bip.brpo.gov.pl/pl/content/rpo-pytanie-prejudycjalne-dzieci-rodzicow-jednej-plci-postanowienie-tsue>

the Commissioner for Human Rights relied on Article 11 of the Charter in his intervention in a merger proceeding between PKN Orlen and Polska Press, which raised controversies as to its impact on the freedom of expression and media pluralism. Even though the Commissioner's intervention before the Polish Competition Authority and Warsaw Court of Competition and Consumer Protection was unsuccessful, it remains to be seen how the Commissioner's recourse to the Charter with regard to media merger proceedings is approached by the Prime Minister and other relevant stakeholders.⁸

Apart from the Commissioner for Human Rights, other national authorities with a human rights remit also use the Charter for Fundamental Rights but are less known for it. Contrarily, national authorities more often do not use the Charter or case-law related to the Charter in their practice and law enforcement with regard to the courts' case law concerning, for instance, the Civil Registry Office and the right to private and family life⁹, local government authorities and the right to private and family life¹⁰ or violations of various rights of migrants and refugees by the Border Guard¹¹.

However, following the responses from the questionnaires, some of the national authorities with a human rights remit declared their commitment to the Charter. **The Financial Ombudsman**¹² stated that in his practice to-date, the analysis referred mainly to Article 21 of the Charter, regarding the non-discrimination in contracting with financial market clients as well as Article 38 of the Charter, regarding ensuring high level of consumer protection. It has described a case referred by the Commissioner for Human Rights, which concerned exclusion from travel insurance of persons with mental disabilities and persons with experience of mental health crises and a case of life insurance regulations related to consumer protection. The Financial Ombudsman held that it has not so far noted an instance of a Charter violation by public authorities.¹³

The President of the Office for Personal Data Protection (PUODO)¹⁴ stated that all the cases handled at the office relate to the enforcement of the right of personal data protection, as protected under Article 8 of the Charter. PUODO held that the complaints received sometimes directly refer to Article 8 of the Charter, while other times it is only at the stage of a complaint to the Voivodship Administrative Court following PUODO's decision that Article 7 or 8 of the Charter are brought up. PUODO confirmed its commitment to the case-law of the European courts, including the Court of Justice. PUODO explained it does not possess any statistics on the number of cases mentioning the Charter.¹⁵

The Small and Medium Enterprises' Ombudsman¹⁶ responded that in his intervention and procedural activities up-to-date they have three times referred to Article 47 of the Charter (each time once in 2019, 2020 and 2021) and the corresponding case-law of the Court of Justice. Nonetheless,

⁸ <https://bip.brpo.gov.pl/pl/content/rpo-ochrona-konkurencji-koncentracja-wolnosc-mediow-premier>

⁹ See e.g. Poland, Supreme Administrative Court, Case No. II OSK 3320/18, 9 December 2020.

¹⁰ A case decided by a regional court in Poland serves as an example. It concerned an application to the local self-government authority for the '500+' social benefit. This benefit is available to families who have at least two children. The applicant did not properly explain his family situation so the local self-government authority ordered a social interview. The applicant refused the interview and the authority therefore decided not to grant the benefit. The court held that the authority had not violated Article 7 (respect for private and family life) of the Charter. It did not first examine whether EU law applied to the case.

¹¹ See e.g. Poland, Voivodship Administrative Court in Warsaw, Judgment No. IV SA/Wa 2176/20, 22 February 2021.

¹² See "Mapping of national human rights structures (Polish chapter)", pp. 26-27.

¹³ Financial Ombudsman's response to the questionnaire, WSA.083.1.2023 RF/33/2023, 16 February 2023.

¹⁴ "Mapping of national human rights structures (Polish chapter)", pp. 20-23.

¹⁵ PUODO's response to the questionnaire, DOL.023.67.2023.WL.DP, 16 February 2023.

¹⁶ "Mapping of national human rights structures (Polish chapter)", pp. 29-30.

the Small and Medium Enterprises' Ombudsman clarifies, the importance of Article 47 of the Charter in these cases was limited and was brought up to strengthen the argument rather than be its essence.¹⁷

The President of the Office for Competition and Consumer Protection (UOKIK)¹⁸ stated that while the office itself does not use the Charter directly, business entities sometimes refer to the provisions of the Charter in their complaints regarding UOKIK's administrative decisions. They relate i.a. to Article 6 of the Charter (lack of reasoning of the decision), Article 47 of the Charter (violation of the right to effective judicial protection by conducting a raid outside of the scope of the court's approval), Articles 7 and 8 of the Charter (violation of the party's right to privacy and data protection) or Article 21 and 31 of the Charter (discriminatory actions towards the party). Nonetheless, if such a complaint is brought up, it is up to the Warsaw Court of Competition and Consumer Protection to consider it.¹⁹

The Patient Ombudsman²⁰ stated that he received complaints related to issues close to those protected under the Charter, such as violation of patient's right to dignity, right to freely and consciously consent to medical services, right to respect for private life, right to retain secret information or right to health care. The complaints received by the Patient Ombudsman up to date have exclusively referred to violation of patients' rights by medical entities.²¹

