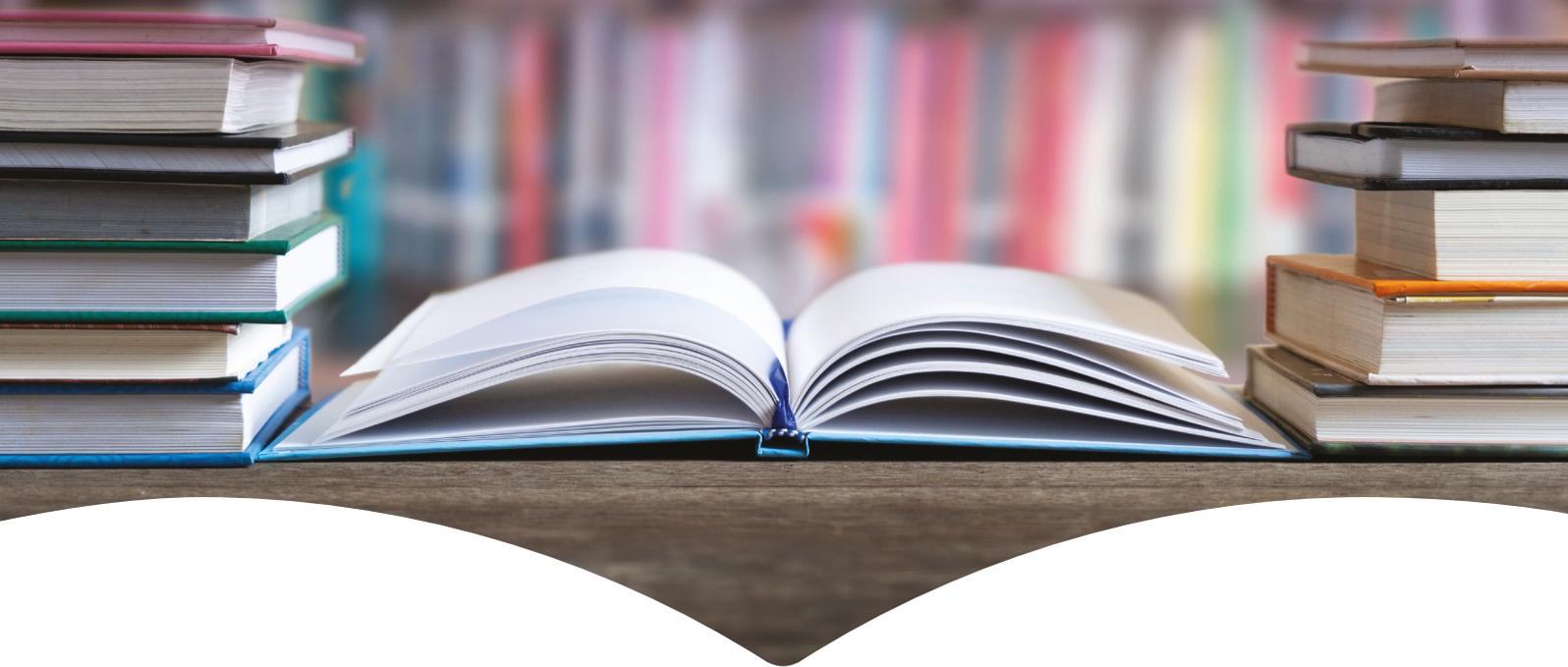




NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION



# **The Interaction between the EU Charter of Fundamental Rights and general principles with the Windsor Framework**

**Prof Tobias Lock** (Maynooth University),  
**Dr Eleni Frantziou** (Durham University)  
and **Anurag Deb** (Queen's University Belfast)

**May 2024**



This paper was written by Professor Tobias Lock (Maynooth University), Dr Eleni Frantziou (Durham University) and Anurag Deb (Queen's University Belfast) for the Northern Ireland Human Rights Commission. The views expressed in the paper do not necessarily represent the views of the Northern Ireland Human Rights Commission, nor the employers of the authors. The paper is not intended to be relied upon as legal advice applicable to any individual case.

Paper finalised March 2024.

© 2024. Copyright is held by Northern Ireland Human Rights Commission.

Northern Ireland Human Rights Commission, 4th Floor, Alfred House,  
19-21 Alfred Street, Belfast BT2 8ED.

## About the authors

---



**Tobias Lock** is a Professor of Law at Maynooth University School of Law and Criminology and founding director of the Maynooth Centre for European Law. From 2020-2023 he held a Jean Monnet Chair in EU Law and Fundamental Rights there. Prof. Lock joined Maynooth from the University of Edinburgh, where he was a senior lecturer in EU law and co-director of the Europa Institute. He is on the board of the Irish Centre for European Law and currently serves as an EU law adviser to the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee. He is also a member of the Royal Irish Academy's ARINS project (Analysing and Researching Ireland North and South). His research centres on EU constitutional and fundamental rights law as well as the relationship between EU law, domestic law, and international law. His current focus is on EU fundamental rights law; EU accession to the ECHR; and the fallout from Brexit, particularly its effects on the devolved parts of the UK.



**Dr Eleni Frantziou** is an Associate Professor of Public Law and Human Rights at Durham Law School, University of Durham. She has written extensively about the application of human rights in the European legal space and the human rights implications of Brexit, with a particular focus on the EU Charter of Fundamental Rights. Eleni regularly contributes to public inquiries and consultations on human rights law and has trained judges and civil servants on the application of the Charter both in the UK and the EU. Her research has been cited by national and supranational bodies, such as select committees of the House of Lords and the House of Commons, the Scottish Parliament, the European Court of Justice, the European Parliament, the EU Fundamental Rights Agency, as well as in several Opinions of Advocates General at the European Court of Justice.



**Anurag Deb** is a PhD candidate in the School of Law at Queen's University Belfast and a paralegal at KRW LAW LLP. He is undertaking his thesis in legislative drafting and has written extensively on issues around the Windsor Framework. His practice as a paralegal also covers public law, with a particular focus on human rights litigation.

# Executive Summary

**This report analyses the extent and ways in which the EU Charter of Fundamental Rights ('CFR' or 'Charter') and the general principles of EU law continue to apply in the Northern Ireland legal order under the Windsor Framework.**

The report explains that the continued application of the Charter and general principles of EU law is principally underpinned by Articles 2 and 4 of the Withdrawal Agreement, which explicitly define EU law as including the Charter and general principles of EU law and stipulate that EU law covered by the Agreement 'shall be interpreted and applied in accordance with the methods and general principles of Union law', respectively. This gives rise to two main avenues for the application of the Charter and general principles under the Windsor Framework: first, the application and interpretation of provisions listed in the Withdrawal Agreement (including the Windsor Framework). Second, the Charter and general principles may be used beyond the EU law specifically mentioned in the Withdrawal Agreement in the application and interpretation of the requirement set out in Article 2 of the Windsor Framework, namely that there shall be 'no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union'.

The principal finding of this report is that the Charter and general principles of EU law have not only

remained relevant in Northern Ireland after Brexit, but that they are likely to continue to be applied in much the same way as they did whilst the UK was an EU Member State. This is a result of two factors: first, the combination of Article 4 WA and s. 7A of the EU (Withdrawal) Act 2018 results in large quantities of EU law remaining applicable in Northern Ireland as *EU law*. Second, Article 2 of the Windsor Framework permits a further application of the Charter and general principles of EU law in situations where there is a risk of diminution to the rights protected in the RSEO part of the GFA. In this regard, the report highlights that there are considerable differences between measures listed in Annex 1 which, for the purposes of rights standards applicable in Northern Ireland are to be treated as if the UK was still a Member State of the EU, and other, non-annexed EU measures.

After setting out the relevant tests for diminution to occur in respect of non-annexed measures, the report argues that, in accordance with settled principles of EU constitutional law, the critical factors for domestic courts should be whether the measures assessed for diminution were binding on Northern Ireland at the end of the implementation period and whether

they were within the scope of EU law. The report also explains that, provided that these conditions are met, it is essential for diminution to be assessed based on a comparative exercise. This involves an analysis of the pre-Brexit application of EU fundamental rights under the Charter and general principles of EU law on the one hand, and the application of those rights after Brexit under any system of rights protection (including domestic law and the ECHR), on the other. The report highlights that, since the remedial strength of Charter rights was their key added value – a feature of the Charter that was well-recognised by the UK Supreme Court before Brexit – it is essential that this feature be maintained within the non-diminution guarantee, if that guarantee is to remain of practical significance.

This means that Article 2 of the Windsor Framework not only preserves the substance of the Charter rights, but also the EU law remedies that accompany those rights as a function of the primacy of EU law, notably direct effect (including the disapplication of incompatible legislation), consistent interpretation, as well as state liability. Finally, the report discusses the potential impact of post-Brexit EU law developments with regard to the continued applicability of the Charter under the Withdrawal Agreement and the Windsor Framework.

It finds that post-Brexit developments in CJEU case law remain relevant, both with regard to the dynamic alignment obligations in the Withdrawal Agreement and Windsor Framework and the more general non-diminution guarantee in Article 2 Windsor Framework more generally. Furthermore, the report briefly shows how divergence in legal developments as a result of the ‘Stormont Brake’ would give rise to legal uncertainty insofar as the interpretation and validity of EU law made applicable in Northern Ireland on the basis of the WA is concerned.

The report is structured as follows. Chapter 1 explains the key concepts, effects, and methods of interpretation of the Charter and general principles under EU law. Chapter 2 explores the basic framework for the application of the Charter in Northern Ireland under the Withdrawal Agreement and Windsor Framework. Chapters 3 and 4 go on to provide further detail about the interaction of between the Charter and general principles and the Windsor Framework in terms of scope and remedies, respectively. Chapter 5 analyses the domestic application of EU case law and legislation now and in the future (‘dynamic alignment’).

The report reflects the law as it stood on 19 March 2024.

# Table of Contents

<b>List of Abbreviations</b>	<b>9</b>
<b>Introduction</b>	<b>10</b>
<b>Chapter 1: Key concepts and effects of the Charter and general principles under EU law</b>	<b>12</b>
1. Introductory remarks	12
2. The relationship between the Charter and general principles of EU Law	12
3. Rights and principles in the Charter	14
4. The Charter and the ECHR	17
5. Applicability of the Charter to the Member States: implementing Union Law	19
6. Effects of Charter rights	23
a. The source of EU remedies: primacy	23
b. Consistent interpretation	24
c. Direct effect	25
d. Effective remedial action under the Charter	27
7. Limitations to Charter rights	33
8. No UK opt-out from the Charter	34
<b>Chapter 2: The basic framework for the application of the Charter and the general principles of EU law in the Northern Ireland legal order</b>	<b>36</b>
1. Introductory remarks	36
2. The relevant provisions of the Withdrawal Agreement and the Windsor Framework	36
3. The architecture and consequences of the EUWA and REULA	37
a. The statutory provisions and text	37
b. The impact of the statutory provisions	39
c. How to read seemingly conflicting provisions	41
d. Section 7A EUWA after the REULA	44
4. Article 2 of the Windsor Framework: general considerations	45
a. The basic features of Article 2 Windsor Framework	45
b. The enforcement of the non-diminution requirement	48
c. The relationship between Article 4 WA and Article 2 Windsor Framework	49
<b>Chapter 3: The continued operability of the Charter in the Northern Ireland legal order</b>	<b>53</b>
1. Introductory remarks	53
2. Applicability of the Charter in Northern Ireland due to Article 4 WA	53
3. Applicability of the Charter under Article 2 Windsor Framework	55
a. Annex 1 Directives	57
b. The Charter and Article 2 outside the Annex 1 directives	58
c. Relevance of post-Brexit CJEU case law	62
d. The meaning of ‘diminution’	65

<b>Chapter 4: Charter functions in the domestic legal order pre and post Brexit</b>	<b>67</b>
1. Introductory remarks	67
2. The effects of the Charter in domestic law before Brexit	68
a. Disapplication through direct effect	69
b. Consistent Interpretation	72
c. Reparation through state liability and Article 47	74
3. The Continued Effects of the Charter under Art 4 and the Annex 1 Directives	75
a. Disapplication and state liability	75
b. Consistent interpretation of EU and implementing legislation with the Charter	77
<b>Chapter 5: Post-Brexit Developments and the Charter</b>	<b>81</b>
1. Introductory remarks	81
2. The ‘Dynamic Alignment’ Obligation	81
3. Post-Brexit EU law that neither amends nor replaces EU law referenced in the Windsor Framework	83
4. The Stormont brake	84
5. How the Stormont Brake functions in practice	84
6. Dynamic alignment and Article 2 Windsor Framework?	85
7. Relevance of Future Case Law in Domestic Decisions	89
<b>Conclusion</b>	<b>92</b>

# List of Abbreviations

<b>CFR/Charter</b>	Charter of Fundamental Rights of the European Union
<b>CJEU</b>	Court of Justice of the European Union
<b>ECHR</b>	European Convention on Human Rights and Fundamental Freedoms
<b>ECNI</b>	Equality Commission for Northern Ireland
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>EUWA</b>	European Union (Withdrawal) Act 2018
<b>HRA</b>	Human Rights Act 1998
<b>GDPR</b>	EU General Data Protection Regulation
<b>IHREC</b>	Irish Human Rights and Equality Commission
<b>NIHRC</b>	Northern Ireland Human Rights Commission
<b>OJ</b>	Official Journal of the European Union
<b>REULA</b>	Retained EU Law (Revocation and Reform) Act 2023
<b>RSEO</b>	Rights, Safeguards and Equality of Opportunity
<b>SIA</b>	State Immunity Act 1978
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UK</b>	United Kingdom
<b>WA</b>	Withdrawal Agreement
<b>WF</b>	Windsor Framework

---

# Introduction

**This report explores the interaction between the Charter of Fundamental Rights of the European Union ('Charter' and 'CFR') and general principles of EU Law protecting fundamental rights on the one hand, and the Windsor Framework ('WF'),<sup>1</sup> which forms part of the EU-UK Withdrawal Agreement ('WA'), on the other. Whereas UK domestic law after Brexit largely removes the domestic applicability of the Charter and general principles of EU law, the Windsor Framework partly retains their relevance in Northern Ireland. This gives rise to a complex relationship between the Windsor Framework and other aspects of withdrawal legislation, the exact scope of which is difficult to determine at first glance. The purpose of this report is to explain the relevant provisions and their interplay, thereby minimising the risk of misunderstandings or inaccurate application of the Charter and general principles in Northern Ireland. As such, the report contributes to preventing the UK breaching its obligations under the EU-UK Withdrawal Agreement.**

More specifically, even though the Windsor Framework does not expressly declare the Charter applicable in Northern Ireland, there are two routes through which both the Charter and the general principles of EU law that predated it continue to have effect in Northern Ireland. The first is Article 4 WA, which stipulates that 'the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and

its Member States'<sup>2</sup>; and that the provisions of Union law referred to in the Withdrawal Agreement – which includes the Windsor Framework – 'shall be interpreted and applied in accordance with the methods and general principles of Union law'.<sup>3</sup> Given that Article 2 WA explicitly defines 'Union law' as including the Charter and general principles of EU law, these instruments continue to have effects where the Windsor Framework refers to EU law, notably in, but not confined to, the Annexes to the Withdrawal Agreement.<sup>4</sup>

---

1 In line with Joint Declaration No 1/2023 of the Union and the United Kingdom in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 [2023] OJ L102/87, the Protocol on Ireland/Northern Ireland – as it continues to be called in the Withdrawal Agreement between the EU and the UK – is referred to in this report as 'the Windsor Framework'.

2 Article 4(1) WA.

3 Article 4(3) WA.

4 We explain this in more detail in Chapter 2(4).

The second route is under the Windsor Framework itself, which entails a non-diminution commitment in Article 2 thereof. This involves an assessment of whether a diminution of rights, safeguards or equality of opportunity as set out in the Belfast (Good Friday) Agreement has occurred as a result of Brexit.<sup>5</sup> Given that the Charter and general principles formed part of the rights protections in Northern Ireland before the end of the Brexit implementation period, they are a relevant factor in this assessment.

The report commences by establishing the baseline of key concepts and effects of the Charter and general principles under EU law in Chapter 1; it then explores the basic framework for the application of the Charter in Northern Ireland according to the Windsor Framework in Chapter 2; the report subsequently explores the details of this interaction between the Charter and the Windsor Framework in Chapter 3 before addressing the functions of the Charter in the domestic legal order with a focus on remedies in Chapter 4. The final Chapter 5 then focuses on the temporal element, i.e., questions around dynamic alignment and what that means for the applicability of the Charter.

The report reflects the law as it stood on 19 March 2024.

---

5 For a detailed analysis of Article 2 WF, see: Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, *European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (ECNI, NIHRC and IHREC, 2022) <https://www.ihrec.ie/app/uploads/2023/04/The-Impact-of-Brexit-on-the-Divergence-of-Rights-and-Best-Practice-on-the-Island-of-Ireland-1.pdf>; see also NIHRC and ECNI Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol (December 2022), available here: [https://nihrc.org/uploads/publications/NIHRC-and-ECNI-Scope-of-Article-2-Working-Paper\\_2022-12-06-101316\\_vcpq.pdf](https://nihrc.org/uploads/publications/NIHRC-and-ECNI-Scope-of-Article-2-Working-Paper_2022-12-06-101316_vcpq.pdf).

# Chapter 1:

## Key concepts and effects of the Charter and general principles under EU law

### 1. Introductory remarks

The operation of the Charter and general principles of EU law in Northern Ireland after Brexit is a topic of significant complexity, which presupposes an understanding of the history and interaction of these instruments of rights protection within EU constitutional law and practice. As the Northern Ireland Court of Appeal judge Sir Bernard McCloskey has put it, ‘human rights development in EU law has been a product of evolution, not revolution.’<sup>6</sup> A process of development of EU human rights started from the judicial recognition of fundamental rights as general principles of EU law more than fifty years ago in *Stauder*<sup>7</sup> and culminated in the codification of fundamental rights in the binding Charter under Article 6(1) TEU in the Treaty of Lisbon.<sup>8</sup> Today, EU law comprises an expansive human rights jurisprudence with distinctive characteristics both in terms of its content and in terms of its enforcement mechanisms. This chapter explains the key concepts,

effects, and methods of interpretation that underpin the Charter and general principles of EU law. Its purpose is to acquaint the reader with the main features and interpretative challenges posed by the Charter and general principles of EU law, so that the changes effected to their status by Brexit (explained in the subsequent chapters) can be fully appreciated.

### 2. The relationship between the Charter and general principles of EU Law

The general principles of EU law are an unwritten source of EU law uncovered and developed in the case law of the European Court of Justice (‘CJEU’). They form part of EU primary law, and have a constitutional status.<sup>9</sup> The general principles of EU law have a range of functions both in interpreting and in enforcing EU law, including the following:<sup>10</sup> all EU secondary law must comply with and be interpreted in light of the general principles of EU law.

6 Sir Bernard McCloskey, ‘The Charter of Fundamental Rights’, in: Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol*, CUP 2022, 159, 159.

7 Case 29/69, *Stauder v City of Ulm*, EU:C:1969:57, para 7.

8 McCloskey (n 6) 159-160.

9 Case C-101/08, *Audiolux*, EU:C:2009:626, para 63. As Neuvonen and Ziegler highlight, there is some uncertainty as to whether all general principles have a constitutional status: Päivi J Neuvonen and Katja Ziegler, ‘General principles in the EU legal order: past, present and future directions’ in Päivi J Neuvonen and Katja S Ziegler and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law*, Edward Elgar 2022, 7, 11-12. It is clear, however, that the protection of fundamental rights is a general principle of constitutional rank: Joined Cases C-402 & 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union*, EU: C: 2008: 46, para 303

10 For a detailed discussion of the functions of the general principles of EU law, see Takis Tridimas, *The General Principles of EU Law* (2nd edn), OUP 2006, 29-35.

Where there is doubt as to the meaning of EU primary law, the latter is also interpreted in the light of the general principles. Moreover, and most controversially, the general principles of EU law can be relied upon as self-standing directly effective protections in situations falling within the scope of EU law. Thus, despite their unwritten character, the general principles of EU law can, in practice, operate similarly to rights-conferring provisions of the Treaties.

The CJEU typically derives the general principles from the constitutional traditions common to the Member States. While there have been exceptions to this rule,<sup>11</sup> and one should not expect to find *all* aspects of the general principles of EU law embodied in every Member State legal order, they tend to broadly reflect the key principles governing those legal orders. The most important general principles developed by the CJEU over the decades include:<sup>12</sup> the principle of proportionality; the principle of equality; legal certainty and legitimate expectations; the right to judicial protection; rights of defence; transparency; abuse of rights; the principle of effective remedies in national courts, including state liability; and, most importantly, EU fundamental rights.

For the purposes of this research, which focuses on the protection of fundamental rights in the Northern Ireland legal order under the Windsor Framework, the relationship between the Charter and the fundamental rights protected as general principles of EU law is of greatest relevance and will, therefore, be the focus of our analysis.

Before the entry into force of the Lisbon Treaty in December 2009, which rendered the Charter binding on both the EU and its Member States under Article 6 (1) TEU, the general principles were the only source of fundamental rights in the EU. This has now changed; but instead of removing the general principles as a source, Article 6 (3) TEU makes it clear that the general principles continue to be a source of fundamental rights in EU law. It states:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

11 Notably, the principle of non-discrimination on grounds of age was not consistently protected in the common constitutional traditions of the Member States at the time of its proclamation by the CJEU in its ruling in Case C-144/04 *Mangold v Helm*, EU:C:2005:709. The Court took a broad view of these traditions in its reasoning in this case, at para 74. This shows that the Court uses common constitutional traditions as well as international law protections as inspiration for the general principles, rather than treating them as the lowest common denominator: Koen Lenaerts and José A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629, 1654. For a broader discussion of the Court's methodology concerning the identification of general principles, see Stefan Vogenauer and Stephen Weatherill, 'Introduction' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law European and Comparative Perspectives* (Hart 2017) 1.

12 For a detailed discussion see Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006).

The Charter has, however, established itself as the main source of fundamental rights in EU law. This is chiefly because it incorporates all the rights previously recognised as general principles of EU law and because both the general principles and the Charter are applicable in the Member States under the same conditions: whenever the Member States are acting within the scope of EU law.<sup>13</sup> For these reasons, the CJEU now rarely, if ever, refers to fundamental rights as general principles. In practice, therefore, the fundamental rights as general principles fulfil a residual or backup function in that they can (potentially) complement the written rights in the Charter by filling existing gaps.<sup>14</sup> For instance, in a 2021 judgment, the Court of Justice confirmed the existence of a ‘right to the protection of trade secrets’ as a general principle which appears to have a broader scope than Article 7 CFR (the right to private life) and can thus be usefully invoked in addition to the Charter.<sup>15</sup>

Apart from their limited role in occasionally complementing the Charter, though, the general principles have lost much of their practical significance in the fundamental rights context. They will therefore only be discussed separately where they protect rights that are not also contained in the Charter.

### 3. Rights and principles in the Charter

Separate to the question of whether the Charter encapsulates general principles of EU law is a textual distinction the Charter draws between rights and principles. According to Article 51 (1) CFR, Member States must ‘respect the rights and observe the principles’ contained in the Charter. Article 52 (5) CFR sheds some light on the significance of the distinction when it says that the ‘provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by the [...] Union and by acts of the Member States when they are implementing Union law [...]. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’.

The distinction introduces an element of uncertainty into the Charter, not least because the Charter itself does not determine which of its substantive provisions contain rights and which contain principles. The Charter’s official Explanations cite Articles 25 (rights of the elderly), 26 (integration of persons with disabilities), and 37 (environmental protection) as ‘examples of principles’.<sup>16</sup> They also state that some provisions contain both elements of a right

13 For the general principles see notably Case 5/88 *Hubert Wachauf v Federal Republic of Germany* EU:C:1989:321 and Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT)* EU:C:1991:254, which are both referenced in the Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; and for the Charter see Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105 and Case C-390/12 *Pfleger* EU:C:2014:281 discussed in more detail below.

14 Tobias Lock, Article 6 TEU, in: Kellerbauer/Klamert/Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights*, OUP 2019, para 24.

15 Case C-927/19 *Klaipėdos regiono atlieku tvarkymo centras* EU:C:2021:700, para 132.

16 Explanations relating to the Charter of Fundamental Rights (OJ 2007/ C 303) 35.

and a principle, citing the examples of Articles 23 (equality between men and women), 33 (family and professional life), and 34 (social security and social assistance), but without identifying which element of the provision contains the right and which the principle. Furthermore, the Explanations indicate that Articles 35 (health care), 36 (access to services of general economic interest), and 38 (consumer protection) contain principles, not rights.

Case law on the distinction is scant. The only case expressly identifying a Charter provision (Article 26 CFR) as a principle was Case C-356/12 *Glatzel*.<sup>17</sup> And in Case C-176/12 *AMS*, the Court's judgment *implied* that Article 27 CFR (workers' right to information and consultation) also contained a principle given that 'for this article to be fully effective, it must be given more specific expression in European Union or national law'.<sup>18</sup> Nevertheless, it is also essential to emphasise that, contrary to earlier analysis in the literature,<sup>19</sup> CJEU case law shows that the rights/principles distinction is separate to the question of justiciability for entire chapters of the Charter and no chapter is entirely excluded from review. Indeed, pre-Brexit case law displaces that approach, which appears to have informed the UK government's right-by-right analysis of the Solidarity chapter.<sup>20</sup>

As shown in the *Bauer* judgment, certain provisions found in the Solidarity chapter, such as Article 31 on fair working conditions including paid annual leave, squarely have the quality of 'rights' and can thus form the subject of full judicial scrutiny.<sup>21</sup>

Article 52 (5) CFR nevertheless shows that the distinction between rights and principles remains relevant in two respects. First, principles require implementation (either by the EU or a Member State); second, once they have been implemented, they can be invoked before a court, but only where the interpretation of implementing acts or the review of their validity is concerned. That is to say: principles may form the basis of *consistent interpretation* – an EU interpretive principle that we further detail below – but would not normally give rise to direct effect (except where the review of the implementing act itself is concerned) or form the basis of a claim for state liability in damages. Rights, by contrast, do not require implementation to be judicially cognisable; and they are not limited in their effects to the interpretation of implementing acts or the review of their validity. Instead, the effect of rights goes further. They can be invoked in the interpretation and the review of the validity of any piece of EU legislation or Member State legislation, so far as it is within the scope of EU law.

17 Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern* EU:C:2014:350.

18 Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* EU:C:2014:2, para 46.

19 Lord Goldsmith, *A Charter of Rights, Freedoms and Principles*, (2001) 38 *Common Market Law Review*, 1201.

20 HM Government, *Charter of Fundamental Rights of the EU Right by Right Analysis*, available at: [https://assets.publishing.service.gov.uk/media/5a8219f6e5274a2e87dc1260/05122017\\_Charter\\_Analysis\\_FINAL\\_VERSION.pdf](https://assets.publishing.service.gov.uk/media/5a8219f6e5274a2e87dc1260/05122017_Charter_Analysis_FINAL_VERSION.pdf) (see p 53 especially).

21 *Joined Cases C-569/16 and C-570/16 Bauer and Broßonn* ECLI:EU:C:2018:871.

The case of *Glatzel* mentioned above provides an instructive example. Mr Glatzel had lost his driving licence (allowing him to drive both cars and heavy goods vehicles, viz. HGVs) following a charge of driving under the influence of alcohol. After a certain period, he was able to apply for a new driving licence, which he was granted with the exception of a licence to drive HGVs. The refusal to grant him a HGV licence had its origin in the German legislation transposing Directive 2006/126/EC which stipulates minimum levels of visual acuity. Mr Glatzel, who suffered from a functional loss of vision in one eye, did not meet the conditions set out in the Directive. He complained that this was in violation, amongst others, of Article 26 CFR, which states that the ‘Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.’ The CJEU considered the Directive to be implementing Article 26 CFR as the Directive’s preamble expressly said that ‘[s]pecific provisions should be adopted to make it easier for physically disabled persons to drive vehicles’.<sup>22</sup> Hence the Court was, at least in theory, in a position to rule on the legality of the Directive in light of Article 26 CFR. The CJEU, however, opted for a narrow reading of Article 26 CFR and of the effects of Charter principles, more generally: Article 26 CFR did not require the EU legislature to adopt any specific measure.

For Article 26 to become the benchmark for a judicial review of implementing Member State legislation, it had to be ‘given more specific expression in European Union or national law’. Unfortunately, perhaps, the CJEU did not spell out by which standards it would propose to conduct a legality review of an implementing measure given that the implementing measure itself would first need to specify the principle further, which suggests a somewhat circular reasoning.

It will therefore be necessary to await further developments in the case law on principles, notably on confirmation of which provisions contain principles and which contain rights; as well as on the role principles play in the judicial review of EU and Member State measures. For now, in the absence of an overarching test, the assessment of which provisions contain rights and which contain principles can only be made on the basis of CJEU case law that classifies provisions as falling within one or the other category, either explicitly (a very limited pool of cases exemplified in *Glatzel*, as noted above) or by implication (i.e., insofar as the CJEU allows Charter rights to form the basis of full judicial scrutiny by using them as stipulations for EU action or by affirming their direct effect, exemplified in *Bauer*).

---

22 *Wolfgang Glatzel v Freistaat Bayern* (n 17) paras 74-79.

## 4. The Charter and the ECHR

The Charter guarantees the rights found in the European Convention on Human Rights (ECHR), but also goes beyond them. The wording of many of the civil and political rights guaranteed in the Charter is based on the ECHR. In some cases, the wording is identical, e.g. Article 4 CFR is an exact mirror image of Article 3 ECHR. In other cases, the CFR has updated the wording of the sister provision in the ECHR to make it more inclusive and/or to reflect recent developments. In some cases, there is no material difference in scope; e.g. Article 5 CFR expressly prohibits human trafficking, whereas Article 4 ECHR only does so on the basis of the case law of the European Court of Human Rights (ECtHR).<sup>23</sup> In other cases, the scope of the updated Charter version of a right is broader, e.g. Article 47 CFR does not feature the restriction of the right to a fair trial to ‘the determination of his civil rights and obligations or of any criminal charge against him’ contained in Article 6 ECHR.

According to Article 52 (3) CFR, Charter rights that correspond to rights guaranteed by the ECHR have the same ‘meaning and scope’ as their ECHR equivalents. Crucially, however, the Charter rights can be interpreted to provide more extensive protection. This has two main consequences: first, corresponding Charter rights must be interpreted in light of the case

law of the ECtHR, which establishes the minimum standard of protection required.<sup>24</sup> Second, Charter rights corresponding to absolute rights in the ECHR (i.e. rights that cannot be deviated from, such as Articles 3 and 4 ECHR) are also absolute under the Charter, so that Article 52 (1) CFR does not apply to them.

The Charter also goes beyond the ECHR in protecting *more* rights. This mostly concerns Titles III, IV, and V of the Charter on equality, solidarity, and EU citizens’ rights, respectively.<sup>25</sup> But even Titles I and II, for which the ECHR was the major source of inspiration, contain additional rights, such as human dignity (Article 1 CFR), integrity of the person (Article 3 CFR), the protection of personal data (Article 8 CFR), freedom of the arts and sciences (Article 13 CFR), freedom to choose and occupation and the right to engage in work (Article 15 CFR), the right to conduct a business (Article 16 CFR), and the right to asylum (Article 18 CFR).

These differences between the protections listed in the Charter and the ECHR can be practically meaningful. For example, in its judgment in *CG*, the CJEU relied on the right to human dignity in Article 1 CFR to anchor an obligation on Northern Ireland to disburse minimum subsistence benefits to EU nationals.<sup>26</sup>

<sup>23</sup> Starting with App No 25965/04, *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

<sup>24</sup> See Charter Explanations, which state that: ‘The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union’.

<sup>25</sup> NB: some of these additional provisions may be classified as ‘principles’, on which see section 3 above.

<sup>26</sup> Case C-709/20, *CG v The Department for Communities in Northern Ireland*, EU:C:2021:602, para 89. The domestic applicability of the *CG* ruling has now been confirmed in *SSWP v AT (AIRE Centre and IMA intervening)* [2023] EWCA Civ 1307. The domestic ruling confirms that Article 1 CFR is a standalone right distinct from Article 3 ECHR (para 171).

The use by the CJEU of the right to human dignity as a self-standing protection distinct from its Article 3 ECHR equivalent on the protection against torture and inhuman or degrading treatment or punishment<sup>27</sup> shows that EU human rights law can be broader in scope than the ECHR substantively, and can sometimes be more onerous for the state in terms of the allocation of its resources. Indeed, the association of material benefits with human dignity can be contrasted with the approach taken under Article 3 ECHR, which has generally been more reticent both in Strasbourg<sup>28</sup> and at the domestic level, under the Human Rights Act 1998 ('HRA').<sup>29</sup>

There is one sense in which the ECHR has a broader scope of application than the Charter, as we discuss in more detail below: the ECHR covers entirely the legal orders of its contracting parties from the moment of ratification, whereas the Charter's jurisdiction is more limited, as it only applies to the Member States in cases of implementation of EU law, as stipulated by Article 51 (1) CFR. However, the Charter could be conceived to be broader than the ECHR in several other respects: for example, in the UK, the HRA decrees that the ECHR is applicable *solely* to

the acts of public authorities.<sup>30</sup> The Charter's scope, by contrast, is not limited in this regard. Furthermore, where it applies, the Charter provides stronger protection of fundamental rights than the ECHR. This assessment is based on two considerations: first, as explained above, the Charter incorporates the ECHR as its minimum standard, but in certain cases goes beyond it through the broader wording of its provisions and the addition of more specific rights. It *may* additionally go beyond it through more expansive judicial interpretation by the CJEU. Second, Charter rights come equipped with the specific features of EU law (notably, direct effect and primacy), which typically give rise to stronger remedies than the ECHR and can even be invoked to challenge the operation of Acts of the UK Parliament. This feature of the Charter as providing more extensive remedial protection of rights than the ECHR was already well-established in domestic law before Brexit, as shown in the *Benkharbouche* judgment,<sup>31</sup> which is further analysed in Chapter 4. Last but not least, provided the case falls within the scope of EU law, there are no restrictions on who may invoke the Charter or in which forum: any natural or legal person may do so before any domestic court or

27 NB: the prohibition of torture and inhuman and degrading treatment or punishment is also separately protected in Article 4 CFR.

28 The Strasbourg Court has not excluded the *possibility* of Article 3 being used in welfare cases (see *Budina v Russia*, App no. 45603/05, ECtHR 18 June 2009) but has so far never found a violation of Article 3 for inadequate welfare provision. The Strasbourg Court has repeatedly noted that Article 3 can only be invoked in 'very exceptional cases' in the field of social security and welfare: see *Paposhvili v. Belgium* [GC], App no. 41738/10, ECtHR 13 December 2016, paras 183-185; see also *D. v. the United Kingdom*, App.no. 30240/96, ECtHR 2 May 1997, para 54; *N. v. the United Kingdom* [GC], App. no. 26565/05, ECtHR 27 May 2008, para 42.

29 See, e.g., *Re S and Re W (Care Orders)* [2002] 2 AC 291; and more recently, *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26.

30 HRA, s 6(1). Note, however, that 'public authority' also includes courts (s 6(3)(a)), meaning that there is an element of horizontal application of the ECHR in that, even in disputes of a purely private nature, courts are precluded from acting in a way which breaches the ECHR.

31 *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, [2019] AC 777.

tribunal.<sup>32</sup> This further distinguishes the Charter and general principles of EU law from the ECHR: under the Charter, there is no requirement to prove victim status and there is no need to exhaust any domestic means of redress before invoking its protection.

It follows that, in light of the remedially *stronger* protection that Charter rights enjoy under EU law, the wider category of potential victims (including companies) that may invoke the Charter, and the added detail that Charter rights display, it would be erroneous to assume that there is no need to consider the Charter in cases of substantive overlap with the ECHR. Rather, what the above discussion demonstrates is that the stronger protections guaranteed under the Charter will almost always trump those guaranteed via the HRA, at least in remedial terms and, in some cases, in substantive terms, too. Thus, protections offered under the ECHR are likely to satisfy the non-diminution guarantee under Article 2 of the WF only in very limited cases.<sup>33</sup>

## 5. Applicability of the Charter to the Member States: implementing Union Law

The Charter of Fundamental Rights applies primarily to the institutions, offices, bodies and agencies of the European Union. Hence the European Union is bound to comply with the Charter in everything it does. By contrast, according to Article 51 (1) CFR, the Charter applies to the Member States ‘only when they are implementing Union law.’ The same applies under the Windsor Framework: the UK and Northern Ireland institutions can only be bound by the Charter when the threshold criterion of ‘implementing Union law’ is met, i.e. where the Northern Ireland institution would be deemed to be acting within the scope of EU law.

In the landmark judgment of *Åkerberg Fransson*, the CJEU adopted a broad understanding of the threshold criterion and equated ‘implementing Union law’ with acting ‘in the scope of Union law’.<sup>34</sup> This should be understood as a broad conception of the ‘implementing Union law’ criterion. It encompasses two broad situations: first, where a Member State is relying on a derogation from EU free movement law (e.g. removal of an EU citizen from its territory for public security reasons); secondly, where the Member State is ‘implementing

32 A possible restriction to this effect is the rule against abuse of rights protected in Article 54 CFR, but this provision is unrelated to primacy and concerns an assessment of the merits of the claim. The application of this provision is, in any event, very limited (unlike its equivalent in Article 17 ECHR). The website of the EU Fundamental Rights Agency lists no notable case law references to Article 54 CFR to date.

33 For this reason, and as we explain in greater detail in Chapter 3, we would respectfully disagree with Colton J in *Angesom* [2023] NIKB 102, para 103, to the effect that ECHR-compliant domestic rights protections via the HRA are sufficient to satisfy the non-diminution guarantee on account of the ECHR’s broader jurisdictional scope.

34 *Åklagaren v Hans Åkerberg Fransson* (n 13).

Union law' in the strict sense, i.e. the Member State is acting in order to comply with an EU law obligation (e.g. an obligation under an EU directive; application of an EU Regulation).

As far as the first situation is concerned, the CJEU confirmed its pre-Charter case law on the applicability of fundamental rights (general principles) so that the Charter applies where a Member State derogates from EU free movement law.<sup>35</sup> For instance, a Member State may remove an EU citizen working in that Member State from its territory on grounds of public policy, public security and public health.<sup>36</sup> When doing so, the relevant Charter rights apply, notably Article 7 TFEU, the right to private and family life.

To illustrate the more complex second situation (implementing in the strict sense), it is useful to recount the facts of the *Åkerberg Fransson* case. Mr Åkerberg Fransson – a self-employed fisherman – was charged with serious tax offences for providing false information in his tax returns concerning income tax and value added tax. He was further charged for failing to declare employers' social security contributions. The tax authorities ordered him to pay tax surcharges in relation to the wrongly declared tax and social security contributions, which Mr Åkerberg Fransson did not challenge.

He subsequently relied on Article 50 CFR – the prohibition of double jeopardy<sup>37</sup> – to challenge the compatibility of his criminal prosecution with the Charter. In the case, neither the national legislation on whose basis the tax penalties were ordered to be paid nor the national legislation on which the criminal proceedings were founded had been adopted by Sweden to implement an EU obligation. In fact, they pre-dated Sweden's EU membership.

Nonetheless, the CJEU found there to be an 'implementation of Union law' insofar as VAT was concerned, given that the relevant VAT Directive<sup>38</sup> in combination with Article 4 (3) TEU prescribed that every Member State was under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. This finding was buttressed by Article 325 TFEU, which obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures.<sup>39</sup> Hence the tax penalties and criminal proceedings in relation to VAT constituted an implementation of the obligations flowing from the Directive and from Article 325 TFEU and thus of EU law. The Court deemed it irrelevant that the national legislation had not been adopted in order to transpose the Directive.

35 Case *Pfleger* (n 13).

36 Article 45 (3) TFEU; Articles 27 and 28 Directive 2004/38/EC narrow this option down for permanent residents and those residing for at least 10 years.

37 Article 50 CFR reads: No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

38 Articles 2, 250 (1) and 273 of Directive 2006/112/EC.

39 *Åklagaren v Hans Åkerberg Fransson* (n 13), paras 25-26.

The *Åkerberg Fransson* judgment is instructive in at least two respects: first, it adopts a functional approach to the term ‘implementing Union law’. This means that as far as a national law provision has the function of effecting compliance with an EU law obligation, it constitutes an implementation even if historically it was adopted independently of such an obligation. Second, one and the same national law provision may be considered an implementation of Union law under one set of facts and not an implementation under another set of facts. In *Åkerberg Fransson* the relevant provisions of the tax code and of domestic criminal law were only implementations of EU law so far as VAT was concerned. As far as income tax and social security contributions were concerned, it was not. This resulted in the case being split up into a purely domestic part (concerning income tax and social security contributions), to which the Charter did not apply, and an EU law part (concerning VAT), to which the Charter applied.

The precise decision whether a national law provision constitutes an implementation of Union law or not is at times difficult to make. The CJEU reiterates that implementation ‘requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other’.<sup>40</sup>

The Court of Justice spelled out a set of criteria, which may inform such a decision:

In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it [...].<sup>41</sup>

The CJEU’s broad interpretation of the threshold criterion contained in Article 51 (1) CFR means that there is no area of EU law to which the Charter does not apply. And more importantly, perhaps, there is no area of domestic law that is as such immune from Charter review.<sup>42</sup> As the judgment in *Åkerberg Fransson* demonstrates, even in fields like substantive criminal law, for which the EU does not have a general competence, Member State legislation can constitute an ‘implementation of Union law’ if the legislation has the function of ensuring compliance with a broader obligation under EU law to ensure the correct collection of VAT.

40 Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126, para 24.

41 *Ibid*, para 25.

42 Daniel Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50 *Common Market Law Review* 1267, 1278.

In turn, it is important that the judgment by the Northern Ireland High Court in *SPUC* is understood in light of the CJEU's approach to the scope of EU law. In *SPUC*, the question arose whether the Charter applied because the EU was a party to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The UNCRPD was concluded by both the EU and the Member States as a so-called mixed agreement chiefly because the EU does not possess competence to conclude the agreement alone. Hence the UNCRPD is only 'Union law' in so far as the EU had the competence to conclude it. For the purposes of Article 51 (1) CFR, this means that any Member State implementation of Union law with regard to the UNCRPD presupposes that the Member State was implementing an obligation under the UNCRPD for which the EU had competence. Otherwise, the Member State would not be 'implementing Union law'. Hence, Colton J's conclusion that 'the applicant cannot rely upon the UNCRPD, or the Charter or EU General Principles because the issue of abortion is not an EU competence'<sup>43</sup> must be understood within this specific (and atypical) context. It should not be read to mean that for the Charter to apply in the Member States, the Member State must have acted in an area of EU competence; or that the EU must have had legislative competence to adopt the provision of Member State law being applied.

Furthermore, according to the CJEU, a Member State is also implementing EU law where the Member State has discretion as to *how* to comply with its EU law obligations;<sup>44</sup> and even where a Member State has discretion *whether* to act at all, provided it chooses to act.<sup>45</sup> By contrast, where EU law only stipulates minimum harmonisation requirements, the Member States are not deemed to be 'implementing Union law' insofar as their national implementation exceeds the minimum required by EU law, but only in respect of the EU-stipulated minimum standard.<sup>46</sup>

It should be reiterated that the CJEU uses the same threshold criterion for the applicability of the general principles in the legal orders of the Member States. In fact, in *Fransson* the CJEU made express reference to the relevant case law on the general principles when interpreting Article 51 (1) CFR, which suggests that the scope of application of the Charter and that of the general principles is identical.

43 *SPUC's Application for Judicial Review* [2022] NIQB 9, para 131.

44 Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233, para 80.

45 Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* EU:C:2011:865, para 68.

46 Joined Cases C-609/17 and 610/17 *TSN and AKT* EU:C:2019:981, paras 41-55.

## 6. Effects of Charter rights

The principles of primacy, consistent interpretation, direct effect, and state liability, which have applied to EU law since the CJEU's rulings in *Costa*<sup>47</sup>, *Van Duyn*,<sup>48</sup> *Van Gend en Loos*,<sup>49</sup> and *Francovich*,<sup>50</sup> respectively, all extend to the Charter.

### a. The source of EU remedies: primacy

The principle of primacy (or supremacy) is a core constitutional principle of EU law. While it is not expressly found in the EU Treaties, the Member States have confirmed its existence within the parameters of the CJEU's case law in a Declaration annexed to the Lisbon Treaty.<sup>51</sup> First spelled out by the CJEU in *Costa v ENEL*<sup>52</sup>, the principle of primacy means that in case of a conflict between EU law and domestic law, the national court must not apply domestic law. It must apply EU law instead. Primacy applies to all provisions of EU law, including the Charter and the general principles, and defines their interaction with domestic law. In its ruling in *Melloni*, the CJEU confirmed that the provisions of the Charter (in that case Article 47 CFR) enjoy primacy over conflicting national laws, including laws of a constitutional nature.<sup>53</sup>

In practice, primacy means that a national court *must* consider EU law even where it has not been incorporated in domestic law and *must* attempt to give effect to it. This can include disapplying domestic law where it clashes with EU law that meets certain conditions, regardless of the status of domestic law, thus including national constitutional law.<sup>54</sup> Moreover, primacy must be observed by every national court, no matter where in the hierarchy of courts it is situated and independently of whether that court would have powers to strike down legislation in the national legal system.<sup>55</sup> Translated into the Northern Ireland context, this means that EU law may require a Northern Ireland court to depart from ordinary canons of interpretation and even to disapply domestic primary or secondary legislation (Northern Ireland or UK).

The primacy of EU law (a) is the source of the following three principles, which must be made available to individuals who invoke their EU rights before domestic courts: consistent interpretation (b), direct effect (c), and effectiveness of remedial action (d).<sup>56</sup>

47 Case 6/64, *Costa v ENEL*, EU:C:1964:66.

48 Case 41/74, *Van Duyn v Home Office* EU:C:1974:133.

49 Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, EU:C:1963:1

50 Case C-6/90 *Francovich and Bonifaci v Italy*, EU:C:1991:428, para. 33.

51 Declaration no 17 (Declaration concerning primacy) to the Lisbon Treaty [2008] OJ C 115/344.

52 *Costa v ENEL* (n 47).

53 Case C-399/11, *Stefano Melloni v Ministero Fiscal*, EU:C:2013:107, paras 59-64.

54 Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114.

55 Case 106/77, *Simmenthal*, EU:C:1978:49.

56 For the avoidance of doubt, these principles apply, in the same way as for the Charter, to the general principles of EU law.

## b. Consistent interpretation

Before considering the possibility of disapplying incompatible domestic legislation, it should be noted that the Charter gives rise to a strong interpretive duty for domestic courts, requiring them to interpret national law – if at all possible – in a way that removes any incompatibilities with the Charter. This duty follows from the primacy of EU law, which applies to all Charter provisions (unlike direct effect, which is subject to further conditions, as we explain in c, below). The duty, variously known as ‘indirect effect’, ‘consistent interpretation’ or the ‘Marleasing principle’, following the case that initially gave rise to it, has a wide-ranging operation.<sup>57</sup> In this report, we use the term ‘consistent interpretation’ to refer to it.

The Court explicitly confirmed the application of the duty of consistent interpretation to the Charter in its ruling in *Dansk Industri*.<sup>58</sup> Following this principle, *all* provisions of the Charter engage an obligation for domestic courts to read national legislation compatibly with the Charter insofar as it is possible to do so. The duty of consistent interpretation also applies universally in litigation before domestic courts. It may, therefore, be used in any vertical litigation against the state or horizontally in disputes between private actors.

Notably, the duty of consistent interpretation under EU law can be more extensive than both ordinary canons of interpretation under domestic law and ECHR-compatible interpretation under section 3 HRA, which requires the courts to attempt to find a rights-compliant interpretation of primary legislation, if it is possible to do so. As Lord Nicholls described it in *Ghaidan v Godin-Mendoza*, ‘the interpretative obligation decreed by section 3 is of an unusual and far-reaching character,’<sup>59</sup> which means that human rights protected under the ECHR already enjoy enhanced protection in domestic judicial interpretation. Indeed, the interpretive duty under the HRA was largely inspired by EU law, as highlighted by Lord Steyn in his reasoning in *Ghaidan*.<sup>60</sup> But the duty of consistent interpretation under EU law has, over time, exceeded what is envisaged by domestic case law concerning the HRA.<sup>61</sup> In *Pfeiffer*, for example, the CJEU found that consistent interpretation under EU law required a national court to do ‘whatever lies within its jurisdiction’ to find a compatible reading, thereby treating the ‘whole body of rules of national law’ as a potential source of such a reading, rather than sectionally reviewing a single piece of domestic legislation.<sup>62</sup> The only limit to the duty is that it falls short of requiring domestic courts to adopt an interpretation that literally contradicts

57 Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, EU:C:1990:395; the duty of consistent interpretation was first introduced in Case 14/83, *von Colson and Kamann*, EU:C:1984:153.

58 Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

59 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at para 30, per Lord Nicholls.

60 *Ibid*, at para 45.

61 *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, at para 91, per Lady Arden.

62 Joined Cases 397/01-403/01, *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, EU:C:2004:584, para 118.

the wording of the legislation.<sup>63</sup> Overall, this means that when considering interpretations consistent with fundamental rights under the Charter, domestic courts may use a more expansive approach than that which they have so far applied to ECHR provisions under s. 3 HRA.

Finally, it is noteworthy that the principle of consistent interpretation extends not only to national courts, but also to interpretations of EU law by the CJEU. As the Court highlighted in *Kamberaj* and *Commission v Poland*, the interpretation of all provisions of the Treaties, as well as of secondary legislation, must conform to the Charter.<sup>64</sup> The Charter must, therefore, be taken into account not only in respect of domestic legislation or enactments, but also in interpreting any provisions of EU law itself.

Understanding the functions and breadth of the duty of consistent interpretation under EU law is essential in Northern Ireland post-Brexit because Northern Ireland courts must interpret EU law expressly made applicable and/or referred to by the Windsor Framework in accordance with the Charter, under the principles of interpretation of EU law, yet often without the possibility of recourse to the CJEU (given that

the CJEU has jurisdiction only over the interpretation of matters directly governed by EU law or where this is specifically provided for under the Windsor Framework).<sup>65</sup>

### c. Direct effect

What happens when, despite its extensive character, the duty of consistent interpretation does not permit an interpretation of domestic law or policy that is compatible with the Charter? In this case, domestic courts must consider whether the Charter provision enjoys direct effect. Direct effect is not a principle with universal or automatic application to all provisions of the Charter. Rather, it applies to the Charter's provisions in the same way and under the same conditions as it does to provisions of the Treaties, i.e. provided that the provision is clear, precise, and unconditional (in the sense of being capable of invocation 'as such', i.e. without the need for further legislation to define the core content of the obligation set out in the Charter provision).<sup>66</sup>

Charter rights such as Articles 1 (human dignity),<sup>67</sup> 7 and 8 (private life and private data),<sup>68</sup> 21 and 23 (non-discrimination and equality between women and men, including equal pay)<sup>69</sup>, 31 (fair working conditions

63 Case C-334/92 *Wagner Miret*, EU:C:1993:945, para 20; *Pfeiffer*, *ibid*, para 112; this is known as a *contra legem* interpretation (lit. 'against the law').

64 *Kamberaj* (n 45); Case C-791/19, *Commission v Poland*, EU:C:2021:596, paras 52-57.

65 Article 12(4) WF provides for CJEU jurisdiction in respect of Article 12(2), Article 5 and Articles 7 to 10 WF.

66 Case C-414/16 *Vera Egenberger*, EU:C:2018:257, para 76.

67 E.g. *CG* (n 26).

68 E.g. Case C-362/14, *Schrems v. Data Protection Commissioner*, EU:C:2015:650.

69 E.g. Case C-555/07, *Küçükdeveci v Swedex GmbH*, EU:C:2010:21; and Case C843/19 *Instituto Nacional de la Seguridad Social (INSS) v BT*, EU:C:2021:55.

including annual leave),<sup>70</sup> 47 (the right to a fair trial and to an effective remedy), and 51 (*ne bis in idem*) have all been found to enjoy direct effect. This, of course, is a non-exhaustive list, which continues to grow as the Court's case law on the Charter develops. The direct effect criteria are assessed separately for each Charter provision. However, Charter principles tend to lack direct effect.<sup>71</sup> Thus in *AMS*, the Court found that Article 27 CFR was not sufficiently precise and unconditional so as to be capable of invocation as such.<sup>72</sup> As noted earlier, therefore, it is not possible to rely on Charter principles to have legislation disapplied.

Crucially, like Treaty provisions, the Charter can have direct effect in both vertical disputes between individuals and the state,<sup>73</sup> as well as in horizontal disputes between private persons.<sup>74</sup> This is significant because it means that, unlike most other national and regional/international bills of rights, such as the ECHR, the addressees of the Charter are not only state authorities, but also private parties, such as employers and services or goods providers. This is an important point to emphasise: unlike the HRA,

which limits the application of ECHR rights to public authorities or private actors performing functions of a public nature,<sup>75</sup> the Charter permits private parties to rely directly on the Charter for violations of their rights by other private parties. This means that if a provision of the Charter is directly effective, it can be applied against a private or public body, even where there is valid domestic legislation contradicting the right, or where no domestic legislation has been put in place.<sup>76</sup> This is an important characteristic of the Charter compared to the ECHR, and has resulted in expansive case law in the field of employment law.<sup>77</sup> In *Bauer*, for instance, the CJEU found a private employer liable for violating Article 31 CFR (paid annual leave) on exactly the same terms as a public authority, even though the violation stemmed from legislation incorrectly implementing the Working Time Directive (2003/88/EC).<sup>78</sup> Indeed, in this regard, the Charter has rendered partly obsolete (albeit only in the field of fundamental rights)<sup>79</sup> the operation of an earlier rule of EU constitutional law prohibiting the horizontal direct effect of directives.<sup>80</sup> Since the entry into force of the Charter, the Court

70 E.g., Case C-55/18, EU:C:2019:402, *CCOO*, EU:C:2019:87; and Joined Cases 569 & 570/16, *Bauer and Willmeroth*, EU:C:2018:871; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v. Shimizu*, EU:C:2018:874.