Finally, as previously held²², **EU Funds Commissioners** (both the national and regional ones) may use the Charter of Fundamental Rights in their work. As regards the EU Charter of Fundamental Rights, the role of the EU Funds Commissioner relates to complaints concerning the enforcement of the Charter. In case of suspicion that an operational programme realised by a management institution or certain activities of a management institution related to the implementation of an operational programme are incompatible with the EU Charter of Fundamental Rights, an individual has the right to submit a complaint to the EU Funds Commissioner. In analysing the complaint, the Commissioner may ask the managing institution for explanations regarding whether the right or freedom stemming from the Charter is not respected despite the managing institution's declaration in the application for funding. Subsequently,, the Commissioner presents their findings to the managing institution. In case of a violation of a provision of the Charter, the Commissioner informs the complainant about possibilities for further action, such as filing a complaint to the Human Rights Officer, National Labour Inspectorate, Patient Ombudsman or court. In case of a violation of binding legal rules, the EU Funds Commissioner also informs relevant law enforcement bodies. The same procedures apply in the case the EU Funds Commissioner receives a complaint through the European Commission. Overall, the EU Funds Commissioner is obliged to review the compliance of operational programmes and activities of their management institutions within 2 months since they were filed. In special cases, this deadline may be extended. However, the individual filing the motion or the complainant have to be duly informed about the extension. The EU Funds Commissioner has published reports on their activity for each of the years 2018-2021. According to the reports, **in 2021 the EU Funds Commissioner received 119 motions/complaints**, a 37% decrease compared to 2020, when they received 189 motions/

¹⁷ Small and Medium Enterprises Ombudsman's response, WPL.36.2023.DL, 14 February 2023.

¹⁸ "Mapping of national human rights structures (Polish chapter)", pp. 33-36.

¹⁹ UOKIK's response to the questionnaire, DPR.071.27.2023, 24 February 2023.

²⁰ "Mapping of national human rights structures (Polish chapter)", pp. 29-31.

²¹ Patient Ombudsman's response to the questionnaire, RzPP-DWS-WPS.420.14.2023, 27 February 2023.

²² "The role of national bodies with a human rights remit in ensuring fundamental rights compliance of EU funds (Baseline Report 1)", pp. 14-18.

complaints. In 2019, the number of the motions/complaints was 185 and in 2018 it was 135. Based on the- motions/complaints, the EU Funds Commissioner issued recommendations to relevant bodies – in 2021 15 recommendations were issued, in 2020 – 17, in 2019 – 21 and in 2018 – 15. The reports discuss examples of motions/complaints concerning delays in proceedings, incorrect organisation or issues regarding the level of treatment by the officials, which may fall under the rights protected under the right to good administration (Article 41) or the right to an effective remedy (Article 47) of the Charter of Fundamental Rights. None of these reports, however, have mentioned the Charter or the rights guaranteed by it. In the response to the questionnaire the (national) EU Funds stated they have not received any motions or complaints based on the Charter.

The regional EU Funds Commissioners have also published reports on their activities for each of the past years. The reports are available on their websites and describe the issues they have been working on and solutions they tried implementing. In the course of the research, we reached out to each of the regional EU Funds Commissioners asking whether they had received any motions or complaints based on the Charter and if yes, how they were dealt with. By the time of writing this report we had received 14 replies (out of 16). While most of the replies stated that the respective Commissioners did not deal with cases concerning the EU Charter, 3 have described cases which related to the application of the Charter.

Firstly, the EU Funds Commissioner for **Kujawsko-Pomorskie voivodship** stated that although none of the complaints received by the office explicitly and directly mentioned the Charter, a number of complaints could be qualified as referring to the right to good administration as protected under Article 41 of the Charter. Namely, out of 130 motions received by the institution in total during the six years of its functioning, 24 could be qualified as such. The EU Funds Commissioner for Kujawsko-Pomorskie voivodship, however, did not elaborate on what the cases concerned specifically. Finally, the office also confirmed its commitment to the Charter.

Secondly, the EU Funds Commissioner for **Warmińsko-Mazurskie voivodship** informed us of one case related to the Charter. It concerned a complaint following the lack of response to an application for funding a project by an institution organising the bid competition at the stage of formal verification. The complainant claimed the formal verification was excessive and had in fact touched upon substantive matters of the project, which in their opinion violated the right to equal treatment and non-discrimination protected by the Charter. Nonetheless, the complaint was dismissed on the basis that the assessment done by the organising institution did not exceed its legal grounds.

Thirdly, the EU Funds Commissioner for **Opolskie voivodship** stated that their office had not received any complaints regarding the violation of the EU Charter of Fundamental Rights. However, they shared that the Marshall's Office of the Opolskie voivodship received one complaint regarding EU funds and the violation of fundamental rights at the end of 2022. The petitioner filed a motion to exclude the town of Nysa from the possibility to receive EU funds in the 2021-2027 financial perspective due to the fact that the town of Nysa was enforcing a resolution which contained provisions considered discriminatory by the High Administrative Court in light of the Polish Constitution, the European Convention for Human Rights and the United Nations Convention on the Rights of the Child. Namely, the resolution stipulated priority to receive childcare funding for biological and adop-

tive parents who are married and jointly raise at least 2 children and, depending on children's age, one or both parents are active on the labour market. Consequently, the resolution excluded single parents raising children as well as couples raising children in informal partnerships. The funds' management institution requested the mayor of Nysa to take a stance on the issue and commissioned an external expert opinion concerning the potential exclusion of the town of Nysa from the 2021-2027 financial perspective due to the discriminatory provisions of the childcare resolution. Finally, the EU Funds Commissioner for Opolskie voivodship confirmed their commitment to the enforcement of EU Charter of Fundamental Rights and mentioned they were working on designing the criteria for projects' selection. The criteria will include cross-checking whether the applicant has been included on the Commissioner for Human Rights' list of municipalities that have passed anti-LGBT resolutions. The inclusion on the list will result in a negative assessment. The criteria will also assess the project's compliance with the Charter in terms of the manner in which it is realised, the project scope and the applicant.

Finally, the replies gathered from other institutions with a human rights remit mention hardly any cases concerning the application of the Charter, which may be a reflection of an insufficient level of awareness and knowledge about the scope of its application. This point will be developed further in our future research through a questionnaire addressed to individual officials involved in EU funds implementation.

The use of the Charter in judicial training and training for civil servants in public administration and the parliament

On 16 March 2023, the Office for the Commissioner for Human Rights held the first workshop on the enforcement of EU Charter of Fundamental Rights for representatives of the management institutions, organised at the Ministry of Development Funds and Regional Policy. The training was attended by the Charter Coordinators from 26 national and regional programmes implemented in the 2021-2027 financial perspective, as well as the regional Commissioners for EU Funds. The meeting inaugurated a series of training workshops concerning the conditionality of compliance of the implementation of EU funded programmes with the EU Charter under the current financial perspective. During the meeting, introductory issues on the legal protection of fundamental rights on EU grounds and the implementation and application of the Charter by Member States, as well as practical aspects concerning the verification of the application of the EU Charter by institutions in the system of implementation of EU funds were discussed.²³

The application of the EU Charter by Polish courts was a subject of a conference organised by the Ministry of Foreign Affairs on 25 September 2015. A post-conference publication entitled "Application of the EU Charter of Fundamental Rights by Polish Courts: a conference organised by the Ministry of Foreign Affairs" followed.

²³ See: Ministry of Development Funds and Regional Policy, 16 April 2023, <https://www.gov.pl/web/fundusze-regiony/warsztaty-dla-instytucji-zarzadzajacych-dotyczace-stosowania-karty-praw-podstawowych>, access on 14 June 2023.

In 2014, the Institute for Law and Society (INPRIS) and the Centre for Research, Studies and Legislation of the National Bar Association of Attorneys-at-Law issued a Polish version of the book entitled “The Charter of Fundamental Rights as a Living Instrument”, which was meant to be both a theoretical and practical guide targeted at law enforcers and practitioners, mainly judges and attorneys-at-law.²⁴

Various smaller workshops on the use of the Charter have been supported or promoted by the Polish Bar Council²⁵ and the National Bar Association of Attorneys-at-Law²⁶. This shall be seen as particularly important for the future use of the Charter in their legal practice.

The use of the Charter in awareness raising initiatives and by civil society organizations (including academia)

The EU Charter was the subject of several academic conferences in Poland. For instance, the “20 years of the EU Charter of Fundamental Rights” was an online event organised by the European Commission Representation in Poland and the EU Agency for Fundamental Rights on 25 May 2021. It gathered both EU and Polish human rights experts representing institutions, politics and academia.

Moreover, on 10-11 May 2019 the Commissioner for Human Rights organised a large academic conference entitled “The EU Charter of Fundamental Rights and its importance for the Polish legal system”. The event gathered both human rights academics as well as practitioners and institutional representatives, mostly from Poland but the event was also attended by Emily O’Reilly, the European Ombudsman and Michael O’Flaherty, the Director of the EU Agency for Fundamental Rights. Throughout the two days of the conference, the panels covered a wide array of topics, each focusing on a different chapter of the Charter.²⁷

Among other academic events related to the Charter, on 24 November 2021 the SWPS University of Social Sciences and Humanities in Warsaw organised an event entitled “‘Every Person’ Manifesto – do we need more rights in the EU Charter of Fundamental Rights?”.

As regards further use of the Charter in Polish academia, there are a few articles related to the Charter published. The main two theme areas are the basic issues in the application and enforcement of the Charter and the question of applicability of the Charter in the light of the Polish/British protocol.²⁸ Overall, however, **the use of the Charter in Polish academia is rather limited.**

²⁴ Ł. Bojarski, D. Schindlauer, K. Władach, M. Wróblewski (ed), Karta Praw Podstawowych Unii Europejskiej jako żywy instrument. Podręcznik dla prawników, Warszawa 2014. See also: Ł. Bojarski, D. Schindlauer, K. Władach, The Charter of Fundamental Rights as a Living Instrument. Manual, Rome–Warsaw–Vienna 2014.