71 Note, however, that provisions only containing elements of principles, such as Article 23 CFR, are not precluded from altogether enjoying direct effect in respect of those aspects which are sufficiently precise (eg, equal pay).

72 *Association de Médiation Sociale* (n 18); see above.

73 Case C-279/09 *DEB*, EU:C:2010:811.

74 *Küçükdeveci* (n 69), para 21.

75 NB that 'functions of a public nature' in section 6(3)(b) have typically been construed very narrowly: see *YL v Birmingham County Council* [2007] UKHL 27.

76 Case C-144/04 *Mangold v Helm*, EU:C:2005:709 and Case C-684/16, *Cresco v Achatzi*, EU:C:2019:43.

77 For a longer analysis of the differences between the Charter and the HRA in cases between private actors, see Eleni Frantziou, *The Horizontal Effect of Human Rights after Brexit: A Matter of Renewed Constitutional Significance* [2021] *European Human Rights Law Review* 365.

78 *Bauer and Broßonn* (n 21).

79 Case C-261/20 *Thelen Technopark Berlin GmbH v MN*, EU:C:2022:33; Case C-122/17, *Smith v Meade*, EU:C:2018:631.

80 Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, EU:C:1986:84.

of Justice has made amply clear that the stipulations of a directive can be applied to private actors where they simply provide more specific expression to a Charter provision that enjoys direct effect.<sup>81</sup> Even though the provisions of the directive cannot, in themselves, be invoked against a private person (such as a private employer),<sup>82</sup> they can be rendered applicable by the presence of a corresponding general principles or Charter right. Over the last five years, this approach has been extended beyond earlier case law on this issue (which had until recently only covered age discrimination)<sup>83</sup>, and has been applied to other grounds of discrimination, such as religious belief,<sup>84</sup> as well as to other aspects of the right to fair working conditions.<sup>85</sup>

#### **d. Effective remedial action under the Charter**

The effectiveness of remedial action is the final EU law principle stemming from primacy that we consider key to the continued operation of EU fundamental rights in Northern Ireland.<sup>86</sup> This is because the key consequence of direct effect and consistent interpretation is that they render EU law more effective by strengthening the remedial position of the person relying on the Charter in domestic law. Consistent interpretation only provides access to the remedies already envisaged in

domestic legislation, shaped in a way that complies with the Charter. Direct effect, too, in theory gives access to remedies recognised in domestic law. It can give rise to a variety of remedies depending on the right and circumstances of the case, provided that it offers effective reparation for the damage suffered including, if necessary, following the disapplication of any incompatible statute.

In this sense, direct effect and consistent interpretation are not strictly speaking ‘remedies’ in their own right, but principles of interpretation that permit individuals to access effective remediation at the domestic level. For example, depending on the facts of the case, domestic courts might consider a suitable remedy in an employment dispute to be financial compensation, reinstatement or recalculation of pension entitlements, de-listing of private information in a privacy dispute, etc. The CJEU does not typically stipulate *which* remedy should be offered to the person who has suffered a violation of their rights. It thus allows a degree of procedural autonomy to domestic courts. However, the CJEU does in all circumstances require that the remedies offered be fully effective. To this end, the CJEU has started actively to refer to Article 47 CFR (the right to effective judicial protection including

81 *Kücükdeveci* (n 69) para 21; see also *Mangold* (n 76); for a detailed account of the case law see also Elise Muir, ‘The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from *Mangold* to *Bauer*’ (2019) 12:2 *REAL* 185.

82 *Marshall* (n 80).

83 *Ibid.*

84 *Egenberger* (n 66); Case C684/16, *Cresco* (n 76).

85 *Bauer and BroBonn* (n 21); *CCOO* (n 70).

86 NB that the principle of effectiveness is a broader EU law principle stemming from primacy, which applies to implementation of EU measures and not only to remedial action. We consider remedial action in this report as it is more relevant to the application of the Charter under the Windsor Framework.

an effective remedy), thereby anchoring the need for ‘effectiveness’ of domestic remedies in the Charter. Finally, in this field, the CJEU uses the principle of state liability in damages as a further incentive for Member States to implement EU law correctly. The operation of these two mechanisms will be considered in turn.

### *i. Article 47 CFR*

Since the entry into force of the Charter, the CJEU has started to rely very extensively on the right to an effective remedy, which is enshrined in this provision. Article 47 has been found to have direct effect, and has been used on its own<sup>87</sup> or alongside substantive rights, such as non-discrimination, even where these rights enjoy direct effect in their own right.<sup>88</sup> Indeed, earlier research has shown that Article 47 CFR is, by a large margin, the most often invoked provision of the Charter, being used in a range of disputes spanning across different areas of EU law.<sup>89</sup> The possible benefits of the CJEU’s keen use of this provision for individuals or legal persons invoking EU fundamental rights are twofold.

First, Article 47 captures process-based violations of fundamental rights that may not be fully detailed in the substantive provisions. For example, in its judgment in *Braathens Regional Aviation*, the CJEU considered the compatibility with the Race Equality

Directive of a private settlement between an airline and a passenger who had been subjected to race discrimination. The settlement was reached in accordance with Swedish implementing legislation, but the passenger challenged it, because it did not entail any formal acknowledgement that discrimination had occurred. The CJEU found that Articles 7(1) and (2) of the Race Equality Directive are specific expressions of Article 47 of the Charter.<sup>90</sup> While it affirmed that Member States are in principle free to choose the nature of national procedures and the corresponding remedies, they must ensure that these remedies result in ‘real and effective judicial protection of the rights that are derived from [the Racial Equality Directive]’.<sup>91</sup> The CJEU then found that the remedies chosen to implement the Race Equality Directive could not be considered effective, because they did not explicitly require a *judicial finding* that discrimination had occurred. While neither the Directive nor Article 21 CFR (non-discrimination) specifically provided that reparation should have a symbolic dimension, rather than being merely financial, the CJEU read this requirement into the legislation, because of the need to comply with Article 47 CFR.

Another example where Article 47 was used in a situation substantively occupied by another provision of the Charter (Article 31 CFR) is *Fuß*.

87 Case C-243/09, *Fuß* EU:C:2010:717.

88 *Egenberger* (n 66).

89 Eleni Frantziou, ‘The Binding Charter Ten Years on: More than a ‘Mere Entreaty’?’ (2019) 38 *Yearbook of European Law* 73, 79-84.

90 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269, para. 33-34.

91 *Ibid.*, para. 38.

In this case, a firefighter was forcibly transferred to an operational role when he requested that his working hours comply with the requirements of the Working Time Directive. There, the CJEU found a violation of Article 47 of the Charter due to the lack of dissuasive penalties for the employer making the transfer, but not a breach of Article 31 of the Charter, which protects the right to fair and just working conditions, which the CJEU did not go on to analyse in its reasoning. The CJEU noted that ‘fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive.’<sup>92</sup>

Second, the CJEU uses Article 47 CFR as a ‘warning’ mechanism, reminding national courts of their obligation to find effective remedies for substantive violations of a fundamental right through direct effect and consistent interpretation, in order to avoid a further, procedural violation of the right to an effective remedy. This is best highlighted by the *Egenberger* case.<sup>93</sup> In that case, the claimant had applied for a temporary position with a development organisation wholly owned by various German protestant churches and church organisations. The position would have mainly involved the drawing up of a parallel report to the official

German government report to be submitted to the United Nations in accordance with the UN Convention on the Elimination of All Forms of Racial Discrimination. The claimant was not invited to interview for the post despite being shortlisted, because she was not a member of a Protestant church; the post went instead to an active member of that church. The respondent relied on the German transposition of Article 4 (2) of Directive 2000/78/EC, which contains the so-called ‘religious ethos exception’ allowing churches and other religious organisations to treat persons differently according to their religion if that ‘person’s religion or belief constitute a genuine, legitimate and justified occupational requirement’. According to German law, the decision whether such an occupational requirement existed was to be determined by the organisation itself ‘in view of its right to self-determination’, so that judicial review was severely limited to a review of the plausibility of such a decision on the basis of the church’s self-perception.<sup>94</sup>

On a first level, the CJEU found that this requirement was substantively *incompatible with Article 21 CFR*, which is directly effective and must, therefore, be adequately protected in domestic law. On a second level, the CJEU found that the narrow judicial review protection offered in domestic law was also not compatible with the Charter – this time Article 47 CFR. Even though the case returned to domestic courts for final assessment,

92 *Fuß* (n 87) para. 66.

93 *Egenberger* (n 66).

94 *Ibid*, para 31.

the CJEU had therefore already made clear in its reasoning that any failure by the domestic court to read down or disapply the discriminatory measure would result *both* in discrimination incompatible with the Charter and in a breach of the right to effective judicial protection and an effective remedy, protected in Article 47 thereof.

Overall, dissuasiveness, both in substantive and in symbolic terms (as shown in *Fuß* and *Braathens*) as well as expansive judicial control of the application of EU law (as shown in *Egenberger*) are key characteristics of the CJEU's interpretation of Article 47 CFR.

#### *ii. State liability in damages*

Beyond the keen use of Article 47 CFR, the Charter also gives rise to the possibility of state liability in damages. Like all other provisions of EU law that confer rights on individuals, where the actions of the state violate the Charter (including through rights-incompatible legislation) and a private party sustains serious damage displaying a direct causal link with that violation, domestic courts must award financial compensation under the so-called *Francovich* principle of state liability in damages. After setting out the principle in outline in the *Francovich* case,<sup>95</sup> the CJEU clarified the conditions for state liability in its ruling in *Brasserie du Pêcheur*:

'[EU] law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.'<sup>96</sup>

It must be noted that the application of state liability to the Charter has been the cause of some uncertainty. In practice, state liability has been used less frequently at the EU level than consistent interpretation and direct effect, as the CJEU has tended to emphasise direct effect over state liability where possible, despite calls by some Advocates General to rely on state liability more regularly.<sup>97</sup> Initially, state liability was typically used to remedy violations of EU rights that lacked direct effect. For example, *Francovich* itself was a claim by a group of employees in Italy whose employer had become insolvent, for compensation for wages owed at the time of dissolution of the company. Whereas an EU directive had been specifically put in place to protect workers in this situation, the provisions of the directive could not be relied upon against the employer directly.<sup>98</sup> Consistent interpretation was also impossible, as Italy had altogether failed to enact implementing legislation. In this situation, the only course of action available to the workers in question

95 *Francovich* (n 50), para. 33. See also Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and R v SS for Transport, ex parte Factortame*, EU:C:1996:79.

96 *Brasserie du Pêcheur*, *ibid*, para 51.

97 See the Opinion of Advocate General Bobek in C684/16, *Cresco Investigation*, EU:C:2019:43, paras 173-185

98 As discussed earlier, unlike Treaty provisions and the Charter, the provisions of a directive cannot be invoked in themselves in private litigation unless there is a corresponding general principle or Charter right, which was not applicable in this case.

was to claim compensation from Italy for its failure to comply with EU law, since that failure had caused them to suffer measurable financial damage. In one sense, therefore, state liability in damages can be considered the only true ‘remedy’ provided by EU law. Whereas, as we have seen, the CJEU may otherwise set out some overarching principles about what an effective remedy would amount to in cases where direct effect or consistent interpretation are possible, compensation under the state liability principle is the only remaining option where other remedial avenues fail. For the same reason, state liability has also been viewed as a fallback remedy: it lacks the flexibility and adaptability to personal circumstances that characterise cases decided under the principles of direct effect and consistent interpretation.<sup>99</sup>

Moreover, particularly in the context of fundamental rights, state liability would be difficult to establish, as the conditions of causality and measurability would often be difficult to make out. Think, for example, of a scenario like *Braathens*,<sup>100</sup> where the principal complaint was that the domestic implementing measure failed to acknowledge discrimination as a self-standing harm: if it had been assessed under the principle of state liability in damages, rather than through the directly effective character of Article 47 CFR, it is unlikely that the claim would have succeeded. No measurable

damage had been sustained under the *Brasserie* conditions. It is likely that these complicating factors in the attribution of state liability in damages have led to the coupling of substantive violations with the violation of Article 47 CFR, which enjoys direct effect, and therefore can act as a vehicle towards remedies better suited to the individual case facts, as discussed above. Overall, the case law so far has not shown state liability to be a principal remedy for the CJEU under the Charter, albeit one that remains available in theory.

Nevertheless, the Court has affirmed the possibility of state liability in damages as a secondary remedy, in two respects. First, state liability is relied upon for breaches of EU legislation that further expresses provisions of the Charter that do not have a clearly defined character as ‘rights.’ In *Smith v Meade*, for instance, which concerned breaches of a directive on insurance conditions, the CJEU noted that state liability in damages was the only avenue available to the applicant.<sup>101</sup> The case was distinguished from situations where the directive specifically expressed a Charter provision capable of enjoying direct effect, such as Article 21.<sup>102</sup> Whereas, in that case, consumer protection (covered by Article 38 CFR) was an aim of the directive, that Charter provision is a principle, and does not enjoy direct effect. It is possible that state liability will therefore retain an important role

99 Eleni Frantziou, ‘The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle’ (2020) 22 *Cambridge Yearbook of European Legal Studies* 208, 222.

100 *Braathens* (n 90).

101 *Smith v Meade* (n 79), para 56.

102 *Ibid*, para 47.

as a fundamental rights remedy for violations of EU law that relate to non-directly effective provisions of the Charter further detailed in secondary legislation.

Secondly, and perhaps more importantly, state liability in damages should not only be viewed as relevant to the Charter as a remedy directly addressing violations of fundamental rights – a function that has less relevance due to the expansive use of Article 47 CFR by the CJEU. Rather, the most likely use of state liability is by a private violator of a fundamental right, such as a private employer who has been forced to pay out compensation in litigation on one of the substantive provisions through direct effect. State liability in damages would thus permit a private actor to recover any losses that they incurred because they followed a seriously erroneous or incomplete implementation of EU law in domestic legislation or because no such legislation was in place. The possibility of relying on state liability in this manner for violations of the Charter was affirmed in *Cresco*, where the CJEU highlighted that the findings of breach of Article 21 CFR by a private employer in line with the direct effect principle did not, at the same time, prevent that employer from subsequently seeking to recover the cost of the compensation they had had to pay, considering they had relied on legislation that itself set out a series of CFR-incompatible exemptions from the principle of non-discrimination on grounds of religious belief.

Finally, it is important to remember that state liability in damages is usually assessed at the national level.<sup>103</sup> As such, the relative absence of state liability case law under the Charter at the EU level should not be understood as denying the possibility of state liability altogether. As Chapter 4 goes on to show, in the UK, EU state liability has been applied occasionally by domestic courts including, in certain cases, after Brexit.<sup>104</sup>

In short, then, where the scope of the Charter is engaged, domestic courts must consider the ways through which EU law might give rise to reparation in domestic law: if the right is directly effective, then it attracts the full protective panoply of consistent interpretation, direct effect – if necessary through disapplication of domestic legislation – and effective judicial remedies in line with Article 47 CFR. Rights that are not precise or unconditional enough to enjoy direct effect can continue to give rise to state liability claims, together with the provisions of secondary legislation that further clarify them. And, of course, *any* legislation at the national level must start from consistent interpretation, under the wide-ranging duty of consistent interpretation – a duty that applies to all provisions of the Charter regardless of their status as rights or principles.

103 Barend van Leeuwen and Rónán Condon, 'Bottom Up or Rock Bottom Harmonization? *Francovich* State Liability in National Courts' (2016) 35:1 *YEL* 229, 231.

104 See, e.g., *Jersey Choice Limited v Her Majesty's Treasury* [2021] EWCA Civ 1941.

## 7. Limitations to Charter rights

As a general rule, Charter rights are subject to limitations. Article 52 (1) CFR spells out the conditions for limiting Charter rights out in some detail:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Limits to Charter rights must be provided for by law. This can be EU law or domestic law. As for the latter, the limitation may be contained in UK or Northern Ireland primary or secondary legislation as well as in the common law. The rationale behind this requirement is that any restriction of a right must be foreseeable for individuals. Any limitation must also respect the essence of those rights. The idea behind this concept is that every Charter right contains a ‘hard nucleus’<sup>105</sup>, which cannot be deviated from under any circumstances. Interference with the essence of a right

would ‘call into question the right as such’.<sup>106</sup> The CJEU has found violations of the essence – which it sometimes refers to as the ‘very substance of the right’ – in a number of cases. For instance, generalised access for public authorities to the content of electronic communications would be a violation of the essence of Article 7 CFR (right to private and family life).<sup>107</sup> National legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data would constitute a violation of the essence of Article 47 CFR (right to an effective remedy).<sup>108</sup> The loss of a worker’s acquired right to paid annual leave or their corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship, without the worker having actually had the opportunity to exercise that right to paid annual leave, would undermine the very substance of that right contained in Article 31 (2) CFR.<sup>109</sup> The CJEU further held that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial.<sup>110</sup>

Any limitation of a Charter right must comply with the principle of proportionality. The proportionality test is typically carried out in four stages.<sup>111</sup>

105 Koen Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ (2019) 20 *German Law Journal* 779, 781.

106 Case C-650/13 *Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde* ECLI:EU:C:2015:648, para 48.

107 Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650, para 94.

108 *Ibid*, para 95.

109 *Bauer and Broßonn* (n 21) para 49.

110 Case C-216/18 PPU *LM* ECLI:EU:C:2018:586, para 48.

111 E.g. in *Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR and Eifert* EU:C:2010:662, paras 74 et seq; NB: the CJEU at times conflates the ‘necessity’ stage with the proportionality in the strict sense (balancing) stage.

First, the restriction must meet objectives of a general interest (a legitimate aim). This can be any objective that is not evidently contrary to the public interest. Secondly, the measure must be suitable (or appropriate). This means that the measure must be designed in a way that it is capable of achieving its overall objective. Thirdly, the measure must be necessary, i.e. of all conceivable measures capable of achieving the stated objective equally well, the measure that least interferes with the right at issue must be chosen. Fourthly, proportionality in the strict sense requires a balancing of the competing interests involved. Typically, it requires a weighting and balancing of the objective pursued and the right restricted. According to the CJEU, ‘where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them’.<sup>112</sup>

There are, however, a number of Charter rights which cannot be restricted at all, similarly to the ECHR. These are so-called absolute rights and their absolute character either flows from their very nature or from Article 52 (3) CFR. That provision says that: ‘In so far as this Charter contains rights which correspond to

rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention’. Articles 3 ECHR (prohibition of torture and inhuman or degrading treatment or punishment) and 4 ECHR (prohibition of slavery, servitude or forced labour) are absolute rights and are mirrored in Articles 4 and 5 CFR respectively. It follows from Article 52 (3) CFR that Articles 4 and 5 CFR must also be considered absolute rights. The same is true for Article 1 CFR, which stipulates that human dignity shall be ‘inviolable’. Here the absolute character of the right follows from its categorical wording. It further follows from Article 52 (3) CFR that any restrictions to the right to life in Article 2 CFR must not go beyond what is permissible according to Article 2 (2) ECHR.

## 8. No UK opt-out from the Charter

As a final point, it should be noted that the UK did not have an opt-out of the Charter while it was an EU Member State. In *NS v Home Secretary*, the CJEU held that Protocol No. 30 to the Lisbon Treaty<sup>113</sup> did not exempt the UK from compliance with the Charter’s provisions.<sup>114</sup> The CJEU here endorsed Advocate General Trstenjak’s opinion, in which the Advocate General noted that the Protocol merely reaffirmed the ‘normative content of article 51 of the Charter’, which – as explored

<sup>112</sup> Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28, para 60.

<sup>113</sup> Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2008] OJ C 115/313.

<sup>114</sup> Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* EU:C:2011:865, paras 116-122.

above – defines the method by which the Charter applies in the Member States.<sup>115</sup> Article 1 (2) of Protocol No 30 stipulates as follows: ‘In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.’ Title IV of the Charter is entitled ‘Solidarity’ and contains mostly rights and principles that would typically be considered to fall into the category of ‘economic, social and cultural rights’. The CJEU has not directly addressed the impact of Article 1 (2) on the applicability of Title IV to the UK or Poland. There are, however, good reasons to assume that Article 1 (2) has no tangible effects either. First, the CJEU recently reiterated with regard to Poland that Protocol No 30 ‘does not call into question the applicability of the Charter in Poland, nor is it intended to exempt the Republic of Poland from the obligation to comply with the provisions of the Charter’.<sup>116</sup> No mention is made of any limitations to this statement resulting from Article 1 (2). Second, even if Article 1 (2) modified this general statement, on the basis of its wording one cannot conclude that the rights contained in Title IV are not available in the UK and Poland. As outlined in section 2 of Chapter 1, the Charter can be seen as a codification of existing general principles of EU law, so that the Charter (or Title IV in particular) should not be seen to be

‘creating’ new rights, but simply to be reaffirming these. Hence even if the Charter-version of a right contained in Title IV were not applicable to the UK and Poland, a general principle of EU law with the same substantive content would be.

The state of the EU *acquis* therefore, in its application to the UK at the end of the implementation period, included the operative part of *NS*, namely that the UK was obliged to conform to the Charter in its implementation of EU law. Thus, no credible reliance can be placed on Protocol No 30 as a means of negating the operation and effect of any part of the Charter in the Northern Ireland legal order through the Withdrawal Agreement and the Windsor Framework.

115 Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, Opinion of AG Trstenjak, EU:C:2011:611, para 169.

116 Case C-619/18 *Commission v Poland*, EU:C:2019:531, para 53.

# Chapter 2:

## The basic framework for the application of the Charter and the general principles of EU law in the Northern Ireland legal order

### 1. Introductory remarks

The purpose of this chapter is to explore the position of the Charter in the legal order of Northern Ireland from 11 pm on 31 December 2020, when the Withdrawal Agreement, including the Windsor Framework, entered into force.

As discussed in more detail in Chapter 1, the Charter applies to ‘to the Member States only when they are implementing Union law’<sup>117</sup> and it ‘does not establish any new power or task for the [...] Union, or modify powers and tasks defined by the Treaties’.<sup>118</sup>

Hence the applicability of the Charter relates to whether a Member State acts within the scope of EU law, this being synonymous with implementing EU law.<sup>119</sup> In accordance with the principles set out in the preceding chapter, however, once the Charter’s applicability is established, there are wide-ranging obligations on Member State courts to try to read domestic provisions and practices consistently with the Charter and, where this is not possible, to disapply *any* ‘legislative, administrative or judicial practice [within that Member State] which

might impair the effectiveness of European Union law’, rather than simply disapplying those practices which *clearly* infringe EU law<sup>120</sup> (as well as to provide access to effective remedies, including financial compensation, where this is required to ensure the effectiveness of the Charter).

The importance of these points in relation to the continued application of the Charter in Northern Ireland will be expanded upon further in the remainder of this report.

### 2. The relevant provisions of the Withdrawal Agreement and the Windsor Framework

There are four provisions of general importance across the Withdrawal Agreement and the Windsor Framework for the purposes of assessing the applicability of the CFR in the Northern Ireland legal order.

The first provision is Article 2 WA, which defines ‘Union law’ as including the CFR and the general principles of EU law, and defines ‘Member States’ as the 27 Member States of the EU.

---

117 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, art. 51(1).

118 Charter, art. 51(2).

119 *Åkerberg Fransson* (n 13).

120 *Ibid*, paras 46-49.

The second provision is Article 4 (1) WA, which mandates that the ‘The provisions of this Agreement and the provisions of Union law made applicable’ in the Withdrawal Agreement shall ‘produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States’. This includes direct effect and primacy – or as Article 4 (2) puts it – disapplication of inconsistent domestic law. Furthermore, Article 4 (3) and (4) require an interpretation of EU law (referred to in the Withdrawal Agreement) which is in accordance with the general principles of EU law and which conforms with relevant CJEU case law. It is noteworthy that this mandate for the conformity of EU law interpretation with CJEU case law is temporally limited to case law handed down prior to the end of the transition period, i.e. 31 December 2020.

However, these temporal limits placed on the relevance of CJEU case law to the interpretation of EU law referred to in the Withdrawal Agreement do not apply to the Windsor Framework. Instead, Article 13 (2) of the Windsor Framework (the third relevant provision for this section) removes the temporal limit in Article 4 and mandates that ‘the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union’.

The fourth provision is Article 13 (3), which further creates an obligation of dynamic alignment between the UK and the EU for certain EU acts referred to in the Windsor Framework. The *general* requirement of dynamic alignment covers all EU acts referred to in the Windsor Framework except for the following: in Annex 2, the first indent of heading 1 and all indents of headings 7-47; and the third subparagraph of Article 5(1) of the Windsor Framework.<sup>121</sup> The listed EU acts which are excepted from general dynamic alignment as regards Northern Ireland are only excepted to the extent that the UK Government notifies the EU that the Northern Ireland Assembly has validly triggered an emergency brake (referred to colloquially as the ‘Stormont brake’ – discussed in Chapter 5) with respect to the listed EU acts above.<sup>122</sup>

### 3. The architecture and consequences of the EUWA and REULA

#### a. The statutory provisions and text

The European Union (Withdrawal) Act 2018 (‘EUWA’) facilitated the UK’s withdrawal from the EU in domestic law. It repealed the European Communities Act 1972, section 2 of which had given effect to EU law in the dualist UK legal order; and it saved most of the EU law that was then in effect in the UK as so-called ‘retained EU law.’ ‘Retained EU law’ thus referred under the EUWA to those aspects of EU law available

121 See WF, Article 13(3a) (final subparagraph).

122 *Ibid.*, the first subparagraph in relation to whole EU acts which amend or replace the listed EU acts under the Windsor Framework, and the fifth subparagraph in relation to parts of EU acts which amend or replace the listed EU acts under the Windsor Framework.

to be enforced domestically before 31 December 2020 and retained as such under the terms of the EUWA.<sup>123</sup> The concept of ‘retained EU law’ has now been replaced by the concept of ‘assimilated law’ pursuant to section 5 of the Retained EU Law (Revocation and Reform) Act 2023.