²⁵ <https://www.adwokatura.pl/konferencje-i-szkolenia/karta-praw-podstawowych-w-polsce-terra-incognita/>

²⁶ See e.g. <https://kirp.pl/warsztat-na-temat-karty-praw-podstawowych-ue/>

²⁷ <https://bip.brpo.gov.pl/pl/content/karta-praw-podstawowych-i-jej-znaczenie-dla-polskiego-systemu-prawnego>

²⁸ See e.g.: Krystyna Kowalik-Bańczyk and Mirosław Wróblewski, Application of the Charter of Fundamental Rights by Polish Courts and the Jurisprudence of the Polish Constitutional Tribunal, Yearbook of Polish European Studies 2015, 18, 239-266; Magdalena Szubska, Geniza i znaczenie dla unijnego porządku prawnego Karty Praw Podstawowych Unii Europejskiej, Polski Rocznik Praw Człowieka I Prawa Humanitarnego 9, 2018; Marcin Woźniak, Ochrona praw podstawowych w Unii Europejskiej w perspektywie Karty Praw Podstawowych UE, Rocznik Administracji Publicznej 2021 (7); Roman Szewczyk, “Karta Praw Podstawowych” Unii Europejskiej, Studia Elbląskie 11, 243-255, 2010; Andrzej Jackiewicz, Problematyka praw człowieka w świetle Karty Praw Podstawowych w aspekcie integracji Polski z Unią Europejską, Studia Europejskie, 2/2003; Marek Jaśkowski, Konsekwencje prawne Protokołu nr 30, w sprawie stosowania Karty praw podstawowych Unii Europejskiej do Polski i Zjednoczonego Królestwa, Zeszyty Prawnicze Biuro Analiz Sejmowych Kancelarii Sejmu, no. 4(40), 2013, p. 29-50. ć

The Charter and the courts since its entry into force. Chosen case-law examples of the Charter's potential

Overall, the use of the Charter by Polish courts is rather scarce. This may be evidenced by the fact that FRA's case law database consists of merely 16 Polish cases with direct references to the Charter. For the sake of the following analysis, a purposeful selection of national courts decisions has been made in order to describe and analyse rulings where the EU Charter played a relevant role. The aim was to present decisions delivered by the highest courts; thus, the focus is placed on the rulings of the Supreme Administrative Court (4 rulings) and the Supreme Court (2 rulings). These rulings were also selected on the basis of being deemed the most relevant to the legal development and/or where the Charter most clearly affected the outcome of the case.

Poland / Supreme Administrative Court / III OSK 3746/21 / 28 June 2022²⁹

The case relates to the resolution of the Istebna Municipality on the "stopping of LGBT ideology by the local community". The resolution was held unlawful by the Voivodship Administrative Court in Gliwice following a complaint by the Polish Commissioner for Human Rights. The Commissioner, among other legal bases, referred to the violation of Article 7, 11(1), 21(1) and 45 of the Charter through violating the right to private and family life, the freedom of expression and the prohibition of discrimination on the grounds of sexual orientation and gender identification. In the reasoning of the Voivodship Administrative Court in Gliwice, Article 21(1) of the Charter played an important role in finding that the Municipality's resolution was discriminatory towards LGBT people.

The ruling of the Voivodship Administrative Court in Gliwice was appealed to the Supreme Administrative Court by the National Public Prosecutor, Istebna Municipality and "Ordo Iuris" Foundation. However, the Supreme Administrative Court dismissed the appeals and upheld the judgement. In its reasoning it also referred to Article 21(1) of the Charter as a principle and standard of non-discrimination, which the Municipality's resolution on "LGBT-free zone" was violating by undermining the prohibition to discriminate against non-heteronormative people in employment.

²⁹ <https://sip.lex.pl/#/jurisprudence/523455430/1/iii-osk-3746-21-wyrok-naczelnego-sadu-administracyjnego?keyword=III%20OSK%203746~2F21&cm=STOP>

Poland / Supreme Administrative Court / I ONP 1/14 / 30 May 2014³⁰

In this case the Charter came up in the context of admissibility of claims of violating Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR) as claims regarding violation of EU law. The Supreme Administrative Court stated that the fact that the Charter of Fundamental Rights of the European Union (which, since the entry into force of the Lisbon Treaty (OJ C 2007.306.1), has a legal status equal to the Treaties) does not alter the legal status of the ECHR.

Namely, the Treaty on the Functioning of the European Union and the Treaty on the European Union contain a reference to the Convention for the Protection of Human Rights and Fundamental Freedoms. The first sentence of paragraph 5 of the preamble to the Charter of Fundamental Rights states that "This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from (...) the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) and from the case law of (...) the European Court of Human Rights (...)". On the other hand, Article 52(3) of this Charter states: "In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope shall be the same as those conferred by the ECHR. This provision shall not prevent Union law from granting more extensive protection". The purpose of this provision is to ensure consistency between the standard of protection of human rights and fundamental freedoms (the Convention system) and the protection of fundamental rights (the EU Charter system) and to prevent the emergence of divergences between the two standards, including those developed by the case law of the Court of Human Rights in Strasbourg and the case law of the Court of Justice of the EU.

However, the Court concluded that this does not mean that the Convention for the Protection of Human Rights and Fundamental Freedoms is part of European Union law. Thus, it follows from the current state of European Union law that the European Union is not a party to the Convention for the Protection of Human Rights and Fundamental Freedoms and that the Convention does not constitute an act forming part of the legal system of the Union.

Poland / Supreme Administrative Court / II GSK 3236/17³¹

In this judgement the Supreme Administrative Court held that the EU Charter of Fundamental Rights provides for the possibility of imposing restrictions on the freedom to conduct a business and the right to property. As the gambling sector carries the risk of gamblers becoming addicted to gambling, its monitoring and reducing the availability of gambling and thus minimising its impact on society is an objective recognised by the Court of Justice of the EU. Thus, national legislation that does not prohibit gambling altogether, but only contains regulations aimed at reducing the avail-

³⁰ <https://sip.lex.pl/#/jurisprudence/521654865/1?directHit=true&directHitQuery=I%20ONP%201~2F14>

³¹ <https://sip.lex.pl/#/jurisprudence/523126709/1/ii-gsk-3236-17-ograniczenia-w-organizowaniu-gier-hazardowych-a-swoboda-dzialalnosci-gospodarczej...?cm=RELATIONS>

ability of gambling and increasing the control of the gambling industry, cannot be considered to violate human rights and freedoms as provided for in the Charter of Fundamental Rights.

Articles 15-17 of the Charter have been brought up in this case in the cassation appeal by the party. In considering the claims the Court immediately dismissed the consideration of Article 15 of the Charter, as it grants protection to physical persons who may choose a profession and undertake an occupation, rather than legal persons who may not. As regards the other two freedoms (Article 16 of the Charter - freedom to conduct a business and Article 17 of the Charter,- governing the right to property), it should be noted that the Charter constitutes a set of rights aimed at guaranteeing respect for human dignity, freedom, equality and solidarity, and its interpretation must take this aim into account. However, the rights and freedoms guaranteed by the Charter are not absolute. The Court held that the rights that guarantee overriding freedoms such as dignity, the right to life, the right to respect for one's physical and mental integrity, the protection of health or the right to liberty and security of person must be given precedence over economic rights. This is indicated in the Preamble which states that the Union is founded on the indivisible universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. By establishing the citizenship of the Union and by creating the area of freedom, security and justice, it places the individual at the centre of its activities and emphasises personal rights but also the order in which the freedoms in question are regulated in the EU Charter of Fundamental Rights. Furthermore, it should be stressed that the Charter itself provides for the possibility of imposing restrictions on the freedom to conduct a business and the right to property, stating that there is 'freedom to conduct a business' but 'in accordance with Community law and national laws and practices' and that 'the use of property may be subject to statutory regulation where it is necessary for reasons of general interest', which is the situation in the present case.

The Court decided that the gambling sector carries the risk of gamblers becoming addicted to gambling and that its monitoring and limiting the availability of gambling and thus minimising its impact on society is an objective recognised by the CJEU. Thus, national legislation that does not prohibit gambling altogether, but only contains regulations aimed at reducing the availability of gambling and increasing control over the gambling industry, cannot be deemed to violate human rights and freedoms provided for in the Charter of Fundamental Rights³². Thus, the Court stated there were no grounds to conclude that the Court of First Instance, in applying the provisions of the Gambling Act, had violated Articles 15-17 of the Charter of Fundamental Rights.

Poland / Supreme Court / BSA I-4110-1/20 / 5 December 2019

After the Court of Justice of the European Union published its judgment of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18 concerning questions referred for a preliminary ruling by the Chamber of Labour Law and Social Security of the Supreme Court, and after the legal interpretation provided by the Court of Justice of the European Union was applied in case III PO 7/18 closed

³² See also judgments of the Supreme Administrative Court of 29 May 2018, ref. II GSK 3167/17, 18 December 2018, ref. II GSK 5080/16

with the judgment of the Supreme Court of 5 December 2019, certain common courts referred further legal questions to the Supreme Court concerning the test necessary to establish whether a case has been heard by an independent court, as well as the effect of the determination that a court which adjudicates a case does not meet the criteria of independence, impartiality and being established by law within the meaning of European Union law. In order to guarantee the uniformity of the case-law of common courts and the Supreme Court's own case-law which impacts the case-law of common courts, the First President of the Supreme Court has petitioned the formation of the combined Civil Chamber, Criminal Chamber and Labour Law and Social Security Chamber Court to resolve this legal question.

The Supreme Court had to resolve the conflict between the national law and EU law including the Charter for the purposes of cases in which individuals appeal against judicial decisions addressed to them on the grounds of lack of judicial independence of judges who had delivered the decisions. The cases originate from the fact of the judges' appointment according to the new procedure provided for in the justice reform act of 2017 changing the composition of the National Council of the Judiciary. The reform has been considered as a breach of Article 45 of the Polish Constitution, Article 6 of the European Convention of Human Rights, Article 47 of the Charter of Fundamental Rights of the European Union and Article 19 of the Treaty on European Union with the effect that court formation with the participation of a person so appointed is unlawful and the procedure in such a case shall be resumed. What is important, the reasoning of the judgment explicitly addresses the question of the conflict between the provisions of the Polish Constitution concerning judicial appointments and of Article 47 of the Charter and the requirements provided for in it by confirming the primacy of the Charter and EU law over the national law. The latter, according to the decision of the Supreme Court following the CJEU ruling, may not hamper the effective protection of EU fundamental rights by restricting the court's power to disapply conflicting legal provisions of the Member State.