As far as the Charter is concerned, the EUWA had declared, in section 5 (4): ‘The Charter of Fundamental Rights is not part of domestic law on or after [the end of the implementation period following the UK’s exit from the European Union]’. This sweeping statement was, however, qualified when considered alongside other aspects of the Act, notably section 5 (5) EUWA, which clarified that the exclusion of the Charter did not ‘affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)’. Hence, while the EUWA removed the Charter from retained EU law, it retained the (largely) parallel<sup>124</sup> general principles of EU law. As discussed in Chapter 1, considering that the general principles comprise all of the provisions of the Charter, the removal of the Charter should not in itself be considered to result in a substantive decrease in the protection of EU fundamental rights under the terms of the EUWA. That

said, paragraph 3 of Schedule 1 to the EUWA declared that there could be ‘no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law’, while paragraph 4 of Schedule 1 removed the possibility of state liability in damages. Thus, the *effect* of fundamental rights as general principles under the EUWA was mostly confined to their use as an interpretive aid.<sup>125</sup> As highlighted in Chapter 1, therefore, precisely those features of EU fundamental rights that had strengthened the remedial position of the persons invoking them, such as state liability in damages and disapplication, were removed under the terms of the EUWA. And since the entry into force of section 4 REULA on the 1st of January 2024, the general principles of EU law are altogether abolished from the domestic legal order (to the extent that this is not reversed by the operation of other provisions).

The position in Northern Ireland is, however, complicated by the operation of the Withdrawal Agreement and Windsor Framework, whereby considerable quantities of EU law continue to have effect within the jurisdiction *as EU law*, instead of the purely domestic ‘retained EU law’/assimilated law. This follows from section 7A EUWA – added to the EUWA by the European Union (Withdrawal Agreement) Act 2020 – which does three things.

123 See EUWA, ss 2-7 and sch. 1.

124 See Chapter 1.

125 This is the case except in limited situations, governed by the EUWA, Schedule 8(39)

First, it directly incorporates the entirety of the UK-EU Withdrawal Agreement into domestic law.<sup>126</sup> Second, it mandates that the ‘rights, powers, liabilities, obligations and restrictions’ which are created, or which arise ‘from time to time’ under the Withdrawal Agreement, be given legal effect within domestic law ‘without further enactment’.<sup>127</sup> Third, it subjects every enactment, including provisions within the EUWA itself, to the incorporated Withdrawal Agreement.<sup>128</sup>

### **b. The impact of the statutory provisions**

The immediate consequence which arises from section 7A is the same as under the now repealed section 2 (1) of the European Communities Act 1972: the entirety of the Withdrawal Agreement, *including* the principles which inform its application and scope, as these principles develop or are progressively interpreted, have automatic effect (via section 7A) within the domestic legal sphere in the UK generally and Northern Ireland specifically.

It follows that the UK Government’s position that the Charter does not form a part of domestic law in Northern Ireland<sup>129</sup> is not a fully accurate reflection of the law for two reasons.

First, the UK Government elides in its reasoning the EU law listed

in relation to Article 2 (and its interpretational mandate), the judicial enforcement of Article 2, and the interpretational mandate given to UK courts under the EUWA. This obscures the operation of the Windsor Framework via section 7A. Insofar as the Withdrawal Agreement, and within it the Windsor Framework, refers to EU law (including in its annexes), this EU law produces the same effects within the UK legal order as it does within the EU, including direct effect, in accordance with the second subparagraph of Article 4 (1) WA, which provides that ‘legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.’<sup>130</sup> In cases falling within the scope of the Withdrawal Agreement, therefore, the CFR applies.<sup>131</sup> The scope of EU law, in this regard, relates back to the reasoning of the CJEU in the *Åkerberg Fransson* case (see Chapter 1 above).

In respect of the Northern Ireland legal order, the same reasoning applies: any state body or official, when discharging a function relating to Northern Ireland which falls within the scope of the EU law referred to in the Windsor Framework, implements EU law for the purposes of CFR applicability. Moreover, any natural or legal person acting pursuant either to the Windsor Framework

126 EUWA, s 7A(2).

127 EUWA, s 7A(1).

128 EUWA, s 7A(3).

129 NI Office, UK Government commitment to ‘no diminution of rights, safeguards and equality of opportunity’ in Northern Ireland: What does it mean and how will it be implemented?, 2020, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/907682/Explainer\\_UK\\_Government\\_commitment\\_to\\_no\\_diminution\\_of\\_rights\\_safeguards\\_and\\_equality\\_of\\_opportunity\\_in\\_Northern\\_Ireland.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer_UK_Government_commitment_to_no_diminution_of_rights_safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf), para 14.

130 On the specific case of the Annex 1 Directives see the discussion at 4 c below.

131 Art. 51 (1) CFR.

or to directly applicable EU law in Northern Ireland can be subject to obligations under the Charter provided that the applicable EU law is also directly effective (i.e. clear, precise and unconditional). A good example of this is the EU Framework Equality Directive: this directive specifies conditions for the exercise of Article 21 CFR (the right to non-discrimination)<sup>132</sup> and, may be relied upon as part of the non-diminution obligation in the Northern Ireland legal order. The Charter can therefore be relied upon in all cases concerning the application or interpretation of this directive and, given that Article 21 CFR has direct effect, it may indeed be used as a means of applying the terms of the directive to private individuals or companies that would not, in the absence of Charter applicability, be directly caught by this measure.

Second, the Charter also applies beyond the EU law listed in Annex 1 in the context of the non-diminution guarantee (Article 2 Windsor Framework), but this applicability is somewhat more complex. The hook for the non-diminution guarantee is that there must be some version of EU law underlying a part of the Belfast (Good Friday) Agreement before the end of the implementation period. That EU law would have to be interpreted in light of the Charter and, *at least*, of relevant CJEU case law before the end of the implementation period.<sup>133</sup>

Neither route bears any relationship with the altogether different power conferred on UK courts by the EUWA and REULA to depart from CJEU case law in their interpretation of retained EU law / assimilated law. This is because Charter applicability is an obligation of the Windsor Framework as given effect by section 7A of the EUWA, whereas retained EU law / assimilated law and their interpretational mandate are creations of domestic law under the EUWA and REULA, respectively. It is important, however, to remember that the Charter did not, prior to Brexit, apply in all cases directly in the UK legal order. As previously set out in Chapter 1, the Charter equally does not apply to every situation within the Northern Ireland legal order by virtue of the Windsor Framework – only to those situations which fall within the scope of EU law. We explore this in more detail when discussing Article 2 and the non-diminution guarantee.

A useful analogy may be drawn with the applicability of the entire *acquis communautaire* before the end of the implementation period, across the whole UK by virtue of the European Communities Act 1972. The *acquis* was required to be given effect as if the UK were still a Member State. A similar effect remains in respect of Northern Ireland for a vastly reduced body of EU law under the Windsor Framework. This is the case even though the CJEU does not retain the full extent of its reference jurisdiction in respect

132 *Kücükdeveci* (n 69), para 21; *Egenberger* (n 66), para 47

133 NB: as we highlight in further detail Chapter 3(3) below, CJEU case law on the Charter handed down *after* the end of the implementation period may also be relevant, as there is no temporal limit to relevant CJEU case law with which the interpretation of EU law made applicable by the Windsor Framework must conform.

of Northern Ireland.<sup>134</sup> Any other interpretation, would, in our view, fail to account for the clear language of the Withdrawal Agreement and the Windsor Framework in retaining the applicability of EU law, including through direct reliance.

### c. How to read seemingly conflicting provisions

There remains a final point in relation to the EUWA, with which this chapter began: the declaration in section 5(4) that the CFR is not part of UK domestic law *anywhere*. The apparent irreconcilability of this provision with the provisions of the Withdrawal Agreement and the Windsor Framework (as set out in the previous section) would fall away if section 5(4) of the EUWA has already been modified or qualified by virtue of section 7A (1-3) EUWA, which is entitled ‘general implementation of remainder of withdrawal agreement’ and reads as follows:

- (1) Subsection (2) applies to—
- (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
- (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,

as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.

- (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
- (a) recognised and available in domestic law, and
- (b) enforced, allowed and followed accordingly.

**(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).<sup>135</sup>**

Section 7A (3) strongly suggests that section 5 (4) is subject to s.7A (1) and (2), so that the Charter with its associated remedies applies in Northern Ireland on the basis of the WA notwithstanding its express removal from the remainder of UK law. Moreover, it is important to appreciate section 5(7) in this context, which subjects the remainder of section 5 (including section 5(4)) to ‘relevant separation agreement law’, defined at section 7C to *include* section 7A.<sup>136</sup>

Section 7A mandates that the ‘rights, powers, liabilities, obligations and restrictions’ which are created, or which arise ‘from time to time’ under the Withdrawal Agreement, be given legal effect within domestic law ‘without further enactment’.<sup>137</sup>

134 Windsor Framework, Art 12(4).

135 Emphasis added.

136 EUWA, s 7C(3)(a)(i).

137 EUWA, s 7A(1).

It also subjects every enactment, including provisions within the EUWA itself, to the incorporated WA.<sup>138</sup> The immediate consequence of this is the same as under the now repealed section 2(1) of the European Communities Act 1972: the entirety of the WA, *including* the principles which inform its application and scope, as these principles develop or are progressively interpreted, have automatic effect (via section 7A) within the domestic legal sphere in the UK generally and Northern Ireland specifically. Last but not least, the exceptions in Schedule 1 EUWA mentioned above are in turn subjected to a long list of overriding provisions in section 7C, which restores their applicability in the application of ‘separation agreement law’ which includes, *inter alia*, Article 4 of the WA<sup>139</sup> and Article 13 of the Protocol.<sup>140</sup> Since the whole of section 5 EUWA (including section 5(4)) is subject to ‘separation agreement law’, defined in section 7C as *inter alia* including section 7A, the requirements of Article 4 WA (including, crucially, the primacy requirement) and Article 13 of the Windsor Framework,<sup>141</sup> the apparent irreconcilability of section 5(4) EUWA with the provisions of the WA and the Windsor Framework falls away given that section 5(4) EUWA has already been modified by virtue of section 7A EUWA.

This interpretation has already been confirmed by the Northern Irish High Court in *SPUC*, discussed earlier. As Colton J put it in that judgment,

The combined effect of section 7A EUWA 2018 and Article 4 of the Protocol limits the effects of section 5(4) and (5) of the EUWA 2018 and Schedule 1, para 3 of the same Act which restrict the use to which the Charter of Fundamental Rights and EU General Principles may be relied on after the UK’s exit.<sup>142</sup>

The same conclusion would appear to follow from the judgment of the Northern Irish Court of Appeal in *Allister and Peeple’s applications for judicial review*<sup>143</sup> and from the judgment of the UK Supreme Court when the case reached it on appeal.<sup>144</sup> This judgment concerned the constitutionality of the Windsor Framework (compatibility with the Act of Union 1800) and one specific aspect of this constitutionality revolved around its Article 18.<sup>145</sup> Article 18 provides for the Northern Ireland Assembly to periodically vote to determine whether to continue the application of Articles 5-10 of the Protocol in Northern Ireland.<sup>146</sup> The issue for the Supreme Court was the fact that the Assembly’s vote in this regard disapplies the petition of concern mechanism, by which a third

138 EUWA, s 7A(3).

139 EUWA s 7C(2)(a).

140 EUWA s 7C(2)(c).

141 EUWA s 5(7) and s 7C(2) and (3).

142 *SPUC* (n 43), para 78.

143 *Allister and Peeple’s applications for judicial review* [2022] NICA 15, para 328.

144 *Allister and Peeple’s* [2023] UKSC 5.

145 *Ibid.*, para 86.

146 WA, Windsor Framework, art 18(1).

of Assembly Members may trigger a petition to subject a given matter on which the Assembly votes, to cross-community consent.<sup>147</sup> Article 18(2) WA requires that the Assembly vote on Articles 5-10 of the Protocol be carried out ‘strictly in accordance with the unilateral declaration [...] made by the United Kingdom on 17 October 2019’. This unilateral declaration made no mention of the petition of concern but provided for the Assembly to consent to the continued application of Articles 5-10 by majority,<sup>148</sup> which is also provided under Article 18(5) WA.

The Supreme Court interpreted the combination of Article 18(2), 18(5) and the unilateral declaration as having imposed an *obligation* on the UK Government to which, by virtue of section 7A EUWA, the petition of concern mechanism was subject. The disapplication of this mechanism for the Assembly vote under Article 18 WA, was, therefore preceded by the modification to the Northern Ireland Act by operation of section 7A EUWA.<sup>149</sup> The Supreme Court’s reasoning, therefore, shows that section 7A EUWA does not merely modify domestic UK law (including Northern Ireland law) by giving

primacy to the express provisions of the WA (and the Protocol), but also modifies domestic law in ways which are a *necessary implication* of the WA’s incorporation into domestic law.

This interpretation chimes with the demands of EU law, which not only requires inconsistent national laws and practices to yield where they are in clear conflict with EU law,<sup>150</sup> but also that EU law must be given effects ‘as far as possible’ in national law.<sup>151</sup> *Allister and Peoples* would appear to accord this same character to obligations arising in the strict sense under the Withdrawal Agreement and the Protocol rather than only under the EU law which is referenced by or listed within them. In this scenario, therefore, the operation of section 7A of the EUWA ensures not only that the Charter has effect, but that it has effect to the maximum possible extent to ensure that obligations under EU law are given effect in the broadest possible terms. Given that the CFR has the same legal force as the EU Treaties under EU law,<sup>152</sup> this scenario would mean that, section 5(4) of the EUWA notwithstanding, the Charter has the same effect in Northern Ireland law as it did before

147 Northern Ireland Act 1998, s 42. Note that this provision was amended by the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, but the Supreme Court was concerned with the original version of the provision. In its original form, there were no restrictions on the category of matters to which section 42 applied; this was subsequently amended to introduce certain restrictions, none of which relate to the Windsor Framework or the voting provisions under Article 18. Post-amendment, therefore, the section 42 mechanism remains disappplied to votes pursuant to Article 18, see Northern Ireland Act 1998, sch. 6A, para 18(5).

148 *Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland* (17 October 2019) available [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840232/Unilateral\\_Declaration\\_on\\_Consent.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf), para 3(b).

149 The explicit disapplication of the petition of concern mechanism was achieved by way of secondary legislation amending the Northern Ireland Act 1998, but section 7A had already ‘modified’ the Northern Ireland Act – see *Allister and Peoples*, (n 144) [108]. See also Anurag Deb, ‘*Allister: the effect of the EU Withdrawal Act*’ (*EU Law Analysis*, 22 February 2023).

150 See our analysis of the doctrine of primacy in Chapter 1.

151 See e.g. *Marleasing* (n 57), para 8.

152 Art 6(1) TEU.

Brexit, albeit in respect of a greatly reduced body of EU law mentioned in the Protocol.

Of course, it is imaginable that the Supreme Court's conclusions on a discrete aspect of the Protocol may not extend to the position of the Charter within the Northern Ireland legal order, more generally.<sup>153</sup> Our interpretation of the impact of section 7A of the EUWA does, however, have the benefit of greater certainty for domestic courts and litigants, which alternative interpretations would not provide, particularly considering that no correction was made of the broader approach adopted in the Northern Ireland High Court and Court of Appeal, where the Charter was specifically highlighted.

#### **d. Section 7A EUWA after the REULA**

The REULA amends the EUWA in two important respects, for the purposes of this report: first, as noted earlier, it abolishes the general principles of EU law in domestic law (section 4 REULA); second, it ends the supremacy of EU law (section 3(1) REULA). Nevertheless, it is essential to emphasise that these changes do not affect the operation of section 7A EUWA. Rather, the effect of section 7A of the EUWA appears to be preserved by section 3(3) of the REULA. Section 3(3) REULA *inter alia* replaces subsections (1)-(3) of section 5 of the EUWA (including references to these subsections within section 5 of the EUWA) with new subsections (A1)-(A3). The effect of this replacement is at its most

important in the reference to (new) subsection (A1) in section 5(7) of the EUWA. This last provision subjects the sweeping language of section 5(1) (which brings an end to the principle of EU law supremacy in the domestic legal order) to 'relevant separation agreement law', defined in section 7C of the EUWA to include, *inter alia*, section 7A of the EUWA, all of the requirements of Article 4 of the Withdrawal Agreement and Article 13 of the Windsor Framework (conferring dynamic alignment on the Annex 1 EU legislation concerning equality and non-discrimination).<sup>154</sup>

The key principle of this meandering and complicated statutory tangle appears to be that section 3(1) of the REULA applies to what was previously known as retained EU law (henceforth called assimilated law) *only*, thus preserving supremacy for EU law *as such* (that is, the provisions of the treaty and law made by the EU), insofar as these apply via the WA and WF. This is because REULA leaves s 7A of the EUWA intact, and it is this provision which acts as the conduit for the observance of the requirement for the United Kingdom to 'ensure compliance' with the WA and for its 'judicial and administrative authorities' to disapply any inconsistent domestic provisions, which is explicitly provided for in Article 4(2) WA, in respect of the WA itself, and the provisions of Union law made applicable by or referred to it. This approach to section 7A WA as a 'conduit pipe' similar to section 2 ECA is plain from the

<sup>153</sup> Though there is no principled reason why the reasoning in *Allister and Peebles* (n 144) cannot be extended to the Windsor Framework generally.

<sup>154</sup> EUWA s 7C(2) and (3).

explanatory note to section 7A and was recently confirmed by the High Court in *Dillon*,<sup>155</sup> following the earlier Supreme Court ruling in *Re Allister*.<sup>156</sup>

The same reasoning applies to the effect of section 4 of the REULA, ending the availability of general principles of EU law. This would apply to the Northern Ireland legal order in much the same way as the wider UK legal order: it applies to any matter *not covered by or within the scope of the Withdrawal Agreement (including the Windsor Framework)*. Consequently, in our view, the only viable position for ensuring respect of the Windsor Framework is to treat the Charter (and general principles of EU law) as applicable in the same manner that it did prior to Brexit – the only difference being that its application is confined to a reduced body of EU law applying as a result of the Withdrawal Agreement and Windsor Framework.

Finally, it is important to remember that section 7A incorporates the provisions of the Withdrawal Agreement, which creates rights and obligations distinct from EU law.<sup>157</sup> Thus, if the Charter applies in the implementation of EU law in Northern Ireland, this implementation arises because of the Withdrawal Agreement and any remedies for breaches in this implementation must similarly be conditioned by the requirements of the Withdrawal Agreement. This becomes clear when we consider the nature and content of Article 2 of the Windsor Framework.

## 4. Article 2 of the Windsor Framework: general considerations

Article 2 of the Windsor Framework has central importance in answering the question of how the Charter has and may have effect in the Northern Ireland legal order. This is because many of the rights in the Rights, Safeguards and Equality of Opportunity (RSEO) section of the Belfast (Good Friday) Agreement, referenced by Article 2, are also contained within the Charter.

### a. The basic features of Article 2 Windsor Framework

Article 2 (1) reads as follows:

1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol [the Windsor Framework], and shall implement this paragraph through dedicated mechanisms.

The substantive content and application of Article 2 of the Windsor Framework has been covered in extensive detail in a previous report.<sup>158</sup>

155 *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons' Applications for judicial review* [2024] NIKB 11, paras 525-526, per Colton J.

156 *Re Allister and others* [2023] 2 WLR 457, paras 66-68, per Lord Stephens.

157 For example, the democratic consent mechanism under Windsor Framework, Art 18.

158 *Craig et al* and the NIHRC and ECNI Working Paper (both quoted at n 5).

This section therefore does not rehearse this previous exploration but relies on some of its key findings.

Non-diminution (in the RSEO context) provides a definite baseline which the UK is obligated to maintain in Northern Ireland. This means that any reduction in the standards of rights and equalities related to the RSEO section, as set out in EU law before 31 December 2020, would breach Article 2 of the Windsor Framework.

At this point, it is worth emphasising that the RSEO section contains not only a list of rights within a broader ‘commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community’, but also specific safeguards relating to the incorporation of the European Convention on Human Rights (ECHR) within UK law, the provision in domestic law of remedies for breaches of the ECHR, the provision of human rights and equality bodies in Northern Ireland and Ireland (the NIHRC and ECNI for Northern Ireland and the IHREC in Ireland) and the rights and needs of victims of violence. Further provisions relating to economic, social and cultural issues include provisions relating to the Irish language, Ulster-Scots and other languages ‘of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland’. Additional provisions relating to cultural issues specify the need for mutual respect in the ‘use of symbols and emblems for public purposes’.<sup>159</sup>

There are three main reasons for emphasising these elements together with the substantive rights contained in the RSEO section. First, these elements are also captured within the sweep of Article 2, which forbids diminution in rights, *safeguards and equality of opportunity* arising out of the RSEO section. Second, many of these elements are drafted in aspirational terms rather than with the precision typically required for legal effect but are nonetheless made part of the basis for the *legal* obligation of non-diminution within Article 2. While the legally enforceable content of these elements may be a matter for future jurisprudence in the Northern Ireland courts (and possibly the UK Supreme Court), it is important to understand how these elements could have operated before 31 December 2020 in order to determine how they might be legally cognisable for the purposes of Article 2. Finally, and related to the second reason, until the Windsor Framework made express reference to the substantive rights, safeguards and equality provisions in the RSEO section, they had no legally cognisable relevance in domestic law. The position, prior to the coming into force of the Windsor Framework, was (and remains) governed by the dualist orthodoxy which sustains constitutional arrangements in the UK, whereby unincorporated international law has no legal effect in the domestic legal order.<sup>160</sup> The substantive rights in the RSEO section, it has to be acknowledged, have not been incorporated *as such* by any domestic statute.

159 Belfast (Good Friday) Agreement, Rights, Safeguards and Equality of Opportunity, 16-20.

160 See *JH Rayner Ltd. v Department of Trade* [1990] 2 AC 418 (HL), 500B per Lord Oliver of Aylmerton. For a recent endorsement of this position, see *R (SC, CB and ors) v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223, para 77 per Lord Reed.

This overarching position, however, yields in circumstances where the UK Parliament has enacted statutory provisions intended to discharge the UK's obligations under an international agreement without incorporating the agreement itself. In other words, a strictly unincorporated international agreement may nevertheless be legally cognisable in domestic courts where the statute enacted to discharge obligations arising under that agreement must be interpreted having regard to the contents of that agreement, even if those contents have not specifically been incorporated by the statute in question.<sup>161</sup> The Belfast (Good Friday) Agreement is a paradigm example of this kind of international agreement. Explicit references to the Agreement abound in the Northern Ireland Act 1998,<sup>162</sup> and the Agreement itself is a generally accepted part of the interpretational backdrop to the Northern Ireland Act.<sup>163</sup> Nevertheless, as stated above, almost none of the substantive rights, safeguards and equality provisions of the RSEO section of the Belfast (Good Friday) Agreement was made part of domestic law – whether by express incorporation or by any statutory provision intended to achieve its aims.<sup>164</sup> It is arguable that the HRA

relates directly to the obligation under the RSEO section mandating the incorporation of the ECHR,<sup>165</sup> but this argument is as yet unsupported by any judicial authority.

The Windsor Framework, however, has substantially altered the pre-existing position by making express reference to the RSEO section. Even though the content of this section has not been incorporated by any UK statute, in incorporating the Withdrawal Agreement and the Windsor Framework, section 7A EUWA has given a measure of legal effect to the entire RSEO section (this effect is covered in greater detail below). It is, for example, clear in our view that, from the perspective of EU law, Article 2 of the Windsor Framework (which is incorporated by section 7A EUWA) has direct effect. This is because it meets the conditions for direct effect: it creates a precise obligation (non-diminution), it is clear in its scope (non-diminution as a result of Brexit) and it is unconditional, in the sense that it does not require the adoption of further measures to make it effective.<sup>166</sup> Moreover, the jurisprudence on Article 2 thus far has essentially been based on the provision's direct effect (we cover these cases in more detail below).<sup>167</sup>

161 *JH Rayner* (n 160), 500E, per Lord Oliver of Aylmerton.

162 For example, section 20(3) (functions of the Northern Ireland Executive Committee), section 52A(7) (cross-community participation in the North-South Ministerial Council and the British-Irish Council) and section 55 (implementation bodies established under the Belfast (Good Friday) Agreement).

163 See *Robinson v Northern Ireland Secretary* [2002] UKHL 32, [2002] NI 390, para 11 per Lord Bingham and para 25 per Lord Hoffmann.

164 Certain other provisions of the RSEO section, for example those relating to the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, were incorporated. See B(GF)A, RSEO, para 5-6 and the Northern Ireland Act 1998, ss 68 and 73.

165 See e.g. Caoilfhionn Gallagher KC, Angela Patrick and Katie O'Byrne, [Report on Human Rights Implications of UK withdrawal from the EU: an independent legal opinion commissioned by the European United Left/Nordic Green Left \(GUE/NGL\) Group of the European Parliament](#) (2 March 2018) para 3.11.

166 See e.g. *van Duyn* (n 48).

167 *Angesom* (n 33), para 91, per Colton J; *SPUC* (n 43), para 77, per Colton J.

It is important, therefore, to remember that the question of Charter applicability pertains not only to the rights within the RSEO section, but also to every safeguard and every provision relating to the economic, social and cultural issues contained within that section, so long as any of these provisions can be shown to have been underpinned by a relevant provision of EU law before 31 December 2020.<sup>168</sup>

### **b. The enforcement of the non-diminution requirement**

The enforcement of the non-diminution requirement under Article 2 of the Windsor Framework involves a somewhat complex trigger. This trigger was explored in detail by the Court of Appeal in Northern Ireland, in *SPUC's application for judicial review*.<sup>169</sup> In *SPUC*, the Court of Appeal set out a six-stage test:

- (i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.
- (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
- (iii) That Northern Ireland law was underpinned by EU law.

- (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.
- (v) This has resulted in a diminution in enjoyment of this right; and
- (vi) This diminution would not have occurred had the UK remained in the EU.<sup>170</sup>

The operation of Article 2 of the Windsor Framework is complicated by the fact that the Northern Ireland legal order comprises subjects which are devolved to the Northern Ireland Assembly,<sup>171</sup> reserved for future devolution to the Northern Ireland Assembly<sup>172</sup> or explicitly reserved to the UK Government (excepted matters).<sup>173</sup> This is in addition to certain statutes enacted by the UK Parliament with which the devolved authorities in Northern Ireland cannot interfere.<sup>174</sup> Thus, responsibility for compliance with Article 2 of the Windsor Framework is shared by devolved and central authorities. This is most clearly illustrated in areas which are the domain of the UK Government *par excellence*, for example matters of immigration and asylum, where rights relevant to these areas can arguably be located within the RSEO section and related to relevant EU law.<sup>175</sup>

168 For some examples see Christopher McCrudden, 'Human Rights and Equality' in Christopher McCrudden, ed, *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP 2022), 143.

169 *Re SPUC* [2023] NICA 35. Note that this is the appeal of the decision in *SPUC* referenced in (n 43) above.