Poland / Supreme Court / III UZP 4/18 / 2 August 2018

The reform of the justice system, adopted in 2017, provided for, among others, an amendment of the Supreme Court Act by lowering the retirement age of judges *in officio* from 70 to 65. This change has been largely criticized as a breach of the principle of the irremovability of judges as the key element of the principle of effective judicial protection and the principle of the rule of law. The constitutionality and compliance of the reform with EU fundamental rights and values was relevant to the case as some of the members of the adjudicating panel had already reached the age of 65 during the proceedings in the case. The Supreme Court had to answer, in consequence, if the adjudicating panel composition should be changed before resolving the merits of the case. The facts of the case were similar to the case resolved by the Court of Justice in its ruling of November 2012 (C-286/12) concerning a similar reform in Hungary. The latter was decided, finally, from the perspective of the prohibition of discrimination in EU law. The novelty of the Polish case consisted in the decision of the Supreme Court to formulate the request for a preliminary ruling with reference to the principles of rule of law and of effective judicial protection.

The importance of this case for the present report originates from the direct and express reference to Article 47 of the EU Charter of Fundamental Rights to review legal provisions that do not directly regulate the right to adjudicate and the accessibility of measures of judicial protection. This was an important step in extending the scope of the Charter and, more broadly, EU fundamental rights and values to general arrangements in the constitutional and political systems of Member States. What was particularly important was that, referring to the CJEU case law starting from the judgment in case *Factortame* (C-213/89), the Supreme Court decided that the doubt concerning the independence and impartiality of the judiciary, perceived in a systemic and general approach, was serious enough to justify the application of interim measures, suspending the provisions in question which did not directly concern the situation of the individual.

Poland / Supreme Court / II PK 199/16³³

The judgement concerns the impact of Article 30 of the Charter on the interpretation of both EU and Polish law by Polish courts. Therein, the Supreme Court held that the protection provided for in Article 30 of the Charter concerns cases of unjustified dismissal. It relates to the justification of dismissal in the material sense and not in the formal sense. It is indicated that termination of the employment relationship should be considered unjustified unless it is proven that there is an objective reason justifying the termination and, moreover, the procedural requirements have been complied with.

It was in the cassation appeal that the claimant, the dismissed employee, relied on Article 30 of the Charter. Namely, they held that the Court of II instance violated the said Article as they held that the defendant, the former employer, did not have the obligation to justify in writing the reasons for the dismissal. Meanwhile, according to the claimant, Article 30 of the Charter provided that every employee was protected against unjustified dismissal.

In discussing this argument, the Supreme Court first touched upon the limited scope of application of the Charter in Poland, following the Polish-British protocol. The Supreme Court decided that Article 30 of the Charter should at least influence the process of interpretation of provisions both of EU law and of Polish law by Polish courts.

Nonetheless, it held however that attention should be drawn to the scope of the protection afforded under Article 30 of the Charter. As can be seen from its literal wording, the protection provided by this provision concerns cases of unjustified dismissal. What is at issue here is the justification for dismissal in the substantive sense and not in the formal sense. The court further revised that the literature indicates that termination of the employment relationship should be considered unjustified unless it is proven that there is an objective reason justifying the termination and, moreover, the procedural requirements have been complied with. Meanwhile, it is generally accepted that Article 30 of the Charter refers to the totality of legislative solutions protecting against arbitrary

³³ <https://sip.lex.pl/#/jurisprudence/522431729/1/ii-pk-199-16-oddzialywanie-art-30-karty-praw-podstawowych-unii-europejskiej-na-proces-dokonywania...?cm=RELATIONS>

termination of the employment relationship by the employer. Therefore, the Supreme Court agreed with the Courts of both instances that the termination of the employment contract with the plaintiff was substantively justified, as the plaintiff had problems with discipline and the proper performance of his duties, and therefore it was the substantive reasons that lay behind the termination of the employment contract with the plaintiff by notice. This means that the employer acted on the basis of objective circumstances and not its subjective opinion. At the same time, it should be noted that all formal prerequisites were fulfilled, as the Labour Code does not contain an obligation to include a justification in the content of the notice of termination of a fixed-term employment contract, and no such direct obligation can be derived from the provisions of European law either.

Poland / District Court in Nowy Sącz / I Ns 376/19 / 19 April 2019

Although the cases chosen for the purposes of the present study originate from the courts of the superior level in the judicial system in Poland, it is important to highlight that in some cases the use of the Charter by the courts of lower levels may have important consequences for the overall establishment of fundamental rights protection. In the decision from April 2019 the District Court in Nowy Sącz decided to enter a partly legally incapacitated person on the electoral register for the elections to the European Parliament. The proceedings were held with the participation of the Polish Helsinki Foundation for Human Rights which decided to join the case for strategic litigation purposes. In its decision the Court, referring to the case law of the European Court of Human Rights on the right of mentally disabled persons to vote as well as to some cases of the CJEU concerning legitimate restrictions of the right to vote referred, among other provisions, to Article 39 of the Charter of Fundamental Rights according to which 'every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides [...]' and that the elections shall be 'direct [and] universal'. The case is particularly worth noting, firstly because the reference to EU law and the ECHR was used as a legal basis for disapplying the national provision of the Electoral Code that expressly exclude the right of incapacitated citizens to vote and, secondly, due to the fact that the Polish Constitution in its Article 62 includes analogous exclusion with regard to national elections. The judgment in the case served as an argument for a further petition to the Senate to change the contested legal provisions. The Chamber decided to initiate a legislative procedure partly addressing the claim to give incapacitated persons the right to participate in the elections to the European Parliament.

Future potential role and added value of the Charter to strengthen the fundamental rights situation at national level

Without delving into further in-depth analysis, the aim of the present study is to delineate the observed confirmed and hypothetically promising practices allowing for developing the potential of the EU fundamental rights in protecting rights and freedoms of individuals at national level. The cases and observations discussed in the previous sections of this report show certain similarities and common points between the factors determining the effective use of the Charter and, on the contrary, the lack thereof. These common points seem, to some extent, applicable regardless of the type of legal practice referred to here (legislative, administrative and judicial proceedings as well as training, educational and advocacy activities).

1. As an entry point, which results from the **persisting problem of little awareness about the Charter itself** among legal practitioners and public servants, **especially as to the scope of its application** and proper interpretation of its Article 51 in cases concerning national measures, **it seems necessary to present, at every stage of a given proceeding, some introductory general remarks about the Charter** in the individual context of the case and to **demonstrate in a clear and convincing way that the Charter may be applied to it** or, in case of uncertainty or doubt, to develop a hypothetical reasoning on the basis of analogous case law of the CJEU or even to proactively preformulate a potential request for preliminary ruling. As presented above, the conditions of the applicability of the Charter are problematic at national level, be it in legislative or judicial proceedings, and constitute the first entry barrier to its effective use. Some of these barriers are caused by structural and formal arrangements on the given procedure (legislative procedure), which requires more effort in advocating for the Charter's use. Even if, formally speaking, the legal system is based on the presumption that state organs, in particular tribunals, know and apply law in its entirety, the empirical findings show that **the deep knowledge of the Charter should not be taken for granted**.

2. The problem of the lack of awareness and knowledge does not only relate to the Charter but to EU law in general. This is a systemic issue: even in the case of the younger generation of lawyers the knowledge of EU law may be too basic as EU law teaching in most law degree programmes is, even nowadays, limited to only 1 or 2 semesters. Raising awareness of the fundamental principles

of EU law could help, in consequence, contribute to better implementation of the Charter. **When referring to its provisions it may be, following these observations, helpful to make a link with a concrete piece of EU legislation and recapitulate the basic rules concerning the application of EU law at national level.**

3. With reference to the previous remark, it is important to repeat the observation formulated in the first baseline study prepared in the framework of the present project, i. e. the conclusion that the **factors hampering the use of the Charter** in Poland in order to review national measures **may follow a more general problem in administrative and judicial proceedings, that relates to constitutional and conventional review conditions.** Although the Constitution provides for the obligation to apply its provisions as the supreme law of Poland, the conditions for disapplying legislative measures conflicting with it have been traditionally interpreted in a restricted way and concentrated around the activity of the Constitutional Tribunal which is close to the centralised model of constitutional review. This logic may be influencing, in a secondary manner, the application of EU law in the same context. It is therefore necessary to **inform and raise awareness about the conditions of EU law application according to the primacy principle and its effet utile. These conditions are much easier to be fulfilled** and make the **check of the compliance with EU law much more accessible than constitutionality review** in individual proceedings. A fortiori, there may be an even bigger problem concerning the conflict between the national constitutional law (and its interpretation by the Constitutional Tribunal) and EU law, which may seem difficult to be solved by a given authority or tribunal with the mere tools of legal interpretation.

4. Thirdly, what seems crucial for the use of the Charter as a real contribution to advancing fundamental rights protection, is to situate its position among other national and international systems and mechanism traditionally used in this context. **It is especially important to demonstrate how the standards of fundamental rights protection under the Charter differ from other sources of human rights law,** particularly from national constitutional law, the European Convention of Human Rights (or, where relevant, the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees) to which the text of the Charter expressly refers but also from other instruments of human rights protection (especially UN Conventions and UN Committees' decisions). In cases of some of the rights and freedoms enshrined in the Charter, the difference may be already observable in the textual formulation thereof. Some of these formulations are more precise and developed than in national law (for example the standard of the right to leave, in the case of Poland).