170 *Re SPUC*, [2023] NICA 35, para 54] per Keegan LCJ. Note that this trigger expands upon the UK Government's own position as set out in *UK Government commitment to 'no diminution of rights, safeguards and equality of opportunity' in Northern Ireland: What does it mean and how will it be implemented?*, para 10. NB: In *Angesom* (n 33), para 86, per Colton J, the above test was slightly revised. However, in *Dillon* (n 155), the *SPUC* test was affirmed as it is of higher authority.

171 Northern Ireland Act 1998, s 4(1) ('transferred matter').

172 *Ibid.*, sch. 3.

173 *Ibid.*, sch. 2.

174 *Ibid.*, s 7.

175 *Craig et al* (n 5), 96-97.

An example of this is the Illegal Migration Act 2023. Section 5 of this Act obligates the Secretary of State to disregard human rights claims made by individuals who have arrived in the UK in breach of immigration law and who have arrived from a country where their life or liberty are not at risk due to certain listed characteristics (this country is not necessarily their country of origin).<sup>176</sup> A ‘human rights claim’ is defined as a claim that removing the person making the claim to a country of which they are a national or a citizen, or from which they have obtained a travel document, would be unlawful under section 6 of the HRA (the duty on public authorities not to act contrary to the ECHR).<sup>177</sup> Disregarding such claims in Northern Ireland would leave people without the safeguard of having remedies to breaches of ECHR rights in Northern Ireland courts – in direct breach of the relevant safeguard in the RSEO.<sup>178</sup> The relevant EU laws underpinning this safeguard in an asylum context includes (pre-Brexit) the principle of *non-refoulement* in the Treaties,<sup>179</sup> the Dublin III Regulation which concerned the processing of asylum claims in the EU<sup>180</sup> and the right to asylum under the Charter.<sup>181</sup> But the responsibility for this breach would not lie with devolved authorities, as devolved authorities have no power

over immigration and asylum matters. Thus, this is a case where liability for a breach in Northern Ireland law (as now modified by the Windsor Framework) would lie with UK *central* authorities – in this case, the Home Secretary.<sup>182</sup> Hence Article 2 has the potential of resulting in enforceable rights against devolved bodies as well as against central UK authorities.

### c. The relationship between Article 4 WA and Article 2 Windsor Framework

There is – at least in theory – a question mark over the relationship between Article 4 WA and Article 2 of the Windsor Framework where the Annex 1 Directives are concerned. Unlike other provisions of the Windsor Framework, such as Articles 5 and 8 (referring to Annexes 2 and 3, respectively), Article 2 does not state that Annex 1 measures “‘shall apply’ or are ‘made applicable’”. On a strict reading therefore one can conclude that Article 4 (1) WA does not apply to the Annex 1 Directives. The UK Government and Daniel Denman (a UK government lawyer writing in a private capacity), for instance, have expressed the view that ‘Article 2(1) does not mean as such that the provisions of EU law listed in Annex 1 have application in Northern Ireland. The only enforceable obligation in Article 2 (1) is that those rights should not be diminished as a result of the

176 Illegal Migration Act 2023, s 5(1), read with s 2(1).

177 *Ibid.*, s 5(5).

178 Belfast (Good Friday) Agreement, RSEO, para 2.

179 Article 78(1) TFEU; substantively also found in Article 19 (2) CFR.

180 Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.

181 Article 18 CFR.

182 See also Anurag Deb and Colin Murray, ‘Article 2 of the Ireland/Northern Ireland Protocol: A new frontier in human rights law?’ [2023] European Human Rights Law Review, 608.

UK's withdrawal from the EU.<sup>183</sup> Further, one might even argue that the Annex 1 Directives therefore do not themselves have the legal effects of EU law.<sup>184</sup>

However, this does not mean that Article 2 Windsor Framework does not have those effects. It has now been settled through litigation that Article 2 (1) Windsor Framework has direct effect within the meaning of Article 4(1) WA.<sup>185</sup> As the first sub-paragraph of Article 4 (1) WA puts it, the 'provisions of this Agreement [...] shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'. The second sub-paragraph of Article 4 (1) WA then confirms that '[a]ccordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law'. And Article 4 (3) WA stipulates that 'the provisions of this Agreement referring to Union law

or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law'. Importantly, these latter two provisions do not require the Union law concerned to have been 'made applicable' by the WA – which it could be argued the Annex 1 Directives are not – but it suffices that Union law is referred to, which is certainly true of the Annex 1 Directives.

Despite this ambiguity in the WA as regards the status of the Annex 1 Directives, however, the consequences of any distinction drawn between measures made applicable and measures merely referenced in the WA are largely academic. This follows from the fact that, even if the Annex 1 Directives themselves are not directly effective within NI law, Article 2 Windsor Framework does have direct effect. It follows from Article 4 (1) WA that EU law remedies – notably the remedy of disapplication flowing from the principle of primacy – apply if the UK does not comply with the

183 UK Government explainer (n 129), para 16; quote from Daniel Denman, 'Article 2 Protocol on Ireland/Northern Ireland' in: Thomas Liefländer; Manuel Kellerbauer; Eugenia Dumitiru-Segnana (eds.), *The UK-EU Withdrawal Agreement: A Commentary*, OUP 2022, para 8.17.

184 There is a further difference flowing from Article 12 (4) Windsor Framework, which gives the EU institutions (etc) their EU law powers with regard to Articles 5 and 7 to 10 Windsor Framework. Notably the Court of Justice is given jurisdiction to hear preliminary references on these; and the Commission has enforcement powers (Article 258 TFEU) in their regard. No mention is made of Article 2 Windsor Framework in this respect, which means in particular that there is no preliminary reference possible from the Northern Ireland courts to the CJEU with regard to the Annex 1 Directives. The fact that there is no option of a preliminary reference from the NI courts regarding the EU law obligations underpinning Article 2 WF does not mean that these are not of an EU law nature either. A useful analogy can be made here with the EU's Area of Freedom, Security and Justice (AFSJ). Until the expiry of a five-year period since the introduction of the Lisbon Treaty, Member States had to opt into the jurisdiction of the CJEU in regard of AFSJ measures, such as the European Arrest Warrant (see Article 35 Treaty on European Union, Nice version). Where a Member State had not done so – the UK being a case in point – the domestic courts had to interpret and apply AFSJ measures as EU law off their own bat (as e.g. happened in *Assange v The Swedish Prosecution Authority* [2012] UKSC 22. Moreover, there is the obligation of a preliminary reference to the CJEU concerning Annex 1 Directives in a dispute on a question of EU law before an arbitration panel set up under the WA, see Article 174 WA. It is therefore inaccurate to say that the CJEU has no jurisdiction over Annex 1 Directives.

185 See, in chronological order, *Re SPUC Pro-life Ltd's application for judicial review* [2022] NIQB 9, [77]; *Re SPUC Pro-life Ltd's application for judicial review* [2023] NICA 35, [53]-[55], which proceeds on the basis that Art 2 is directly effective, given that the Court of Appeal took no exception to Colton J's exploration of this issue in the High Court; *Re Angsom's application for judicial review* [2023] NIKB 102, [91]; *Re JR295's application for leave to apply for judicial review* [2024] NIKB 7, [43]; *Re Dillon* (n 155), [520]-[521].

non-diminution obligation contained in Article 2 Windsor Framework. This follows expressly from Article 4 (1) (2) WA and has been given effect in UK law by section 7A of the European Union (Withdrawal) Act 2018.<sup>186</sup>

A potential diminution can, therefore, be challenged before Northern Ireland courts with regard to any measure caught by Article 2 Windsor Framework, whether it be a provision specifically listed in Annex 1 to the Windsor Framework or any other provision of EU law that engages the scope of the RSEO part of the Belfast (Good Friday) Agreement.<sup>187</sup> This means that, at a minimum, there is an obligation of result to maintain the level of protection of rights captured by Article 2. The relevant point in time here is the level of protection as it was understood before Brexit, i.e. including at least equivalent enforcement mechanisms and remedies as those envisaged by EU law. For example, as Denman notes, if measures coming within the scope of Article 2 ‘were no longer given effect in the law of Northern Ireland in a way that individuals could enforce, that would appear to be a diminution in the protection of those rights that resulted from the UK’s withdrawal from the EU.’<sup>188</sup>

This ‘obligation of result’ reasoning can be applied across Article 2 (1) Windsor Framework. It should be noted, however, that it is a more complex obligation when it comes to the six Directives enumerated in Annex 1, because their observance engages a forward-looking aspect beyond the static baseline of 31 December 2020 (the end of the Brexit implementation period). If these measures are amended at EU level, there is dynamic alignment, i.e. the Windsor Framework is automatically updated to incorporate those changes. This follows from Article 13 (3) Windsor Framework on dynamic alignment (discussed in further detail in chapter 5 of the report). If this happens and there is no amendment of Northern Ireland law, this automatically means that Northern Ireland law falls foul of the non-diminution obligation in Article 2 Windsor Framework. As noted above, Article 2 Windsor Framework produces the ‘EU law effects’ of direct effect and primacy in accordance with Article 4 WA. These remedies are ‘recognised and available in domestic law’ by virtue of section 7A (2) EUWA 2018. This then has the practical effect of rendering the amendment of an Annex 1 Directive applicable in Northern Ireland and thus part of Northern Ireland law.

186 A (doctrinal legal) explanation for the difference in treatment between the directives referenced in Annex 1 and EU measures referenced in Annexes 2-5 could be that other measures in the Windsor Framework, such as those concerning the free movement of goods, or indeed entire sections of the Withdrawal Agreement itself, such as the free movement of persons, required more explicit language to set up an agreeable legal framework that would not otherwise have existed in the UK following Brexit. By contrast, the Annex 1 directives had already been implemented in domestic law and were not subject to immediate removal because of Brexit anywhere in the UK. Article 2 Windsor Framework merely served the purpose of safeguarding against the possibility of future diminution in Northern Ireland, where the rights protected *inter alia* by EU law have had such considerable historical and social significance. In other words, since Article 2 was not setting out a new legal framework, as opposed to referring to rights that were already – and would continue to be – applicable in NI, there was no need for it to state that rights were ‘made applicable’ rather than simply referring to them in an Annex.

187 For examples see Craig *et al* (n 5).

188 Denman (n 183) para 8.14, fn 21.

This result is further backed up by the second sub-paragraph of Article 4 (1) WA, which provides that ‘legal or natural persons shall [...] be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law’.

In the end, regardless of the interpretive route employed (i.e., whether the Annex 1 Directives apply as EU law or simply as references in the body of the directly effective Article 2 Windsor Framework), the text of the WA and Windsor Framework yields two overriding consequences which are beyond doubt: first, the Annex 1 directives may be relied upon in domestic litigation (whether it be as EU law or as a form of domestic replication thereof); and second, EU law remedies such as disapplication are available in respect both of the Annex 1 Directives and the non-diminution obligation more generally. As the saying goes, ‘all roads lead to Rome’.

# Chapter 3:

## The continued operability of the Charter in the Northern Ireland legal order

### 1. Introductory remarks

When it comes to the applicability of the Charter in Northern Ireland under the Windsor Framework, it is important to distinguish two avenues through which the Charter can take effect in the Northern Ireland legal order: the first is via Article 4 WA, which provides in paragraph 3 that Union law referred to by the WA shall be ‘interpreted and applied in accordance with the methods and general principles of Union law’.<sup>189</sup> Given that EU law must be interpreted and applied in accordance with the EU Charter, the Charter applies in Northern Ireland in so far as the Windsor Framework refers to provisions of Union law (notably those in Annexes 1-5). The second avenue through which the Charter applies in Northern Ireland is the non-diminution requirement under Article 2 WF. Under Article 2 WF, the Charter becomes relevant based on the test set out in *SPUC*, as explained in the preceding chapter. This test may impact its overall operation and limits.

### 2. Applicability of the Charter in Northern Ireland due to Article 4 WA

Various provisions of the Windsor Framework make reference to Union law or declare specific provisions of Union law applicable in Northern Ireland.<sup>190</sup> One can broadly distinguish three situations: first, the Windsor Framework declares applicable EU secondary law laid down in Annexes 2-5 of the Windsor Framework<sup>191</sup> second, the Windsor Framework provision itself declares one or more provisions of EU primary or secondary law applicable, e.g. Articles 34 and 36 TFEU;<sup>192</sup> third, the Windsor Framework makes reference to ‘Union law’ or provisions of Union law more broadly without expressly declaring them applicable (on the relevance of this distinction see below).<sup>193</sup>

According to Article 4 (3) WA the ‘provisions of [the WA, of which the Windsor Framework is a part] referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law’.

189 On this avenue see McCloskey (n 6), 164.

190 Notably: Articles 5 (3 to 5); 7 (1); 8 (1); 9 (1); 10 (1); 11 (1); 13 (7).

191 E.g., Article 8 (1).

192 Relating to prohibition on quantitative restrictions and measures having equivalent effect on imports between Member States and exceptions respectively, referenced in Article 7 (1); but also the limitation in Article 13 (7).

193 Article 11 (1).

According to the CJEU, this means in particular that ‘every provision of [Union] law must be placed in its context and interpreted in the light of the provisions of [Union] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’.<sup>194</sup>

In other words, the provisions of Union law made applicable and/or referred to by the Windsor Framework must be interpreted and applied in the same way as they would be interpreted and applied in an EU Member State. As discussed in section 5 of Chapter 1 and succinctly put by the CJEU, the ‘applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.’<sup>195</sup> The reference to the ‘general principles of Union law’ in Article 4 (3) WA confirms this: after all, they guarantee – broadly speaking – the same rights as the Charter and apply in the same situations as the Charter.<sup>196</sup>

One can distinguish four situations in which the Charter may have an effect in the Northern Ireland legal order by virtue of Article 4 WA. First, the Charter may be used to interpret the provisions of Union law covered by the Windsor Framework. Second, the Charter may be invoked where such provisions are ‘applied’ in Northern Ireland, i.e. beyond the interpretation of the provisions themselves, so that

the Charter may notably be used to inform the way they are implemented and enforced; third, the Charter may be invoked to challenge the validity of EU secondary law made applicable or referenced by the Windsor Framework; and fourth, the Charter is relevant when interpreting provisions of the Withdrawal Agreement and Windsor Framework themselves.

In relation to the third of these situations, the Charter may be of relevance in the context of Article 4 WA challenges to new EU secondary law with which Northern Ireland would be dynamically aligned according to Article 13 (3) WF. All EU secondary law must be Charter-compliant to be valid. Article 12 (4) WF decrees that the CJEU continues to have jurisdiction as regards Articles 5 and 7-10 Windsor Framework and thus over EU secondary law mentioned in Annexes 2-5. Article 12 (4) Windsor Framework makes express reference to the CJEU’s jurisdiction over preliminary references from national courts. According to Article 267 (1) (b) TFEU preliminary references can be requested concerning the validity and interpretation of the acts of the institutions [...] of the Union. Given that Article 12 (4) Windsor Framework makes reference to Article 267 (2) and (3) TFEU which gives the courts a right to request a preliminary ruling (para 2) on such questions, and in the case of the highest court a duty to do so (para 3), it will be possible for claimants in Northern Ireland to

194 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335, para 20.

195 *Åkerberg Fransson* (n 13), para 21.

196 See Chapter 1; see also Piet van Nuffel, ‘Article 4’ in: Thomas Liefländer; Manuel Kellerbauer; Eugenia Dumitiru-Segnana (eds.), *The UK-EU Withdrawal Agreement: A Commentary*, OUP 2022, para 2.38, who goes so far as to say that ‘in substance, Article 4 (3) has the same effect as Article 51 (1) of the EU Charter of Fundamental Rights’.

challenge the validity of a piece of EU secondary law that is currently applicable by virtue of the Windsor Framework or which becomes applicable through dynamic alignment by virtue of Article 13 (3) WF or Art 13 (4) WF (which allows measures to be subsequently added to the WF).<sup>197</sup>

As far as case law handed down by the CJEU after the end of the transition period is concerned, Article 13 (2) WF would strongly suggest that the provisions of EU law referred to in the Windsor Framework continue to be interpreted and applied in light of such case law. Hence any interpretations of the Charter in connection with those provisions in post-Brexit case law would need to be followed, too. Indeed, this approach has been confirmed by the judgment of the Court of Appeal of England and Wales in *AT*. In that case, the court relied on the CJEU's post-implementation period ruling in *CG*, which established an obligation for Member States to provide minimum subsistence benefits to EU citizens lawfully residing in their territory, where refusal to do so would result in a violation of Article 1 CFR (the right to human dignity).<sup>198</sup> The court found that this ruling was relevant in the interpretation of obligations arising for the UK as a result of Article 4 of the Withdrawal Agreement.<sup>199</sup> It therefore accepted a lower court's finding that an EU citizen with pre-settled status (thus coming within

the scope of the WA) was entitled to Universal Credit when she and her child became destitute following an incident of domestic violence. Given that the court's interpretation concerned Article 4 WA altogether, there is no reason to expect case law pertaining to any aspect of the Windsor Framework to be treated differently as a minimum baseline.<sup>200</sup>

### 3. Applicability of the Charter under Article 2 Windsor Framework

As noted in the previous chapter, the non-diminution provision contained in Article 2 (1) WF may also result in the Charter being applicable in the Northern Ireland legal order. Considering that the Charter was applicable in Northern Ireland before the UK's withdrawal from the EU in cases where the public body at issue (UK or Northern Ireland) was deemed to be 'implementing Union law', on a plain reading of Article 2, the non-diminution obligation must include rights contained in the Charter in so far as they would have protected individuals before Brexit and in so far as the additional requirements of Article 2 are met.

As established above, the test for the application of Article 2 Windsor Framework – as spelled out by the Northern Ireland Court of Appeal in *SPUC* – is as follows:

197 See Chapter 5 for the consideration of CFR applicability in light of Article 13(3a) of the Windsor Framework.

198 *CG* (n 26) para 89.

199 *AT* (n 26) paras 83-92.

200 NB: We do, however, consider the possibility of CJEU case law having broader relevance under the Windsor Framework below and in Chapter 5.

- (i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/ Good Friday 1998 Agreement is engaged.
- (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
- (iii) That Northern Ireland law was underpinned by EU law.
- (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.
- (v) This has resulted in a diminution in enjoyment of this right; and
- (vi) This diminution would not have occurred had the UK remained in the EU.

Additionally, the Charter only applies where a Member State is implementing Union law (see Chapter 1). This question is best considered at stage iii) of the test outlined above as the Northern Ireland law in question was only ever underpinned by the Charter if there was an implementation of EU law according to Article 51 (1) CFR. According to the case law of the Court of Justice, ‘implementing EU law’ is synonymous with ‘being within the scope of EU law’. Hence for the Charter to apply on the basis of the above test, it is necessary to answer the hypothetical question: would this situation have been in the scope of EU law, when the UK was still an EU Member State?

It is important to understand that this question is not automatically answered once one has identified a right included in the RSEO section of the Belfast (Good Friday) Agreement, which is underpinned by EU law. For instance, Article 11 CFR – protecting the right to freedom of expression and the right to receive information – is underpinned by the Audiovisual Media Services Directive.<sup>201</sup> This does not mean, however, that Article 11 CFR can be invoked in every free speech case in Northern Ireland under Article 2 of the Windsor Framework. Instead, one must answer the hypothetical question whether the specific case would have been in the scope of EU law if the UK were still in the EU. For example, speech made at a demonstration in Belfast opposing certain road traffic measures introduced by Belfast City Council would not be in the scope of EU law and thus the speaker would not be protected by Article 11 CFR.

The same would be true in cases of over-implementation (so-called ‘gold plating’) of EU directives. For instance, the Equality Framework Directive 2000/78/EC does not cover discrimination on the basis of sexual orientation in the provision of goods and services.<sup>202</sup> Nonetheless, Northern Ireland equality law does prohibit such discrimination in the provision of goods and services.<sup>203</sup> In cases relating to such discrimination in the provision of services (e.g. against a self-employed individual) therefore, Charter rights (e.g. Article 47 CFR) do

201 Directive 2010/13/EU [2010] OJ L 95/1.

202 Directive 2000/78/EC is confined to outlawing discrimination on this basis in employment and occupation only.

203 See Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

not apply, even though cases relating to sexual orientation discrimination in employment *do* engage such rights.

Thus, the question whether certain Charter rights apply by virtue of Article 2 Windsor Framework cannot be answered in the abstract: the answer is always dependent on a concrete set of facts. One cannot therefore say, for instance, that certain Charter rights are *per se* captured by Article 2 Windsor Framework and therefore applicable in Northern Ireland in all circumstances and that others are not.

To determine the applicability of the Charter in the context of the non-diminution obligations it is useful to distinguish between Annex 1 Directives and all other EU law.

#### a. Annex 1 Directives

If a situation falls within the scope of the Annex 1 Directives, the applicability of the Charter is relatively straightforward: Article 2 itself decrees that the Annex 1 Directives form part of the non-diminution commitment; the Directives had been made applicable in Northern Ireland law through Regulations prior to 31 December 2020;<sup>204</sup> and those Northern Ireland Regulations must be considered an implementation for the purposes of Article 51 (1) CFR.<sup>205</sup> As a consequence the Charter applies where the Annex 1 Directives apply.

The case of *Egenberger*, which was already discussed in Chapter 1, demonstrates the importance of the Charter – in this case Article 47 CFR – in such a situation. After establishing that Article 47 of the Charter applied in this case, the CJEU held that Article 4 (2) of Directive 2000/78/EC was designed to ensure a fair balance between the right of autonomy of churches and the rights of workers not to be discriminated against and that it set out the criteria to be taken into account in the balancing exercise which must be performed to ensure a fair balance between those competing rights.<sup>206</sup> It then went on to hold that ‘in the event of a dispute, however, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority, and ultimately by a national court’.<sup>207</sup> Hence the Charter was successfully invoked to create an extended remedy to challenge decisions by churches and affiliated bodies to invoke the ‘religious ethos exception’ in the Directive.

Interestingly, the referring German court subsequently decided that the German legislation allowing the churches to determine the existence of a genuine occupational requirement autonomously would have to be disapplied. It then went on to review the decision of the church organisation itself and concluded that she had been discriminated against on the basis of her religion.<sup>208</sup>

204 See Craig *et al* (n 5), Appendix 4.

205 *Egenberger* (n 66), para 49.

206 *Ibid*, paras 51-52.

207 *Ibid*, para 53.

208 Federal Labour Court (Bundesarbeitsgericht) 8 AZR 501/14, DE:BAG:2018:251018.U:8AZR501.14.0.

This case demonstrates how the Charter can be invoked in an Annex 1 scenario and result in the disapplication of domestic law.<sup>209</sup>

### **b. The Charter and Article 2 outside the Annex 1 directives**

The applicability of the Charter by virtue of the non-diminution obligation contained in Article 2 Windsor Framework is more complex outside the Annex 1 directives. This is due to the interaction between elements i) to iii) of the test outlined above with the requirement that the situation at issue is deemed to be an implementation of Union law. This demonstrates again that the Charter does not apply in and of itself in Northern Ireland under the Windsor Framework, but only insofar as the situation comes within the scope of EU law.<sup>210</sup>

Apart from the Directives mentioned by the UK Government as falling within the scope of Article 2<sup>211</sup> there remains a degree of legal uncertainty in this area at present as to which rights, safeguards or equality provisions contained in the RSEO section of the Belfast (Good Friday) Agreement were underpinned by a domestically effective iteration of EU law on 31 December 2020. The ECNI's and NIHRC's working paper on the scope of Article 2 (1)<sup>212</sup> features an appendix mapping

relevant rights contained in the RSEO section of the Belfast (Good Friday) Agreement onto EU law as it stood on 31 December 2020. This provides a good indication as to which provisions of EU law might be considered to be underpinning the civil and political rights mentioned in the RSEO section, though it should not be considered to be definite or exhaustive in this regard.

It should be emphasised that the key assessment here, in line with the *SPUC* test, is whether an EU measure was *binding* on the UK on or before 31 December 2020. It is essential to emphasise that, in EU law, the question of whether a measure has a 'binding' character is wholly separate to the question of whether it enjoys direct effect. The *Angesom* ruling had created some confusion in this regard, by associating the binding character of an EU measure with the question of whether that measure was capable of enjoying direct effect.<sup>213</sup> However, this position was recently revised explicitly in *Dillon*, with Colton J clarifying that binding effect and direct effect are separate matters.<sup>214</sup> We wholly welcome this clarification, as it avoids any future misunderstandings of the binding character EU measures. Indeed, it is a foundational aspect of the principle of primacy that *even measures not enjoying direct effect are binding on the Member States*.<sup>215</sup>

209 More on disapplication as a remedy in Chapter 4.

210 On the applicability of the Charter in the Member State legal orders, see Chapter 1.

211 UK Government Explainer (n 129), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/907682/Explainer\\_UK\\_Government\\_commitment\\_to\\_no\\_diminution\\_of\\_rights\\_safeguards\\_and\\_equality\\_of\\_opportunity\\_in\\_Northern\\_Ireland.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907682/Explainer_UK_Government_commitment_to_no_diminution_of_rights_safeguards_and_equality_of_opportunity_in_Northern_Ireland.pdf)

212 ECNI's and NIHRC's working paper (n 5).

213 *Angesom* (n 33), para 116.

214 *Dillon* (n 155), paras 566-567.

215 See, eg, Case C573/17, *Popławski*, EU:C:2019:530.

As we explained in Chapter 1, one of the key remedial mechanisms of EU law – state liability in damages under the *Francovich* rule – was devised precisely in order to ensure that measures not enjoying direct effect still gave rise to effective remedies, albeit the resultant remedies are not always as adaptable or expansive as those for directly effective measures. It is essential, therefore, to distinguish the concepts of binding effect and direct effect in assessing diminution. Even a directive that does not have direct effect may have binding effect, thus coming within the non-diminution requirement. For instance, a non-directly effective directive can be (and must be) used when interpreting domestic law.<sup>216</sup> Equating the two concepts (binding effect and direct effect) would have the problematic consequence of potentially restricting the non-diminution guarantee under Article 2 only to those provisions of EU law which are capable of direct effect – thus casting aside other important ways of giving effect to EU law, such as consistent interpretation and state liability. Whereas it is clear that measures enjoying direct effect would be better candidates for the non-diminution trigger, in the sense that their added value compared to ECHR or domestic measures would often be greater/more obvious, all EU measures that *were or should have been* implemented in NI before 31 December 2020 are capable of triggering the guarantee in principle.

The effects of the Charter in the field of non-diminution are twofold: first, the Charter may be relevant for the interpretation of the legislation that is considered to have ‘implemented Union law’ in Northern Ireland on 31 December 2020; and second, the Charter may have the effect of requiring the availability of a specific remedy to give effect to the implementing act. The following three examples – based on CJEU case law – demonstrate how the Charter applies outside the scope of the Annex 1 directives at present. The examples were chosen to reflect the degree of connection with the RSEO section ranging from the UK Government’s own admission of a connection in example 1 to a more tenuous, but still very much arguable connection in example 3.

**Example 1:**  
*Parental Leave Directive – mentioned in UK Government explainer*

According to the UK Government, Directive 2010/18/EU on parental leave is within the scope of the UK Government’s commitment under Article 2<sup>217</sup> as – even though the UK Government does not expressly say so – it helps to ensure the right to equal opportunity in all social and economic activity found in the RSEO chapter of the Belfast (Good Friday) Agreement. As a consequence, there must be no diminution of existing parental leave rights.

216 This is the principle consistent interpretation, which was developed precisely to fill the gap left by non-directly effective directives, see above Chapter 1.

217 UK Government (n 129) para 13.

CJEU Case C-129/20 *Caisse pour l'avenir des enfants* shows that the rights contained in the Directive must be interpreted in light of Article 33 (2) CFR. In the case the claimant was a mother of twins, who had applied for parental leave to be granted by her employer, the state of Luxembourg. According to Luxembourgish law she would have only been entitled to parental leave if she had been employed at the time of the birth of the children, whereas the claimant had been unemployed at that time. The CJEU held that 'the individual right of each working parent to parental leave on the grounds of the birth or adoption of a child, enshrined in clause 2.1 of the revised Framework Agreement [to which the Directive 2010/18/EC gives effect], must be interpreted as articulating a particularly important EU social right which, moreover, is laid down in Article 33(2) of the Charter of Fundamental Rights. It follows that that right cannot be interpreted restrictively'.<sup>218</sup> The Court thus used the Charter to reiterate the fundamental right character of the right to parental leave,<sup>219</sup> which means that it had additional weight compared to rights merely guaranteed in secondary EU law. This then allowed the Court to conclude that the right could not be interpreted restrictively.

As a result, the claimant in the case could not be excluded from claiming parental leave because she was not in employment at the time when she gave birth.

### **Example 2:**

#### *Data protection law - right contained in the ECHR as ratified by the UK*

The second example relates to the broader category of 'civil rights and religious liberties of everyone in the community'. Given the prominent role accorded to the ECHR in the Belfast (Good Friday) Agreement, it is convincing to assume – as the two Commissions do in their Article 2 working paper<sup>220</sup> – that the 'civil rights' in this sense encompass as a minimum the rights contained in the ECHR. At this juncture it may be useful to distinguish between ECHR rights contained in parts of the ECHR that have been ratified by the UK and those that have not. While it should not be suggested that the latter are outwith the scope of the non-diminution commitment, the connection between the former and the non-diminution commitment is more certain than with the latter.

The broad field of data protection is covered by Article 8 ECHR<sup>221</sup> and underpinned by EU law guarantees, most prominently by the GDPR.<sup>222</sup>

218 Case C-129/20 *Caisse our l'avenir des enfants* EU:C:2021:140, para 44.

219 Previously established in Case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaionaton* ECLI:EU:C:2015:473, para 19.

220 ECNI's and NIHRC's working paper (n 5).

221 Going back to cases such as *Klass and Others v Germany* 6 September 1978, Series A no 28; *S and Marper v United Kingdom* ECHR 2008; and most recently *Big Brother Watch and Others v United Kingdom* nos 58170/13, 62322/14, 4960/15, 25 May 2021.

222 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1.

Importantly, the CJEU has made extensive use of Articles 7 and 8 CFR to interpret data protection rights contained in the GDPR and its predecessor, Directive 95/46/EC broadly. The rights protections in the Charter differ from the ECHR in that Article 8 CFR contains an express right to the protection of personal data. If the non-diminution commitment substantively covers the rights guaranteed by the ECHR – at least so far as it has been ratified by the UK – then the non-diminution commitment must extend to data protection given the ECtHR’s long-established line of case law in this regard. This then is underpinned by various EU law provisions, which themselves – if applied in the domestic context – imply the application of the Charter. The CJEU has interpreted the GDPR and connected data protection provisions broadly in light of those Charter rights. For instance, it read a ‘right to be forgotten’ into the GDPR’s predecessor Directive 95/46/EC.<sup>223</sup> Furthermore, Articles 7 and 8 CFR set clear limits to the extent to which EU member states can order the wholesale retention of communication data<sup>224</sup> as well as to the transfer of data to non-EU countries.<sup>225</sup> Those limits therefore form part of the non-diminution commitment.

### **Example 3:**

#### *Prohibition of double jeopardy – right in a Protocol to the ECHR not ratified by the UK*

Article 4 (1) Protocol No 7 to the ECHR contains the prohibition of double jeopardy. It says that ‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.’

There is an expanding line of case law by the CJEU on the prohibition of double jeopardy (or *ne bis in idem* as it is often referred to), which is also protected in Article 50 CFR. The question is whether the prohibition of double jeopardy as protected by EU law forms part of the non-diminution commitment. First, it would need to be established that it is part of the RSEO commitment in the Belfast (Good Friday) Agreement. While it is part of the ECHR, the UK is clearly not bound by Article 4 Protocol No 7 as it has not even signed that Protocol, let alone ratified it. At the same time, it can hardly be denied that, given that it is a procedural right, the prohibition of double jeopardy is a ‘civil right’, which is protected in Northern Ireland law. The common law<sup>226</sup> – modified

223 Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* EU:C:2014:317.

224 Fundamentally established in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* EU:C:2014:238 and later refined in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* EU:C:2016:970; Case C-623/17 *Privacy International* EU:C:2020:790; Joined Cases C-511/18, 512/18, 520/18 *La Quadrature du Net and Others* EU:C:2021:791; and Case C-140/20 *GD* EU:C:2022:258.

225 *Maximilian Schrems v Data Protection Commissioner*; Case C-311/18 *Schrems II* EU:C:2020:559; Opinion 1/15 *PNR Agreement EU-Canada* EU:C:2017:592.

226 See *Re Cranston’s application for judicial review* [2002] NI 1 (NIQB), 9e, per Kerr J (as he then was). For the wider principle at common law, see also *Connelly v DPP* [1964] AC 1254 (HL).

by the Criminal Justice Act 2003<sup>227</sup> – prohibits double jeopardy and so does Article 14 (7) ICCPR, which the UK has ratified. Thus, there is a strong argument to be made that the prohibition of double jeopardy constitutes a ‘civil right’ within the scope of the RSEO section of the Belfast (Good Friday) Agreement.

Secondly, this right was also underpinned by a domestically effective iteration of EU law. Article 54 of the Convention Implementing the Schengen Agreement (CISA) contains the prohibition of double jeopardy and the UK had opted into this particular provision of the Schengen Agreement.<sup>228</sup> Additionally, Article 3 (2) of the Framework Decision on the European Arrest Warrant mandates that a European Arrest Warrant must not be executed if ‘the requested person has been finally judged by a Member State in respect of the same acts’<sup>229</sup> and the UK was bound by that particular provision until 31 December 2020. Hence there are good grounds in favour of a finding that the non-diminution guarantee covers the prohibition of double jeopardy.

The key difference between the protections against double jeopardy in EU law (Article 54 CISA and 50 CFR) and the protection in domestic law is that the former has a potentially broader scope in that it protects individuals who have been finally convicted or acquitted anywhere in

the Union and not just in the domestic legal order of the state concerned.

This can have far-reaching consequences as the recent CJEU decision in Case C-435/22 PPU *Generalstaatsanwaltschaft München* demonstrates.<sup>230</sup> Here a Serbian national, who had been finally convicted of an offence in Slovenia, had been arrested in Germany on foot of an international arrest warrant issued by the United States. The United States requested extradition on the basis of the US-German extradition treaty, which contains a more limited double jeopardy clause allowing refusal of extradition only if the requested person had been convicted or acquitted in Germany. Hence a refusal to extradite on part of the German authorities in this case would have been in breach of the extradition treaty. Nonetheless, the CJEU held that according to Article 54 CISA ‘read in the light of Article 50 of the Charter’ had to be interpreted as precluding the extradition in such a case.

### **c. Relevance of post-Brexit CJEU case law**

A final note in this section is on the applicability of CJEU case law. The express provision in this regard is Article 13(2), which mandates a duty to interpret ‘the provisions of this Protocol [viz. the Windsor Framework] referring to Union law or to concepts or provisions thereof’ in

227 See Criminal Justice Act 2003, Part 10.

228 See Council decisions 2000/365, 2004/926, and 2010/779 as amended by Council Decision 2014/854/EU [2014] OJ L 365/1.

229 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

230 Case C-435/22 PPU *Generalstaatsanwaltschaft München* EU:C:2022:852.

accordance with pre- and post-Brexit case law of the CJEU.<sup>231</sup> For the purposes of Article 2 of the Protocol, this appears to clearly apply to secondary EU law as listed in Annex 1. Hence any CJEU case law handed down since 31 December 2020 relating to Annex 1 directives is binding.

For example, in a judgment handed down in January 2023, the Court of Justice clarified that the scope of Directive 2000/78/EC covers not only persons in an employment relationship (workers in the strict sense), but also self-employed persons provided that their occupational activities are genuine and are pursued in the context of a legal relationship characterised by a degree of stability.<sup>232</sup> The case concerned a self-employed video editor who regularly provided services to a television station in Poland. After he had posted a video online supporting tolerance towards same-sex couples, two of his engagements by the TV station were cancelled. He complained that this happened because of his sexual orientation and that it was in violation of anti-discrimination law laid down in Directive 2000/78/EC. Having found that his type of occupation was within the scope of the Directive, the Court of Justice held that the Directive precluded national legislation which has the effect of excluding

self-employed persons such as the applicant from protections against discrimination on grounds of sexual orientation. As the Directive is found in Annex 1 to the Windsor Framework this judgment has binding effect in the context of Article 2 WF.

The position is more complex in relation to the non-diminution guarantee outside Annex 1, given that outside Annex 1, Article 2 makes no express reference to EU law or its concepts or provisions.<sup>233</sup> An important point needs to be borne in mind when considering this issue. CJEU case law clarifies existing EU law (primary or secondary) rather than creating new law or positively extending it in any novel way. As a result, the legal effect of a post-Brexit CJEU judgment interpreting a pre-Brexit provision of EU law in light of the Charter will be to *clarify what the law has always been*, rather than what the law is from the date of such a judgment. This is a settled feature of CJEU rulings, which is attributable to the civil law tradition that governs the Court's operation. Having been modelled on the French *Conseil d'État*, the CJEU's function is to pronounce the *meaning of the law*, rather than to develop it under a formal doctrine of precedent.<sup>234</sup> As Tridimas explains, under this tradition, 'a judgment is seen as determining the correct, or at least a reasonable,

231 Without the relevant pre-Brexit temporal limit contained in Article 4(4) of the WA; on the potential issues arising from the so-called Stormont Brake, see Chapter 5.

232 Case C-356/21, *J.K.*, EU:C:2023:9, para 45.

233 Importantly, this does not mean that the non-diminution guarantee is premised *only* on the RSEO chapter of the Belfast (Good Friday) Agreement. This is because, absent the need to locate an underpinning EU law, there would be no diminution *as a result of* Brexit, given that the RSEO chapter had no domestic legal relevance or effect prior to Brexit anyway.

234 Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 307-330, 308.

interpretation of a pre-existing rule or principle'.<sup>235</sup> In turn, this means that the interpretation dates *from the introduction of the adjudicated measure*, rather than from the date of the ruling.

The CJEU's case law itself contains telling examples of the implications that this difference in legal traditions can make. The above approach is best highlighted by the Court's 1976 ruling in *Defrenne*. Substantively, this case was pioneering because it affirmed equality between men and women in all matters concerning pay, including in the calculation of pension entitlements, across the public and private employment sectors. Nevertheless, the CJEU acknowledged that this ruling could have wide-ranging financial consequences for many businesses, potentially driving some of them to bankruptcy.<sup>236</sup> It therefore accepted, for the first time, the request of several Member States (including the UK and Ireland) to limit the temporal effects of the ruling, so as to make it impossible for claimants to make retrospective claims.<sup>237</sup> In doing so, however, the Court emphasised that this decision was taken 'exceptionally' and was partly attributable to the fact that the European Commission had failed to initiate proceedings against Member States wrongly

implementing Articles 157 TFEU and (then) Council Directive 75/117/EEC, thus contributing to an impression that unequal calculations for women were acceptable.<sup>238</sup> Later case law has shown that temporal limitations are very rare, with the CJEU not always considering financial implications as a reason outweighing the full application of its rulings.<sup>239</sup> Murauskas has found that, overall, the CJEU makes a temporal limitation in less than 0.16% of the cases it receives.<sup>240</sup> It follows that, in the vast majority of cases and unless specifically restricted by the CJEU itself, the rulings of the CJEU are authoritative in absolute terms and not just prospectively: they apply from the point at which an EU measure became applicable. The UK Supreme Court has in the past acknowledged and adopted the CJEU's approach in domestic litigation concerning EU law.<sup>241</sup>

As a result, giving no legal effect in the Northern Ireland legal order to a post-Brexit judgment clarifying a measure covered by non-diminution would arguably clash with the non-diminution guarantee, as understood in EU law. This is because, but for Brexit, the relevant EU law clarified by a CJEU judgment would automatically apply *in its clarified state* in the UK.

235 *Ibid.*, 310.

236 See, e.g. Case 43-75 *Defrenne v Sabena*, EU:C:1976:56, paras 69-70.

237 *Ibid.*, paras 74-75.

238 *Ibid.*, paras 71-73.

239 Case C-292/04, *Meilicke* EU:C:2007:132; Michael Lang, 'Limitation of the temporal effect of a judgment of the Court' (2007), 35 *Intertax* 230, 230.

240 Donatas Murauskas, 'Temporal Limitation by the Court of Justice of the EU: Dealing with the Consequences' (2013/14) 6:2 *European Journal of Legal Studies* 78, 87 (Table 1). NB: Murauskas refers to case law between 1976 and 2013.

241 *Walker (Appellant) v Innospec Limited and others* [2017] UKSC 47, paras 22ff and esp, para 44, acknowledging the restriction of retroactive effect of EU judgments only in cases with 'catastrophic' consequences.

It is important to highlight that this is not *new* EU law; it is merely a clarification of pre-Brexit EU law. Thus, even though Article 13(2) does not explicitly apply to the non-diminution guarantee outside the Annex 1 directives, it is necessary to acknowledge that it may play a role in effectively realising the wider non-diminution guarantee. In other words, the pre-Brexit EU law which is engaged by the wider non-diminution guarantee may be required to be given legal effect in Northern Ireland in accordance with post-Brexit CJEU case law concerning such EU law. It would be helpful for this potential discrepancy in the value placed upon CJEU case law under the different elements of Article 2 WF to be authoritatively clarified in a judgment on this point.

#### **d. The meaning of ‘diminution’**

A final, but crucial, aspect of Article 2 that we must consider is how to interpret the scope of the ‘diminution’ trigger. In our view, that assessment has to be made after a careful weighing of, at least, the level of detail in the content of the protected right in the Charter as well as the effects that the EU iteration of the right had and, particularly, its direct effect potential.

As noted in Chapter 1, the Charter is more expansive both in terms of the content of the protected rights and in terms of the effects that these rights created in the domestic legal order before Brexit, compared to ECHR rights. Consequently, if Brexit resulted in reducing aspects of the protection of the relevant right,

including the ways in which the right may be claimed, then in our view the diminution trigger must be considered to be met. That assessment can only meaningfully be made after a careful comparison between the treatment in domestic courts of the ECHR or domestic iteration of the right and its Charter counterpart. If the Charter version of the right engaged more expansive interpretation in any of the ways we have suggested earlier, such as by allowing its application to or invocation by a wider range of actors, by relying on a ‘supercharged’ duty of consistent interpretation, by giving rise to direct effect (and hence permitting the disapplication of legislation), or by resulting in state liability in damages to a value greater than otherwise available in domestic law, then the non-diminution requirement would be engaged.

In this regard, therefore, we respectfully disagree with the reasoning of Colton J in *Angesom’s (Aman) Application for Judicial Review*, insofar as this suggested that the fact that a particular right is covered by both the ECHR and the Charter would be sufficient evidence that the right had not been domestically diminished.<sup>242</sup> As we noted in Chapter 1, even if the rights are protected substantively in both systems to the same extent, diminution may still occur because the Charter version of the right offers a stronger protection of individuals before domestic courts than its ECHR version, eg, through the additional remedies that the Charter entailed

<sup>242</sup> *Angesom* (n 33), para 103.

compared to the HRA.<sup>243</sup> We thus welcome the helpful refinements on *Angesom* offered in *Dillon*, where Colton J fully recognises that diminution comprises an assessment of the available remedies, even in a situation where the ECHR and Charter rights have the same meaning:<sup>244</sup> ‘if the relevant rights are co-extensive, the applicant is entitled to the greater remedy.’<sup>245</sup> In the following chapter, we delve further into how the Charter placed individuals in a stronger remedial position than the ECHR before Brexit and why the additional remedies it offered are key to the analysis of diminution.

---

243 The point that the Charter entailed stronger protection remedially than the HRA and may therefore be preferred by applicants for this reason has already been recognised by the Court of Appeal of England and Wales in relation to the interpretation of Article 4 WA in *AT* (n 26), para 106.

244 *Dillon* (n 155), paras 585-588.

245 *Ibid*, para 586.

# Chapter 4:

## Charter functions in the domestic legal order pre and post Brexit

### 1. Introductory remarks

As we highlighted in Chapter 1, a key feature of the Charter's operation across the UK legal order before Brexit was that it offered both a substantively wider protection of fundamental rights than the ECHR (as it protected more rights than the ECHR) as well as a broader range of remedies that individuals could rely on than the HRA in situations falling within the scope of application of EU law.

The concepts of direct effect and primacy distinguished the Charter and the general principles of EU law that preceded it from other aspects of UK human rights law. They meant that, insofar as a human rights claim had an EU law dimension, national courts were able to award concrete remedies for their violation, even where the violation was caused by primary legislation,<sup>246</sup> as they were able to disapply the offending legislation – an option that is unavailable under the HRA framework. While, as briefly discussed in Chapter 1, section 3 HRA sets out a principle of interpretation in conformity with the ECHR that is inspired by and similar to the duty of consistent interpretation, in the

HRA context that duty operates as the principal remedial mechanism for human rights violations.<sup>247</sup> Where interpretation compatible with human rights is impossible, the HRA does not offer other binding means of reparation domestically.

As a 'measure of last resort' domestic courts can make a declaration of incompatibility of domestic law with ECHR-protected human rights pursuant to section 4 HRA, but that declaration is not legally binding on Parliament and, as such, has been found not to constitute an effective remedy by the European Court of Human Rights.<sup>248</sup> By contrast, through the operation of the principles of primacy and direct effect, the Charter gave rise to the possibilities of disapplication of legislation and state liability in damages, which placed individuals in a more advantageous remedial position in situations falling within the scope of EU law than outside it. These possibilities meant that EU law often displaced ECHR protections in domestic litigation where both EU law and the Convention were engaged, as well as in areas where Convention law remains more limited, such as employment and pensions.<sup>249</sup>

246 *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Libya v Janah* [2017] UKSC 62, para 78.

247 *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at paras 38-49 per Lord Steyn.

248 *Burden and Burden v UK*, Application No 13378/05, ECtHR 29 April 2008, paras 40-44.

249 *Frantziou* (n 77) 365.

As already noted in Chapter 2, the EUWA appeared to considerably limit the extent to which individuals could rely on EU fundamental rights, whether through the Charter (Section 5(4) EUWA) or through the general principles of EU law in order to have legislation or other conduct quashed or disapplied by domestic courts (Schedule 1(3) EUWA) or to claim damages in state liability pursuant to the *Francovich* principle (Schedule 1(4) EUWA). This approach has already been widely criticised for generating in a diminution of rights in the rest of the UK.<sup>250</sup> However, as we argued in Chapter 2, the situation is more nuanced when considered in light of the operation of Section 7A EUWA. As a result of this provision, the Charter still applies (including the associated EU law remedies) in Northern Ireland in the areas specifically defined in Articles 2 WF and 4 of the Withdrawal Agreement. This is especially clear in areas that require dynamic alignment with EU legislation and case law under Article 13 of the Windsor Framework, i.e. in respect of provisions specifically listed in the Windsor Framework, where the Charter will have a significant role prospectively, through future amendments to EU legislation and the case law of the Court of Justice. But, as we noted earlier, the Charter – and in some cases future case law pertaining to the Charter – has continued relevance in Northern Ireland in areas engaging the

broader non-diminution obligation enshrined in Article 2 of the Windsor Framework.

This chapter will first offer a more detailed account of how the Charter operated in domestic case law before Brexit and how the EUWA purported to alter its application. It will then analyse the future effects of the Charter in areas falling within directly applicable EU law and the Annex 1 directives, where we argue that the effects of the Charter remain largely unchanged. Finally, the chapter considers the continued application of the Charter to non-listed areas coming within the scope of Windsor Framework by virtue of the RSEO section of the Belfast (Good Friday) Agreement, providing examples of how EU remedies could remain relevant in this broader and less clearly defined field of application of the Windsor Framework.

## 2. The effects of the Charter in domestic law before Brexit

In line with our analysis of the effects of the Charter in Chapter 1, before Brexit, an individual whose case fell within the scope of EU law would have been able to rely on a Charter provision to achieve a rights-compatible reading of legislation whenever possible, like with the HRA.<sup>251</sup> While, as we further explain below, some differences in the

250 See, notably: Tobias Lock, 'Human Rights Law in the UK after Brexit' [2017] (Brexit Special Extra) Public Law 117; Menelaos Markakis, 'Brexit and the EU Charter of Fundamental Rights' [2019] Public Law 82; Joelle Grogan, 'Rights and remedies at risk: implications of the Brexit process on the future of rights in the UK' [2019] Public Law 683; Catherine Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82 Modern Law Review 350.

251 However, see our analysis below on the potentially more expansive scope of that reading in the future.

breadth of the duty of consistent interpretation can be identified between EU law and the HRA, the most significant differences stem from cases where a rights-compatible reading was impossible for the courts to achieve. In such cases, through the possibilities of direct effect and state liability in damages, EU law provided more extensive protection for individuals than domestic law otherwise did.<sup>252</sup>

### a. Disapplication through direct effect

In cases where consistent interpretation was impossible, an individual seeking to rely on a clear, precise, and unconditional provision of the Charter, such as Article 21 or 47 CFR, would have the option to have that right applied directly. In the absence of implementing legislation, for example, they would have been able to use that right on its own to fill in the legislative gap to find a remedy and, in the case of incompatible legislation (including primary legislation), they would have been able to have that legislation disapplied before domestic courts. The *Benkharbouche* case provides the clearest example of the special protection that the direct effect of the Charter – in this case, Article 47 – offered to claimants seeking to counter legislative failures at the domestic level.<sup>253</sup>

In this case, the UK Supreme Court highlighted that the applicability of the Charter (triggered by the presence of a relevant directive)

meant that domestic courts could resolve through disapplication disputes governed by primary legislation, where the only option available under the HRA would have been a section 4 declaration of incompatibility and consequent dismissal of the case.

The two claimants in *Benkharbouche*, Ms Benkharbouche and Ms Janah, worked as a cook and domestic worker at the Sudanese and Libyan embassies in London, respectively. They were both dismissed without due process, and it subsequently transpired that they had not been paid the minimum wage, that they had not been offered paid annual leave, and that they had not been compensated for overtime. Ms Janah was additionally owed arrears of pay and had experienced racial discrimination and harassment in the course of her employment. These facts were not in dispute, but the two women were prevented from bringing claims for compensation against their employers, as these were actors enjoying immunity under sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 (SIA). For this reason, Ms Benkharbouche and Ms Janah invoked their right to a fair trial (including the right of access to court), which was protected under both Article 6 ECHR and Article 47 CFR. The claimants argued that this right had a binding effect on all actors, both public and private, so that domestic courts could proceed to hear the claim and award compensation for violations of labour law.

252 Note that, in EU law, fundamental rights can usually be invoked both by natural and by legal persons under the same conditions: see *Internationale Handelsgesellschaft* (n 54). For example, it is very common for private companies to invoke Article 47 CFR in the context of antitrust litigation (see further Frantziou 2020 (n 89).

253 *Benkharbouche* (n 246).

The Supreme Court partly agreed. On the one hand, the SIA could not be interpreted in conformity with human rights under section 3(1) HRA, and as such no remedy was available under the HRA other than a section 4 declaration of incompatibility. On the other hand, the Supreme Court found that, since aspects of the case engaged the scope of EU law because they concerned violations of the Working Time Regulations (secondary legislation implementing the Working Time Directive), the effect of Article 47 CFR had to be considered. Even though the material scope of Articles 47 CFR and Article 6 ECHR did not differ in this instance, Article 47 enjoyed horizontal direct effect, and it was therefore possible for the applicants to enjoy its full protection in this dispute, including through disapplication of incompatible legislation. As Lord Sumption put it, at para 78:

a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility.

Since the extensive immunity imposed by the SIA resulted in the absence of an effective remedy for the applicants, it was contrary to Article 47, and the relevant provisions of the SIA had to be disapplied. This meant, in turn, that the provisions of secondary

legislation that had been excluded because of the employers' immunity became applicable, thus allowing the claimants to enjoy compensation (as provided in secondary legislation) for the elements of the case that related to the application of EU law.

It is important to note that the case was not, from the perspective of EU or international law, wide-ranging or expansive in its reading of fundamental rights.<sup>254</sup> Rather, it offered a clear technical illustration of the ways in which the principles of primacy and direct effect of EU law could affect the remedial position of individuals seeking to employ human rights in domestic litigation prior to the UK's withdrawal from the European Union, offering them a shorter and less complex legal pathway than the HRA, in cases where both were applicable. This is highlighted by the fact that the ECtHR subsequently also found violations of the right to an effective remedy (Article 6 ECHR), in conjunction with the right to non-discrimination (Art 14 ECHR), when the case ultimately reached it in respect of the aspects that did not concern EU law. A crucial point, however, is that the EU aspects of the case were settled at the Supreme Court level in 2017, whereas the non-EU aspects were not resolved until April 2022 in Strasbourg, thus taking an additional five years before a final judgment was pronounced, and ultimately requiring further action on the part of the UK (a revision to the

254 Katja Ziegler, 'Immunity versus Human Rights: The Right to a Remedy after *Benkharbouche*' (2017) 17 Human Rights Law Review 127, 148.