5. On the other hand, especially **in cases where there is no established case law of the CJEU on the given issue or there is no EU secondary law which could serve as a reference for the interpretation of the Charter provisions, it appears important to complete the motivation and reasoning concerning their application and meaning by referring to other sources of fundamental rights and freedoms.** The use of the Charter seems to be successful, in particular when accompanied by observations on the **case law of the European Court of Human Rights** which sets, according to the express rule provided for in Article 52 para. 3, the minimum standard of protection under the Charter. Together with presentation of other international instruments (UN

Conventions and soft law) it constitutes a solid basis for the application of the Charter (see the last case discussed in the section on judicial use of the Charter). The other possible references are the **constitutional traditions of the Member States**, i.e. comparatively demonstrated standards existing in other EU Member States. This may be also incorporated in EU law argumentation through a very broad concept of 'general principles of EU law'.

6. The decisive argument in favour of the use of the Charter standard of fundamental rights protection – in a perspective of competing human rights instruments – may result from the **systemic interpretation of fundamental rights and rule of law values, which is specific to EU legal order**. The EU law system, because of its very structure, **includes principles that do not exist in other legal orders** and which may, in a secondary manner, serve as a lever for a more consolidated and broadened fundamental rights protection (such as the principle of **mutual trust** which may allow for **establishing minimum standards** of individual rights and freedoms with the use of comparative law analysis or the principles relating to it, such as the **non-regression clause** developed recently in the CJEU case law starting from the judgment in *Republika* case, C-896/19) (see: Polish rule of law cases before the CJEU).

7. It has been clearly observable that the Charter's use is more likely to be successful in cases where a given issue has been regulated in detail in **EU secondary law which may serve as a reference for the review of national measures** by giving concrete and detailed expression of the right or freedom in question. **A similar logic applies to cases where the interpretation of the Charter is backed with official positions of EU institutions** such as the European Commission (infringement proceedings) or the European Parliament (resolutions), which serve as discursive support for the use of the Charter provisions in a meaning which may be considered as uncertain or unfounded in hard law.

8. In addition to that, it seems that the use of the Charter is particularly successful in cases **where a holistic and systemic approach is adopted** to foster a certain fundamental rights standard. We refer here to the cases where the **activity has been deployed in parallel on multiple levels, for example in judicial proceedings and, at the same time, in parliamentary advocacy** based on the right to petition. A similar success factor applies to **strategic litigation**. What is worth noting in the perspective of recent developments of rule of law protection in Poland is that **it may be particularly effective to bring the case not only at national level but also before international or EU institutions** whose activity may function as an additional **external pressure** fostering fundamental rights protection (which was clearly observed in cases of so-called LGBT-free zones, which led to the adoption of further mechanisms securing fundamental rights compliance within the scope of EU funds by the so-called conditionality mechanism or horizontal Charter conditionality).

9. Following the previous remark, some of the successful Charter applications analysed in this report present also another common characteristic which is linked to the **vivid interest** in the **public debate** concerning them, already at the stage before final solution. **Bringing the case to the national and, especially, international public discourse in the media and public institutions is a clear success factor** for the Charter use (see the LGBT-free zones cases).

10. Lastly, it appears that the use of the Charter can be successful at any stage of the proceedings and before all the levels of administrative or judicial structure. In the perspective of a given procedure, **the Charter argument should be introduced and developed from the very beginning**, as in many cases presented in this analysis the exact interpretation of the Charter or its applicability to the case may be subject to doubts and controversies. This requires extensive discussion of these issues through the observations exchanged in the course of the proceedings, especially in the case of judicial proceedings.

Conclusion

The present report delineates some baseline findings on the use of the EU Charter of Fundamental Rights in Poland. By reference to many types of legal practices as well as advocacy and political activities backed with empirical observations and chosen case examples, certain major flaws of the Charter setting in national legal system and culture in Poland have been identified. Some of them are of a systemic nature, including the formal and procedural arrangements of legislative proceedings (in particular with regard to requirements concerning impact assessment of legal initiatives), lack of awareness and thorough EU law training among public servants and officials, restrictive attitude to conditions of EU law compliance review by administrative organs and tribunals, linked probably to some issues concerning the culture of constitutional review in Poland or, lastly, the separation of powers in a given national and global political setting involving multiple institutions. The analysed examples have also allowed to formulate, based on the identified common points between them, some hypothetical or confirmed success factors for the Charter's use, concerning legal reasoning, the placement of the Charter in the global context of other human rights sources and instruments (especially ECHR) and its advocacy in social, political and legal sense (including strategic litigation). Some of them relate also to the basic issue of defining the scope of application of the Charter as well as to the fundamental principles of EU law as such and the conditions of its use for the reviewing and potential disapplication of conflicting national measures, which may constitute a considerable entry barrier for effective use of the Charter. The observations on the chosen case-law show also that the specificity of EU legal order with its fundamental principles relating to its compound structure (mutual trust, loyal cooperation) may consolidate the advocated fundamental rights standard for the purposes of its future use.



35 YEARS
COMMISSIONER
FOR HUMAN RIGHTS
1988 – 2023

Office of the Commissioner for Human Rights

al. Solidarności 77, 00-090 Warsaw, Poland

Help line BRPO: +48 800 676 676

bip.brpo.gov.pl