SIA, which was finally resolved by remedial order in September 2022).<sup>255</sup>

It is not surprising, therefore, that the Charter started to be preferred in domestic litigation in situations where both EU law and the HRA were applicable. *Benkharbouche* is not an isolated case, with various other rulings having highlighted the broad implications that the possibility of disapplication had at the domestic level, especially within private law. *Walker v Innospec* provides a good illustration in this regard, this time concerning an area of law (discrimination in the context of private employment pensions) where the Convention offers less clear protection.<sup>256</sup> This case concerned discrimination on grounds of sexual orientation in the calculation of private pension entitlements, contrary to the Framework Equality Directive (2000/78/EC). In partly implementing the Directive through the Equality Act 2010, the UK had allowed for the calculation of survivor pensions on equal terms between homosexual and heterosexual couples since 5 December 2005 only (the day on which section 1 of the Civil Partnership Act 2004 came into force). Schedule 9 (18) of the Equality Act excluded periods worked prior to the above date from the pension entitlement of the surviving partner in a same-

sex partnership. The Supreme Court found that this exclusion was contrary to the Equality Directive, which gave further expression to the general principle of equality enshrined in Article 21 CFR, and which could thus be relied upon directly against a private actor, such as Mr Walker's employer (*Innospec*). The Supreme Court therefore disapplied paragraph 18 of Schedule 9 of the Act and ordered that pension entitlements be recalculated with retrospective effect, in line with the CJEU approach to interpretation (as discussed in the preceding chapter). The *Walker* case, therefore, had significant repercussions for employers contributing to private pension funds and for the administration of those funds. Moreover, while Schedule 9 of the Equality Act has now been modified, rendering the point moot in this instance, it is important that the Supreme Court did not go on to decide whether a declaration of incompatibility should also be made under section 4 HRA.<sup>257</sup> This shows, as Alison Young has noted, that courts in the UK had become accustomed to using disapplication under EU law, in some cases even instead of the HRA so that, over the last two decades, 'what might once have seemed controversial has become run of the mill.'<sup>258</sup>

255 *Benkharbouche and Janah v the United Kingdom*, App nos 19059/18 and 19725/18, ECtHR 05.4.2022. On the process and remedial order, see further: Joint Committee on Human Rights, 'Draft State Immunity Act 1978 (Remedial) Order 2022: Second Report', 7th report of Session 2022-23, HC 895, HL Paper 103, 29 November 2022, available at <https://committees.parliament.uk/publications/31758/documents/178682/default/#:~:text=On%207%20September%202022%2C%20the,Affairs%20and%20Secretary%20of%20State>

256 *Walker (Appellant) v Innospec Limited and others* [2017] UKSC 47.

257 *Benkharbouche* (n 246), para 75.

258 Alison Young, 'Benkharbouche and the Future of Disapplication' UKCLA Blog 24 October 2017, available at: <https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/>; see also Alison Young, 'Fundamental Common Law Rights and Legislation' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart 2020) 223.

Crucially, from the perspective of the continued application of the Charter in Northern Ireland, this line of case law shows that the Charter had considerable added value in situations where both the Charter and the ECHR apply, and especially in areas where the Strasbourg Court's case law may be viewed as less protective than EU law, such as pensions and other welfare benefits.<sup>259</sup> Similarly, while as we have previously argued the Charter mainly codified fundamental rights that were recognised as general principles of EU law, it was not 'inconsequential' in practice, in the sense that domestic courts started using the remedy of disapplication actively *after* the entry into force of the Charter.<sup>260</sup> As Amos has noted, disapplication through the direct effect of EU law had been routinely used also by lower courts and tribunals,<sup>261</sup> which under the doctrine of primacy were also obliged to disapply domestic legislation that contradicts EU law.<sup>262</sup> This is particularly clear in the context of employment and pensions law where, being directly effective both vertically and horizontally, EU fundamental rights could be invoked in exactly the same way in private law matters as in

complaints against the state.<sup>263</sup> Similar findings, following *Walker*, were made in *Beattie* – a case we discuss in more detail below, as it shows the importance of the EUWA in this context.

This pre-Brexit emphasis on disapplication through direct effect before domestic courts is in some respects unsurprising, in the sense that direct effect is clearer than the duty to interpret domestic law consistently with EU law. However, it is equally important to show, as already alluded to in Chapter 1, that even the principle of consistent interpretation under EU law has benefits compared to the application of the ECHR.

### **b. Consistent Interpretation**

While the duty of consistent interpretation<sup>264</sup> was available to domestic courts before Brexit, there was a degree of reticence in employing it, as it was seen as extending the 'ordinary canons' of statutory interpretation employed by UK courts.<sup>265</sup> Instead, as noted above, domestic courts made full use of the possibility of disapplication, which they understood as a strictly EU-derived remedy. There are, of

259 Unlike *Benkharbouche*, it is not clear that a declaration would have been issued on this point, as non-discrimination in respect of pension entitlements is an aspect of the Strasbourg Court's case law which is less protective than EU law: see, e.g., *Aldeguer Tomás v Spain*, App. No.35214/09, judgment of 14 June 2016. The added value of the Charter in the context of welfare is also evident in the growing case law on Article 1 CFR, as further discussed in Chapter 1. See, to this end, the judgments in *CG* and *AT* (n 26), the latter finding in clear terms that the Charter not only has remedial added value (para 106), but also that ECHR would only apply to a 'only a subset' of cases covered by Article 1 CFR (para 110).

260 Takis Tridimas and Lady Arden, 'Limited but not Inconsequential: the Application of the Charter by the Courts of England and Wales' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Oxford: Hart 2020) 331, 338-9.

261 Merris Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', UKCLA Blog 4 October 2017 at: <https://ukconstitutionalaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/>

262 See Chapter 1.

263 *Frantziou* (n 77).

264 *Marleasing*; *von Colson and Kamann* (both cited at n 57).

265 *Gilham v Ministry of Justice* [2019] UKSC 44, at para 39, per Lady Hale. See further M. Brenncke, 'Statutory Interpretation and the Role of Courts after Brexit' (2020) 25:4 E.P.L. 637, 653.

course, early (pre-Charter) examples of strong uses of consistent interpretation, which also cover fields subsequently occupied by the general principles and, ultimately, Charter-based case law. For example, this is amply demonstrated in the context of equality and employment protection by cases such as *Litster* and *Pickstone*.<sup>266</sup>

In *Pickstone* – an equal pay dispute within the private sector – the House of Lords had implied an entire phrase into the 1983 Equal Pay Regulations, which had permitted a woman to claim equal pay for work of equal value only where no man was employed in exactly the same position, so as to render the protection of equal pay effective.<sup>267</sup> The Court's approach was based on an examination of the purpose of the legislation and a presumption of compliance with Treaty obligations.<sup>268</sup> In a similar vein, albeit in a different field, in *Litster*, the House of Lords took a purposive view of compensation following a collective redundancy, imposing on the transferee of the company the duty to pay compensation for unfair dismissal. This was done to ensure that the employees' right not to be dismissed prior to the company's transfer, as expressed in the (then) Business Transfers Directive 77/187/EEC, did

not become simply 'illusory'.<sup>269</sup> After the entry into force of the Charter, however, there was a discernible move in domestic law towards disapplication, rather than consistent interpretation.<sup>270</sup>

The domestic preference for disapplication is evident from cases like *Vidal-Hall* – a case concerning the collection and storing of cookies by Google for advertising purposes. In that case, the Court of Appeal of England and Wales confirmed that, as primary EU law, exactly the same principles of interpretation apply to the Charter as provisions of the Treaties.<sup>271</sup> However, the Court of Appeal found that the duty of consistent interpretation falls short of interpretation that is 'inconsistent with a fundamental feature of the legislation'<sup>272</sup> – a limitation applicable to the interpretive duty under the HRA since the (then) House of Lords' ruling in *Ghaidan v Godin-Mendoza*.<sup>273</sup> Cognisant of the possibility of disapplication, the court in *Vidal-Hall* read this limitation into the EU law duty of consistent interpretation and, for this reason, did not go on to read down sections 13(2)(a) and (b) of the Data Protection Act in order to comply with the protection of privacy enshrined in Article 8 of the EU Charter (the general principle of data protection), instead going

266 *Litster v Forth Dry Dock and Engineering Co Ltd* [1988] UKHL 10; *Pickstone v Freemans Plc* [1988] UKHL 2.

267 *Pickstone*, *ibid*, para 12, per Lord Templeman: 'as between the woman and the man with whom she claims equality'.

268 *Ibid*, para 19, per Lord Oliver.

269 *Litster* (n 266) para 23, per Lord Oliver.

270 Alison Young, 'Benkharbouche and the Future of Disapplication' UKCLA Blog 24 October 2017 at <https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/>; see also A. Young, 'Fundamental Common Law Rights and Legislation' in M Elliott and K Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart, 2020) 223.

271 *Vidal-Hall v Google, Inc.* [2015] EWCA Civ 311.

272 *Ibid*, para 88.

273 *Ibid*.

on to disapply it. Since Parliament had ‘deliberately’ chosen to limit compensation to cases of economic loss and this was an ‘important element’ of the overall scheme of compensation provided by the legislation, consistent interpretation was impossible.<sup>274</sup>

Nevertheless, this approach does not necessarily correspond to the limits placed on consistent interpretation at the EU level, as derived from cases such as *Pfeiffer* and *Dansk Industri*. As further explained in Chapter 1, in those cases, domestic courts were invited to employ creative solutions for reading in or down domestic legislation, being encouraged to search the entire body of domestic law for evidence of a compatible reading.<sup>275</sup> In turn, while consistent interpretation was recognised in domestic law before Brexit, it can be questioned whether domestic courts applied it to the full extent envisaged by the CJEU. As Lady Arden noted in *IDT Card*, the precise limits of consistent interpretation have not been fully tested under domestic law and may not yet go as far as the EU duty.<sup>276</sup> This open question on the limits of consistent interpretation is likely to acquire significance in future case law, especially in areas where disapplication is unavailable.<sup>277</sup>

### c. Reparation through state liability and Article 47

Finally, as noted earlier, material losses incurred because of the state’s sufficiently serious misapplication or misinterpretation of legislation could result in state liability in damages.<sup>278</sup> This is because ‘[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible’.<sup>279</sup> Domestic courts have recognised and applied the rule in *Francovich* since the *Factortame (no 4)* ruling.<sup>280</sup> Further, while state liability cases did not typically concern the Charter, domestic courts had understood and embraced alternative ways of remedying violations of EU fundamental rights. In the ruling in *Benkharbouche*, for instance, domestic courts recognised the direct effect of Article 47 and used this provision to disapply incompatible legislation and thereby provide an effective remedy (an approach that was subsequently consolidated by the CJEU in *Egenberger*<sup>281</sup>).

274 *Ibid*, paras 91-92.

275 *Pfeiffer* (n 62); Case C-212/04, *Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) EU:C:2006:443; *Dansk Industri* (n 58).

276 *Revenue and Customs v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 at para 91, per Arden LJ.

277 This would be situations in which EU law does not have direct effect.

278 *Francovich* (n 50), para 33.

279 *Ibid*.

280 *R v Secretary of State for Transport, Ex Parte Factortame Ltd and Others* [1999] UKHL 44.

281 *Egenberger* (n 66).

### 3. The Continued Effects of the Charter under Art 4 and the Annex 1 Directives

As we noted in Chapter 3, in situations where EU law operates under the Windsor Framework as *EU law*, such as in respect of the directives specifically listed in Annex 1 of the Windsor Framework, the full set of rights and remedies associated with EU law remains applicable, in the same way as it applied pre-Brexit. Even in the alternative view, where the Annex 1 directives do not apply as EU law but only insofar as they are referred to in the text of Article 2 WF, the remedy of disapplication remains because Article 2 is itself directly effective.<sup>282</sup> Unlike in the rest of the UK, therefore, in Northern Ireland, EU law carries Charter applicability with it via Articles 4 of the Withdrawal Agreement and Article 2 of the Windsor Framework, with an obligation of dynamic alignment and a concomitant duty to conform to the *evolving* case law of the CJEU under Article 13 of the Windsor Framework in respect of specifically listed legislation (i.e., in respect of Article 2, this duty applies to the Annex 1 Directives but not necessarily in respect of the RSEO section of the GFA).

The key question that arises, then, is whether remedies that do not exist in domestic law independently of EU law can be considered to apply in Northern Ireland as part of the non-diminution obligation. A narrow reading might distinguish the *effects*

of the Charter rights from the rights themselves. This would recognise the interpretative *relevance* of the Charter (literally or through the guise of the general principles that preceded it) to the determination of cases pertaining to the Annex 1 directives, but without at the same time making it possible to rely on the remedies of state liability or, crucially, disapplication (since these remedies are no longer available for domestic courts to use under the terms of Schedule 1 EUWA, except insofar as this is required under section 7A EUWA and the terms of the Withdrawal Agreement, as discussed earlier). As we explain further below, however, this reading is neither supported by existing authority nor does it practically meet the condition of non-diminution set out in Article 2.

#### a. Disapplication and state liability

If we imagine that a case like *Walker* came before domestic courts in Northern Ireland today, the situation might be considered to operate as follows. The case, as noted above, concerned sexual orientation discrimination in the calculation of pension entitlements by a private employer. First, it is clear that such a case falls within the scope of Windsor Framework Annex 1 because it concerns a listed directive (Directive 2000/78/EC) and, as such, domestic courts would have a duty to take into account the Charter and/or the general principles of EU law in interpreting the Directive. But if, say, because of the operation of a numerical or other clearly expressed threshold, it proved impossible to

<sup>282</sup> See our analysis in Chapter 2(3) for a more detailed explanation.

reach an interpretation of domestic legislation consistent with the terms of the Directive read in the light of the Charter, then domestic courts would have to consider whether they have the right to disapply the incompatible legislation or, where relevant, offer damages under the state liability doctrine. In turn, because section 7A EUWA supersedes the limitations written into the EUWA and the REULA, the *Walker* case would be decided *in exactly the same manner*, i.e. giving rise to the full set of remedies previously available for violations of EU law in this field, including disapplication and state liability. Further, in such a scenario, the Charter would not only have the same remedial value that it previously had in domestic law, but would indeed be able to carry forward these effects to future interpretations of the Charter in the case law, which remain relevant through the dynamic alignment obligation.

This approach would most clearly result in the maintenance of post-Brexit equivalence and enjoys some support in case law about the contested remedies. With regard to disapplication, the Employment Appeals Tribunal recently affirmed in *Beattie* that situations governed by EU law can proceed on the basis that they give rise to disapplication in the same way as in *Walker v Innospec*.<sup>283</sup> Similarly, the continued availability of state liability in damages to situations falling within the scope of EU law was recently confirmed by the ruling in

*Jersey Choice*. In this case, the Court of Appeal of England and Wales was concerned with a claim in damages founded upon the UK's failure to properly implement Directive 83/181/EEC. The claim could only succeed on the basis that there had been a breach of general principles of equality, fiscal neutrality, or proportionality. The Court of Appeal of England and Wales held that the UK's withdrawal from the EU did not impact upon the claimant's 'right to pursue its damages claim, its reliance upon its rights under the EU Charter and/or its reliance upon rights under general principles of EU law'.<sup>284</sup> This was because:

'the removal of a right of action relating to general principles of EU law does not apply to any proceedings commenced within the period of 3 years beginning with IP completion day [i.e. 31 December 2020] insofar as the proceedings involved a challenge to acts occurring before IP completion day and the challenge was not for the disapplication or quashing of an Act of Parliament or a rule of law which was not an enactment or certain other specified laws (see section 23(7) and Schedule 8 paragraph 39(5)). And further the removal of the right to *Francovich* damages does not apply to proceedings commenced within the period of 2 years starting with IP completion day insofar as the proceedings relate to anything which occurred before IP completion day (section 23(7) and Schedule 8 paragraph 39(7))'<sup>285</sup>

283 *Secretary of State for Work and Pensions v Beattie and ors* [2022] EAT 163, para 139.

284 *Jersey Choice Limited v Her Majesty's Treasury* [2021] EWCA Civ 1941, para 25.

285 *Ibid.*

While both *Beattie* and *Jersey Choice* concerned a situation in which EU law applied because the proceedings or challenged act, respectively, predated the end of the implementation period (i.e. they occurred before 31 December 2020), they provide useful analogies with the Article 4 WA and Annex 1<sup>286</sup> measures, because they show that domestic courts will continue to treat situations governed by EU law in the same way as they would have done before Brexit, and that the remedies of disapplication and state liability remain relevant thereto. Moreover, the applicability of the Charter and, with it, the possibility of disapplication, was also confirmed in the judgment of the Court of Appeal of England and Wales in *AT*<sup>287</sup> – a case that interprets the use of the Charter in the context of Article 4 WA after the end of the transitional period, which further supports a broad view of its applicability.

That case concerned the disbursement of Universal Credit to a destitute EU national who enjoyed pre-settled status and was covered by the terms of Article 13 WA. The court found that the Charter applied and should be assessed as a ‘standalone ground’,<sup>288</sup> despite the fact that the ECHR may also have been relevant to the applicant’s case. Moreover, the court specifically rejected the argument that, when invoked in the context of Article 4 WA, the Charter should be confined to powers equivalent to those arising

under the HRA. On the contrary, the court highlighted that the Charter ‘confers direct effect upon litigants and a connected power and duty on national courts to disapply inconsistent domestic law, an important point emphasised in the Explanatory Notes accompanying section 7A EU(W)A 2018[...]. That potency is missing from the HRA 1998 when equivalent rights are being enforced where the remedies available to a court do not stretch to the power of disapplication.’<sup>289</sup> The case thus confirmed both that an applicant is at liberty to rely on the Charter instead of the ECHR/HRA where the former provides more extensive protection, but also that disapplication remains available prospectively, in cases arising under Article 4 WA that involve the Charter.<sup>290</sup>

### **b. Consistent interpretation of EU and implementing legislation with the Charter**

The Charter also informs the broader application of EU law under the Windsor Framework. The *Fransson* case, the basic facts of which were discussed in Chapter 1, demonstrates this. This case is instructive because it demonstrates how the Charter right at issue was invoked not to interpret provisions of the Directive as such, but measures merely falling within the scope of a duty stipulated by EU secondary legislation (in this case, the main aim of directive 77/388/EEC was to ensure uniformity of VAT rules in the EU).

286 On the specific case of the Annex 1 Directives see the discussion Chapter 2 above.

287 *AT* (n 26).

288 *Ibid*, para 105.

289 *Ibid*, para 106.

290 NB: state liability in damages was not at issue in that case.

The substantive question in this case was whether Article 50 CFR should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts. The Court's answer was that the applicability of Article 50 CFR depended on whether the tax penalty would have to be considered 'criminal in nature'; an assessment to be carried out by the referring national court according to the so-called *Engel* criteria established by the European Court of Human Rights.<sup>291</sup> This question was to be decided by the referring court. The actual consequences of *Fransson* in Swedish law were considerable: the Swedish courts held that in the case there was a violation of Article 50 CFR; and this resulted in a large number of petitions for a retrial in Sweden given that more than 1,000 people had been convicted in contravention of Article 50 CFR as now interpreted by the Swedish courts.<sup>292</sup> This shows that an EU measure having, in principle, a different aim (the harmonisation of VAT) can be used as a vehicle for the expansion of fundamental rights in the field in which the directive operates.

In a similar vein, in areas coming within the scope of Article 4 WA, the Charter will continue to have a broad interpretive value. First, in line with the

findings in *Kamberaj* and *Commission v Poland*, the interpretation of all provisions of the Treaties, as well as of secondary legislation, must conform to the Charter.<sup>293</sup> Any EU law made applicable by the Windsor Framework must be interpreted in light of the Charter. Most of the provisions are found in Annexes 2-5 Windsor Framework and are – broadly speaking – of a commercial nature. This means that the Charter rights most relevant to their interpretation are Articles 15-17 CFR.<sup>294</sup>

A wider range of Charter rights may be relevant in the interpretation of Article 36 TFEU – made applicable by Article 7 (1) Windsor Framework – which is a provision allowing for derogations from free movement of goods 'for reasons of grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'. According to the case law of the CJEU, these derogations must be interpreted in accordance with the fundamental rights guaranteed by the Charter<sup>295</sup> and the general principles of EU law.<sup>296</sup>

The case of *Schmidberger* provides an example how the free movement of

291 *Engel and Others v The Netherlands* (1976) Series A No 22.

292 Maria Bergström, 'The Impact of Case C-617/10: Åkerberg Fransson at National Level - The Swedish Example' in Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano (eds), *The Court of Justice and European Criminal Law* (Hart 2019) 259, 260.

293 See e.g. *Kamberaj* (n 44); *Commission v Poland* (n 64).

294 Article 15 guarantees the freedom to choose and occupation and a right to engage in work; Article 16 guarantees the freedom to conduct a business; and Article 17 guarantees the right to property (including intellectual property).

295 *Pfleger* (n 13).

296 *ERT* (n 13).

goods can clash with a fundamental right (freedom of assembly). It is not inconceivable that a similar situation could arise under the Windsor Framework.<sup>297</sup> In *Schmidberger*, the Austrian authorities ordered the closure of the Brenner motorway – the major transit route for goods connecting Germany and Italy through Austria – for a duration of 30 hours so that a demonstration organised by an environmental group could take place. The demonstration and the fact that it had been given permission by the authorities had been announced well in advance. The claimant in the case was a haulage company, which claimed that it had suffered a loss (lost profits; having to pay drivers' wages; etc) due to the motorway closure. The claimant relied on EU state liability, which required it to show a 'sufficiently serious breach' of EU law.

The CJEU accepted that the free movement of goods guaranteed by Article 34 TFEU – which remains applicable in Northern Ireland due to Article 7 (1) WF – not only concerned imports of goods, but also their transit.<sup>298</sup> Hence the decision not to ban the demonstration was capable of restricting intra-EU trade, so that this decision amounted to a 'measure having equivalent effect to a quantitative restriction' and was thus incompatible with Article 34 TFEU, unless it could be objectively justified.<sup>299</sup>

It then held that fundamental rights could be invoked as a legitimate interest which 'in principle justifies a restriction of the obligations imposed by [EU] law, even under a fundamental freedom guaranteed by the treaty such as the free movement of goods.'<sup>300</sup> The CJEU then pointed out that free movement of goods is subject to restrictions according to Article 36 TFEU – also applicable in Northern Ireland – as well as the unwritten overriding (or mandatory) requirements.<sup>301</sup> It then carried out a proportionality exercise weighing the interests concerned – the free movement of goods on the one side and freedom of expression and assembly on the other – and balancing them and concluded that Austria had not violated Article 34 TFEU by allowing the demonstration to go ahead as it enjoyed wide discretion in this case. There was therefore no breach of EU law, which meant that there was no basis for a claim of state liability.

The *Schmidberger* case demonstrates how the CJEU has interpreted EU law applicable in Northern Ireland under the Windsor Framework in light of fundamental rights. It should be noted that the *Schmidberger* case arose before the Charter became binding, so that the CJEU based its decision on EU fundamental rights guaranteed as general principles of EU law. If the case arose today, it would in all likelihood be argued and decided in the same manner with the exception

297 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* EU:C:2003:333.

298 *Ibid*, para 61.

299 *Ibid*, para 64.

300 *Ibid*, para 74.

301 *Ibid*, para 78.

that instead of the general principles the Charter would be invoked as the main source of fundamental rights in the EU legal order.

Case C-579/19 *Food Standards Agency* is another example, which concerns EU secondary law.<sup>302</sup> The case concerned Regulations 854/2004 and 882/2004,<sup>303</sup> which are both applicable in Northern Ireland according to Windsor Framework Annex 2. According to Article 54 (3) of Regulation 882/2004 the operator of a slaughterhouse has to be informed of rights of appeal against decisions taken under the Regulation, notably a decision by an official veterinarian – such as the one in the case before the Court – not to affix a hygiene mark to the carcass of a slaughtered animal, which means that it cannot be sold for human consumption. One of the questions in the case was whether the limited judicial review against such a decision available in England and Wales was compatible with the right to an effective remedy guaranteed by Article 47 CFR. The CJEU held that for a court or tribunal to determine a dispute concerning rights and obligations under EU law, it must have power to consider all the questions of fact and law that are relevant to the case.<sup>304</sup> Yet this was not the case because the powers of judicial review of the courts in England and Wales in the case did not go so far as to

constitute an appeal on the merits of the decision. Instead, the courts were limited to reviewing the decision of the veterinarian declaring the carcass unfit for human consumption as to its lawfulness, which includes whether the veterinarian acted for an improper purpose, failed to apply the correct legal test or reached a decision that was irrational or taken without sufficient evidential basis.

The CJEU decided that the Regulations ‘read in light of Article 47 CFR’ did not require more expansive powers of judicial review. This was chiefly because the veterinarian had to carry out a complex technical assessment and possessed broad discretion. In light of the objective of protecting public health, Article 47 CFR therefore did not require judicial supervision of all of the veterinarian’s assessments of the very specific facts of the case.<sup>305</sup>

302 Case C-579/19 *Food Standards Agency* EU:C:2021:665.

303 Regulation 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption [2004] OJ L 226/83; Regulation 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L 165/1 (since replaced by Regulation 2017/625).

304 *Ibid*, para 80.

305 *Ibid*, paras 85, 88, 91.

# Chapter 5:

## Post-Brexit Developments and the Charter

### 1. Introductory remarks

In Chapters 3 and 4, we explored the continued operation of the Charter and its effects in Northern Ireland, focusing in particular on existing obligations under Articles 4 WA and 2 WF. In this, final chapter, we turn to the relevance of *future* EU law to these areas. Whereas, as we already highlighted in Chapter 3, Article 4 WA itself can be considered to comprise an obligation to observe post-transition CJEU case law that interprets obligations arising under the Withdrawal Agreement, this chapter shows that the Windsor Framework goes considerably beyond this duty as a result of the ‘dynamic alignment’ obligation set out in Article 13 (3) WF. This chapter sets out the basic features of the dynamic alignment obligation and the so-called ‘Stormont brake’ mechanism. It then goes on to provide a set of reflections on how dynamic alignment might become relevant in the context of fundamental rights in particular, under Article 2 WF.

### 2. The ‘Dynamic Alignment’ Obligation

Article 13 (3) Windsor Framework stipulates an exception to the general rule in Article 6 (1) WA by stating that ‘unless otherwise provided, where this Protocol [viz. Windsor Framework] makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced’. This has the consequence that any Union act (except those caught by the Stormont brake provided under Article 13(3a), as set out below) mentioned in the Windsor Framework – notably in its annexes – is automatically and dynamically amended or replaced if the underlying EU act is amended or replaced by the European Union. The consequences for the applicability of the Charter are twofold: first, the Charter can be invoked to interpret the amended act or its replacement; and secondly, the applicability of the Charter would have to be assessed in light of the amended act or its replacement, i.e. the Charter could apply in a broader set of cases in the Northern Ireland legal order as a consequence of such dynamic alignment. An example to illustrate this might be the (long-envisaged, but not yet accomplished) extension of the anti-discrimination protections contained in Directive 2000/78 – currently applicable in the employment context – to the provision of services and goods.<sup>306</sup>

<sup>306</sup> European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

This would mean that the parallel prohibition of discrimination contained in Article 21 of the Charter could be invoked in cases involving the provision of services and goods as well – a clear extension of the Charter’s reach in the Northern Ireland legal order.

At the same time, it is important to recall that CJEU case law changing the perceived scope of EU measures is also relevant to annexed measures, even in the absence of legislative changes. Dynamic alignment around the six Annex 1 directives *automatically* tracks the evolution of these directives, including their amendment (to any extent whatsoever) or replacement and any change to the case law of the CJEU concerning these directives.<sup>307</sup> For example, it is noteworthy that CJEU case law has made leaps in terms of the interpretation of worker status in Directive 2000/78/EC in the last two years, which should be taken into account in applying that directive. In both *TP « (Monteur audiovisuel pour la télévision publique)»* and *HK v Danmark and HK/Privat*, the CJEU read the application of the directive to workers broadly, in the light of Article 21 CFR, thereby extending the directive’s protection of sexual orientation discrimination to some self-employed contract workers (albeit not to all providers

of goods and services).<sup>308</sup> This means that, even though Directive 2000/78/EC has not been amended, the dynamic alignment obligation requires that we take into account relevant interpretations of the case law that read that directive in the light of fundamental rights, even if that case law is subsequent to Brexit. The need for tracking EU case law developments has already been recognised by the Dedicated Mechanism and it is positive that large-scale tracking has already been taking place in Northern Ireland.<sup>309</sup> Indeed, it stems from that analysis that the Charter and general principles of EU law are especially meaningful in this context, having already formed the basis of significant interpretations of aspects of annexed measures in EU case law, such as strengthening domestic remedies for racial discrimination; heightening safeguards for disability discrimination in the employment context; and clarifying the role of religious symbols in the workplace (issues discussed in more detail in an earlier report).<sup>310</sup>

307 Craig *et al* (n 5), 20. See also Windsor Framework, Art 13(3). The proposed ‘Stormont brake’ under draft Article 13(3a) applies to headings 1 and 7-47 of Annex 2 and does not apply to Annex 1, thus we understand that the dynamic alignment requirement for the Annex 1 directives will remain as they currently are, see [Draft Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework](#), Article 2.

308 Chiara de Capitani, Anti-discrimination and labour rights: CJEU confirms protection from discrimination (including on grounds of sexual orientation) covers self-employed workers (EU Law Analysis, 23 March 2023), available at: <https://eulawanalysis.blogspot.com/2023/03/anti-discrimination-and-labour-rights.html>.

309 Craig *et al* (n 5), chapters 4 and 5 and appendices 1 and 2.

310 *Ibid.*

### 3. Post-Brexit EU law that neither amends nor replaces EU law referenced in the Windsor Framework

Outside the straightforward obligation of dynamic alignment for the annexed measures, one can identify a number of less clear-cut issues.

As shown above, the Charter informs the interpretation and application of the Withdrawal Agreement and any EU law relevant to the Windsor Framework. Where such EU law is replaced or amended, the Windsor Framework envisages automatic dynamic alignment for a considerable part of this law. By contrast, where new EU law is adopted that falls within the scope of the Windsor Framework but does not amend or replace a Union act listed in one of the annexes, or that is subject to the Stormont brake, then a Joint Committee decision is necessary to adopt such new EU law. Where this happens, Article 4 WA would mean that the Charter applies as outlined in Chapter 3.

However, if no agreement in the Joint Committee can be reached, the following issue may arise. Any failure to resolve a dispute in these circumstances may have problematic consequences.

First, the Windsor Framework does not define ‘new’ EU law beyond describing it as ‘neither amending nor

replacing’ EU law to which it refers. This may, as Steve Peers sets out,<sup>311</sup> be problematic in circumstances where an EU law makes only modest changes to any measure of EU law listed in the Windsor Framework but otherwise has no relationship to that measure. If this is considered ‘new’, so that the UK is able to avail of Article 13(4) Windsor Framework, any changes made within the EU would not apply to Northern Ireland (pending the resolution of the dispute concerning the new EU law), but the unchanged version of the EU law referred to in the Windsor Framework would remain applicable in Northern Ireland. Of itself, this does not pose a problem for Charter applicability. However, if the CJEU should subsequently use the Charter to interpret the *amended* measure, then the consequent judgment may, depending on its impact on the *unamended* remainder of the measure, fall within the interpretational mandate under Article 13(2) Windsor Framework as it may well have to be regarded ‘relevant case law’. This would require Northern Ireland authorities to determine whether there is an impact on the old measure, and the extent of such an impact, when assessing whether to discharge the Article 13(2) duty. Thus, although the Windsor Framework makes a distinction between the EU law it expressly lists (mandating dynamic alignment to this law) and other (including prospective) EU law, the interpretive duty under Article 13(2) bridges this distinction in potentially unpredictable ways.

311 Steve Peers, ‘Just Say No? The new ‘Stormont Brake’ in the Windsor Framework (part 2 of the analysis of the framework)’ EU Law Analysis, 5 March 2023.

The same issue would in theory arise if the Stormont brake mechanism were used, as we explore below.

#### 4. The Stormont brake

The so-called Stormont brake mechanism entered into force on 2 February 2024 following the entry into force of the Windsor Framework (Democratic Scrutiny) Regulations.<sup>312 313</sup> A number of conditions need to be satisfied before the brake can be triggered.<sup>314</sup> The detail of these conditions is not as relevant to the question of Charter applicability as the effect of the brake being triggered. This is because, if the brake is successfully triggered, the replacing or amending EU act which would have become applicable in Northern Ireland but for the brake, does not apply. Instead, a process is triggered under Article 13(4) of the Windsor Framework in respect of the amending or replacing EU act.<sup>315</sup>

This process mandates that the Joint Committee under the Windsor Framework exchange views on the ‘implications of the [replacing or amending EU act] for the proper functioning of [the Windsor Framework]’.<sup>316</sup> This is then followed either by the Joint Committee deciding to add the amending or replacing EU act to the Windsor

Framework (in which case the relevant act applies in Northern Ireland).<sup>317</sup> Failing agreement on such a decision, the Joint Committee is required to ‘examine all further possibilities to maintain the good functioning of [the Windsor Framework] and take any decision necessary to this effect’.<sup>318</sup> The absence of either outcome allows the EU to take ‘appropriate remedial measures’ after giving notice to this effect to the UK government.<sup>319</sup>

#### 5. How the Stormont Brake functions in practice

The effect of the Stormont Brake can be summarised into either one of two outcomes: the amending or replacing EU act is added to the Windsor Framework and thus takes effect in Northern Ireland (subject, as all EU acts are, to the Charter). It follows from Article 13 (2) of the Windsor Framework that the act is then interpreted in accordance with CJEU case law, including on the Charter. Or it is not added and consequently does not take effect in Northern Ireland.

In the latter case a potential difficulty arises. Consider a situation in which an EU act, X, is replaced by another EU act, Y. Upon the successful trigger of the Stormont brake, X remains applicable in Northern Ireland

312 The Windsor Framework (Democratic Scrutiny) Regulations 2024: [https://assets.publishing.service.gov.uk/media/65c225c2688c390013334c30/Letter\\_to\\_Assembly\\_on\\_the\\_Democratic\\_Scrutiny\\_Regulations.pdf](https://assets.publishing.service.gov.uk/media/65c225c2688c390013334c30/Letter_to_Assembly_on_the_Democratic_Scrutiny_Regulations.pdf)

313 Decision No 1/2023 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework [2023/819] [2023] OJ L 102/61, Annex I, para 1(a).

314 *Ibid.*, Annex I, para 1(b) and 1(c). See also, the Northern Ireland Act 1998, sch 6B, para 11-14.

315 WF, Article 13(3a), sixth subparagraph.

316 *Ibid.*, Article 13(4).

317 *Ibid.*, Article 13(4), second subparagraph (a).

318 *Ibid.*, Article 13(4), second subparagraph (b).

319 *Ibid.*, Article 13(4), third subparagraph.

while Y is applicable in the EU. If, in this scenario, the CJEU decides that the effect of Y is modified by a Charter-consistent interpretation, then there is no guidance provided in the Windsor Framework as to how the courts of Northern Ireland should approach the question of a CFR-consistent interpretation of X.

Article 13 (2) of the Windsor Framework mandates that its provisions referring to Union law be interpreted in conformity with the relevant CJEU case law. If in such a scenario the new EU act, Y, is interpreted by the CJEU in light of the Charter (or indeed parts of it are declared invalid as infringing the Charter), there is a question for the Northern Ireland courts as to how to deal with this in the interpretation of the old (and still applicable) act X.

If the CJEU interpretation affects a provision that is also found in the old EU act X, an argument could be made that any interpretation by the CJEU is still ‘relevant case law’. By contrast, if the provision of act Y differs significantly from X, the Northern Ireland courts will probably not consider themselves bound by CJEU case law concerning Y. Albeit an unlikely scenario, more problematic still would be a situation where the

CJEU declares parts of act Y to be invalid (based on a Charter violation) where the act X contains a similar or identical provision to that declared invalid given that the Northern Ireland courts may not have the power to follow suit with regard to X. This is because, assuming the Stormont Brake is successfully triggered, Y falls to be added to the Windsor Framework in accordance with Article 13(4). If Y is not added, it is not ‘referred to’ as a Union act within the meaning of Article 13(2), and thus, there is no basis for Northern Ireland courts to consider CJEU case law on Y when interpreting X.

As the Stormont brake has not yet been used in practice, it will be important to return to these questions once the Stormont brake is operationalised, and even more importantly, if it is successfully triggered.

## 6. Dynamic alignment and Article 2 Windsor Framework?

As previously set out, Article 2 by itself does not contain any substantive rights. Instead, its core comprises the six equality and non-discrimination directives listed in Annex 1.<sup>320</sup> The Windsor Framework creates an

<sup>320</sup> Windsor Framework Art 2(1) and Annex 1. The directives in question are, in order of being listed in Annex 1, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L 204/23; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1; and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.

obligation on the part of the UK to maintain dynamic alignment with these six directives.<sup>321</sup> But Article 2 situates these directives within the context of the RSEO section of the Belfast (Good Friday) Agreement,<sup>322</sup> in respect of which the UK is enjoined to ensure no diminution as a result of Brexit. While the six directives are of course distinct legal provisions, the contents of the RSEO section are framed in ‘loose language or framed as aspirations’.<sup>323</sup> The Windsor Framework has been interpreted by the High Court in Northern Ireland as *not* incorporating the Belfast (Good Friday) Agreement, including the RSEO section as such,<sup>324</sup> meaning that this aspect of Article 2 does not give rise to distinct, enforceable rights within the Northern Ireland legal order. This appears to be contradicted in *Angesom*, with Colton J referring in that case to ‘those Strand Three rights which have direct effect’.<sup>325</sup> However, the judge’s reference here should not be taken to mean that the Court held the RSEO section to have been incorporated. Instead, the judgment must be read in context. The reference to ‘direct effect’ in *Angesom* deals, not with Strand Three, but those rights relied upon by the applicant which come within the scope of Strand Three. This is abundantly clear in the way that Colton J draws a distinction

between *Angesom* and what Scofield J held in *Ní Chuinneagain*. This is also supported by the fact that Colton J in *Angesom* dismissed *in limine* those of the applicant’s arguments under Article 2 WF which were unsupported by explicit provisions of the EU law.<sup>326</sup> Consequently, a right within the RSEO section does not have ‘independent legal effect’ and must still be supported by a relevant EU law, fully in line with *Ní Chuinneagain*.<sup>327</sup> Again, in *Dillon*, Colton J anchored any diminution claim on the EU law which underpinned a relevant right in the RSEO section, instead of considering diminution solely with reference to the latter.<sup>328</sup> Consequently, it is important to remember at all times that the RSEO section *does not* give rise to freestanding rights in the domestic legal order enforceable on their own terms in the absence of a link to underpinning EU law. Nevertheless, as will become clear further below, the RSEO section is not merely a backdrop to the content of Article 2 of the Windsor Framework.

In contrast to other provisions, then, the wider non-diminution guarantee in Article 2 (beyond the Annex 1 directives) is intended to be a static baseline, in that it does not track the evolution of EU law after 31 December 2020.<sup>329</sup> Nevertheless, the concept

321 Windsor Framework Art 13(2).

322 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland* (with annexes) 1998 (2114 UNTS 473), Annex 1: *Agreement Reached in the Multi-Party Talks* (Belfast (Good Friday) Agreement), Rights, Safeguards and Equality of Opportunity.

323 *Craig et al* (n 5), 19.

324 *Ní Chuinneagain’s application for judicial review* [2021] NIQB 79, para 24 per Scofield J.

325 *Angesom* (n 26), [105].

326 See *Ibid.*, [107]-[112].

327 *Ní Chuinneagain* (n 324), [24].

328 *Dillon* (n 157), [571].

329 *Craig et al* (n 5), 20. See also Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, ‘Rights, Opportunities and Benefits’ in *Northern Ireland after Brexit* (NIHRC and IHREC, 2020), 42.

of dynamic alignment also extends to the non-diminution requirement, to an extent. This is because, while the specific provisions of EU law which ground the non-diminution requirement are ‘frozen’ in terms of their iterations before 31 December 2020, the case law of the CJEU which pertains to these provisions is not similarly frozen.<sup>330</sup> Indeed, as noted earlier, under EU constitutional law, interpretations of EU measures by the CJEU are not considered to amend or develop the application of the measures: rather, they are viewed as offering the *correct interpretation* of that measure – i.e. the interpretation that *ought to* have been applied since the measure’s introduction. This means that subsequent CJEU decisions on the annexed measures must be tracked and followed domestically in order for the dynamic alignment obligation to be met.

For example, this would comprise EU case law such as *VI*, concerning the status of the NHS as a provider of comprehensive sickness insurance for the purposes of Article 7 of Directive 2004/38/EC – an area falling outside the scope of the Withdrawal Agreement.<sup>331</sup> This case concerned the interpretation of the requirement of ‘comprehensive sickness insurance’ laid down in Articles 7(1)(b) and 7(1)(c) of Directive 2004/38/EC for EU citizens and their family members residing in a host Member State for more than three months. These provisions were implemented in the UK by Regulation 16 of

the Immigration Regulations 2016. The Regulations rendered recognition of affiliation to a comprehensive insurance system conditional upon that system being privately funded (i.e. separate from the UK’s public health service, the NHS). The claimant, VI, challenged this requirement insofar as it prevented her from claiming benefits associated with lawful residency, including Child Tax Credit and Child Benefit, for periods during which neither she nor her child were affiliated with a private healthcare service. The Court found that it had jurisdiction to hear the case in line with Article 86 of the Withdrawal Agreement, as it was referred during the transitional period and concerned facts to which EU law was fully applicable.<sup>332</sup> The CJEU found that there had unequivocally been a breach of EU law as a result of the erroneous domestic application of the directive:

‘[...] it is settled case-law that the right of permanent residence in the host Member State, conferred by EU law on a minor national of another Member State, must, for the purposes of ensuring the effectiveness of that right of residence, be considered as necessarily implying, under Article 21 TFEU, a right for the parent who is the primary carer of that minor Union citizen to reside with him or her in the host Member State, regardless of the nationality of that parent’.<sup>333</sup>

Accordingly, the parent’s right to reside in the UK could not be made

<sup>330</sup> See also Craig *et al* (n 5), 55.

<sup>331</sup> Case C-247/20 *VI v Her Majesty’s Revenue and Customs*, EU:C:2022:177.

<sup>332</sup> *Ibid*, para 36.

<sup>333</sup> *Ibid*, para 58.

conditional upon comprehensive sickness insurance cover for any period following the establishment of the child's permanent resident status (whereupon the requirement at Article 7(1)(b) of the Directive ceases to apply for that child).<sup>334</sup> The Court found that the requirement that comprehensive sickness insurance be private was also incompatible with Article 7(1)(b) of Directive 2004/38/EC and Article 21 TFEU.<sup>335</sup> In other words, the Court found that many EU citizens resident in the UK in recent years were wrongfully obliged under the UK's Immigration Regulations to purchase private health insurance and/or were denied permanent residency and the associated entitlements, if they did not do so.

From the perspective of EU law, a ruling like *VI* would mean that the Immigration Regulations must be disapplied, so that private health insurance is no longer required for the establishment of permanent resident status and that any losses incurred because of reliance upon the UK's misinterpretation of the directive could result in state liability in damages under the rule in *Francovich* – a course of action that appears suitable in this context, considering the seriousness and financial quantifiability of the damage.

However, as De Mars has discussed in greater depth, in the rest of the UK, the matter is governed by Schedule 8(39) EUWA, which only allowed damages claims to be brought before domestic courts within two years from the end of the transitional period, i.e. until 31 December 2022. Any future claims would not succeed.<sup>336</sup> Arguably, the situation is different in Northern Ireland as a result of the non-diminution obligation under the Windsor Framework.

As Frantziou and Murray have noted, Child Tax Credit and Child Benefit could be considered to be captured by the Belfast/Good Friday Agreement's concept of a right to 'equal opportunity in all social and economic activity'.<sup>337</sup> It has since been affirmed that the provisions of the GFA can be invoked by any member of the community in Northern Ireland and not just parties to the sectarian conflict.<sup>338</sup> The wrongful requirement of comprehensive sickness insurance thus prevented EU migrants living in Northern Ireland from being able to enjoy the full benefit of public health provision and the aforementioned social security benefits to which their status should have entitled them. In turn, the non-diminution requirement could operate in Northern Ireland to correct substantively the interpretation of the directive for

334 *Ibid*, paras 59-60.

335 *Ibid*, paras 69-70.

336 Sylvia de Mars, A Last-Minute Postscript: the CJEU finally dares to find that the NHS is a provider of 'comprehensive sickness insurance' (EU Law Analysis, 18 March 2022), available at: <https://eulawanalysis.blogspot.com/2022/03/a-possibly-pointless-postscript-cjeu.html>.

337 Eleni Frantziou and Colin Murray, C-247/20 VI v The Commissioners for Her Majesty's Revenue & Customs and the implications of preliminary references during the transitional period: a case study in legal complexity, (European Law Blog, 17 March 2022), available at: <https://europeanlawblog.eu/2022/03/17/c-247-20-vi-v-the-commissioners-for-her-majestys-revenue-customs-and-the-implications-of-preliminary-references-during-the-transitional-period-a-case-study-in-legal-complexity/>.

338 *Angesom* (n 33), para 108.

individuals who continue to benefit from its terms after the end of the transitional period, through settled or pre-settled status.

But the non-diminution requirement could also operate in more procedural terms: it could mean that temporal limits on remedies such as state liability in damages that are applicable in the rest of the UK cannot be considered applicable in Northern Ireland, even where they arise as a result of post-transitional period CJEU case law, to the extent that they refer to a measure binding on the UK before the end of the transitional period. To treat these temporal limitations as applicable could *in itself* amount to diminution as a result of Brexit since, prior to Brexit, incorrect interpretations of EU measures would have been domestically actionable under the principles of direct effect and state liability, as explained in Chapters 1 and 4.

## 7. Relevance of Future Case Law in Domestic Decisions

The relevance of future case law relating to the Charter outside the dynamic alignment commitment can be seen in the ruling of the Court of Appeal of England and Wales in *Tuneln Inc v Warner Music UK Ltd & Anor*,<sup>339</sup> which draws a distinction between the interpretation of retained EU law (i.e. EU law applicable in the UK post-Brexit) and the interpretation of EU law proper (i.e. EU law applicable to pre-IP day facts), with

the courts treating CJEU precedent and remedies as binding in the latter scenario, but in that scenario only.

The findings in *Tuneln* are useful for understanding the relevance of the Charter to Northern Ireland in two respects. First, insofar as a situation that comes within the scope of EU law concerns pre-IP day facts, its treatment *as EU law* means that all domestic courts (including, of course, Northern Ireland courts) will treat it in the same way as they would have done before Brexit. Second, in relation to post-IP day facts, areas governed by the Windsor Framework through Article 4 WA and Annexes 2-5 can also be treated in the same manner because, as already explained in Chapter 2, they carry forward the same principle: they stipulate the application of EU law *as EU law*, in line with section 7A EUWA, rather than being retained EU law. As EU law necessarily includes the Charter and must be interpreted in accordance with it, we expect the domestic effects of the Charter to remain largely unchanged in the areas governed by EU law *as EU law*.

While the situation is more complicated when it comes to areas governed by the thinner Article 2 commitment to non-diminution, use of the Charter is necessary there as well, insofar as such use would also have been pertinent before the entry into force of the Windsor Framework. However, it is essential to re-emphasise that – unlike a common law jurisdiction – EU constitutional law treats *case law*

<sup>339</sup> *Tuneln Inc v Warner Music UK Ltd & Anor* [2021] EWCA Civ 441.

pronouncements as *interpretations* of the law as it was, rather than as *incremental developments* of that law.<sup>340</sup> As such, subsequent judicial interpretations of provisions of the Charter that are relevant to the RSEO part of the Belfast (Good Friday) Agreement would remain relevant in Northern Ireland since they refer to a time when the Charter was part of domestic law. In this sense, it could be argued that EU measures falling within the non-diminution guarantee that are subsequently reinterpreted by the CJEU suffer substantive diminution if their reinterpretation results in a higher level of protection of fundamental rights, but this is not applied in Northern Ireland as a result of Brexit. Second, even if the false interpretation of a measure is not in itself a direct consequence of Brexit (since that interpretation might have been applied during the UK's membership – as in the *VI* ruling, explained in the preceding section), any reinterpretation of the measure by the CJEU would have previously enabled individuals to challenge the state's incorrect application before domestic courts, under the principles of direct effect and state liability. Diminution could thus occur if individuals were barred, as a result of Brexit, from using those principles to enforce what the correct interpretation of an EU measure falling within the RSEO section, where the correct interpretation is only revealed in post-Brexit CJEU case law.

Finally, the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission emphasise that an equivalence of rights between Ireland and Northern Ireland forms a defining feature of the Belfast (Good Friday) Agreement.<sup>341</sup> Such a feature would be caught within the RSEO section, and may also necessitate at least a presumption of dynamic alignment with the equality and non-discrimination *acquis communautaire* beyond the Annex 1 directives.<sup>342</sup> To a considerable extent, this follows from the lack of a temporal limit to the influence of CJEU case law insofar as the Windsor Framework is concerned. Article 13(2) removes this temporal limit from the implementation and application of 'the provisions of this [Framework] referring to Union law or to concepts or provisions thereof', which includes the *acquis* insofar as the latter forms the basis for the non-diminution guarantee under Article 2 WF. Plainly, therefore, in order to understand *whether* there has been a diminution from this *acquis* following Brexit, the *acquis* itself needs to be understood in conformity with the principles of EU constitutional law – of which Charter compliance is one. The mere fact that such an understanding may necessitate at least a degree of alignment with post-Brexit EU law is no bar to the requirement under Article 13(2), which, it should be stressed, has not been amended in any way by the Windsor Framework.

340 See also above Chapter 3.

341 Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, [Policy statement on the United Kingdom withdrawal from the European Union](#) (NIHRC and IHREC, 2018) p. 6.

342 Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1, 18.

The current impasse relating to devolved governance in Northern Ireland has the potential to seriously impact both the non-diminution and dynamic alignment requirements within Article 2 of the Windsor Framework. This is because it may not be possible for any change in the case law of the CJEU relevant for non-diminution which requires a corresponding change to devolved Northern Ireland primary or secondary legislation (or legislation which governs devolved areas over which the devolved Northern Ireland authorities have competence) to be made while the Assembly remains unable to function. The same concern arises in the case of any dynamic alignment which requires changes to devolved legislation. These concerns are mitigated to some extent by the existence of an extremely broad power of delegated legislation exercised by the Secretary of State for Northern Ireland, which authorises him to make regulations to ‘implement the Protocol [viz. Windsor Framework]’<sup>343</sup> including to deal with ‘matters arising out of, or related to, the Protocol [viz. Windsor Framework]’.<sup>344</sup> These powers extend to making regulations which ‘could be made by an Act of [the UK] Parliament (including modifying [the EUWA])’.<sup>345</sup>

However, the exercise of this power to make laws has proven politically controversial, with litigation commenced or threatened in respect of such exercise.<sup>346</sup> Moreover, the liberal use of this power in the absence of a functional Assembly may give rise to concerns about a creeping form of direct rule undermining the devolution arrangement in Northern Ireland.

343 EUWA s 8C(1)(a).

344 EUWA s 8C(1)(c).

345 EUWA s 8C (2).

346 *Allister and Peoples* concerned the Windsor Framework on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 which made provision for the voting process under Article 18 of the Windsor Framework, see [103]-[106] of the judgment; and the Official Controls (Northern Ireland) Regulations 2023, which by regulation 3(1) empowers the Secretary of State for Northern Ireland to authorise the ‘construction of facilities for the purpose of performing official controls’ relating to goods, as required under the Windsor Framework – in respect of which pre-action correspondence has been served on the UK Government, see <https://www.itv.com/news/utv/2023-01-31/legal-challenge-to-governments-border-control-posts-legislation>.

# Conclusion

**This report has analysed the ways in and extent to which the Charter continues to operate in Northern Ireland after Brexit. It has shown that, primarily through Article 2 of the Windsor Framework and Article 4 of the Withdrawal Agreement, the Charter retains considerable force in Northern Ireland, even though it has been removed from the statute books in the rest of the UK.**

Its retention in Northern Ireland is legally significant, as the Charter gives rise to stronger individual remedies and protects a broader range of fundamental rights than any other instrument in UK law, including the Human Rights Act 1998. In the preceding chapters, the report has argued that the Charter has not only remained relevant in Northern Ireland after Brexit, but that it is indeed likely to continue to be applied in much the same way as it applied whilst the UK was in the EU. Thus, despite their exclusion under the terms of the EUWA and, more recently, the REUL, the Charter and general principles of EU law have remained operative in Northern Ireland as a result of s7A EUWA. The potent combination of Article 4 WA and s. 7 A EUWA means that large quantities of EU law remain applicable in NI as EU law.

Moreover, Article 2 of the Windsor Framework permits a further application of the Charter and general principles of EU law, in situations where there is a risk of diminution to the rights protected in the RSEO part of the GFA. In this regard, the report highlighted that there are considerable differences between measures listed in Annex 1 which, for all practical purposes are treated

in NI in largely the same manner as before Brexit, and other measures. The report set out the relevant tests for diminution to occur in respect of non-annexed measures. It argued that, in accordance with settled principles of EU constitutional law, the critical factors for domestic courts should be whether the measures assessed for diminution were binding (a broader category of measures than measures which are directly effective) and whether they were within the scope of EU law. The report also explained that, provided that these conditions are met, it is essential for diminution to be assessed based on a comparative exercise. This would involve an analysis of the pre-Brexit application of EU fundamental rights under the Charter and general principles of EU law on the one hand, and the application of those rights after Brexit under any system of rights protection (including domestic law and the ECHR), on the other. The report highlighted that, since the remedial strength of Charter rights was their key added value – a feature of the Charter that was well-recognised by the UK Supreme Court before Brexit – it is essential that this feature be maintained within the non-diminution guarantee, if that guarantee is to remain of practical value.









NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

Northern Ireland Human Rights Commission  
4th Floor Alfred House  
19-21 Alfred Street  
Belfast  
BT2 8ED

**T:** +44 (0)28 9024 3987

**E:** [info@nihrc.org](mailto:info@nihrc.org)

**W:** [www.nihrc.org](http://www.nihrc.org)

